IN THE SUPREME COURT OF NEW ZEALAND SC 15/2006

BETWEEN **TRUSTEES EXECUTORS LTD**

Appellant

AND **PETER JAMES MURRY AND OTHERS**
AND
MOREL & CO LTD AND JENNIFER ANN MOREL

Respondent

SC 17/2006

PETER JAMES MURRY AND OTHERS

AND

MOREL & CO LTD AND JENNIFER ANN MOREL

Hearing 21 and 22 November 2006

Coram Blanchard J
Tipping J
McGrath J
Gault J
Henry J

Counsel L J Taylor and J A Maslin for Trustees Executors
B O'Callahan and D C E Smith for Peter James Murray and Others
PR Jagose and J F Keane for Morel and Co Ltd and Jennifer Ann Morel

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CIVIL APPEAL

10.0am

Taylor May it please the Court, Taylor, I appear for Trustees Executors, the appellant in the first appeal with my learned friend Miss Maslin.

Blanchard J Yes thank you Mr Taylor.

Jagose May it please Your Honours, Jagose for the Morel parties, the respondents in both appeals and Ms Keane.

Blanchard J Yes thank you Mr Jagose.

O'Callahan May it please Your Honours my name is O'Callahan and I appear with Miss Smith for the parties, the plaintiffs in the proceedings, that is the appellants in the 17 matter and respondents in the 15 matter.

Blanchard J Yes thank you Mr O'Callahan. Well Mr Taylor, I think we begin with you.

Taylor Thank you Sir. Sir I'm not sure whether the Court has formed a view as to the most efficient procedure. We've discussed it among counsel and we thought that in the first appeal, that's SC15, the appeal by Trustees Executors, it's probably appropriate that I go first obviously as the appellant, Mr Jagose then go second because he effectively supports the appeal and that then Mr O'Callahan do his response and we do a reply if necessary and then that the second appeal, the one relating to reasonable discoverability, be done on the basis that my learned friend Mr O'Callahan make submissions as appellant Mr Jagose responds and I'll add anything I have to add at the end of his response.

Blanchard J Well that would be acceptable. The only point I would make is that there is actually no appeal by the Morel Interests in relation to the first matter. They are a party as a respondent but they're not an appellant.

Taylor Yes Sir, that's correct. Whether that, I'm not sure what position is in terms of speaking rights and that I would have thought as a party

Blanchard J I think as a party they're entitled to be heard, but it may be that submissions will be of reasonably limited extent in this appeal.

Taylor Yes I understand that Sir and in fact in the written submissions that they've filed they've really confined their submissions very much to one aspect of it.

Blanchard J Yes, well no doubt they'll just be trying to tell us if you've dropped the ball in any respect.

Taylor Yes Sir. Does the Court wish me to go through the facts? The facts are fairly well established in a chronology as set out in the bundle number 1 of the appellant's bundle of authorities.

Blanchard J I think we've probably got a pretty good grasp of the facts.

Taylor Yes Sir. There are two issues in the appeal, the first being whether the cheque arrangement, that is the tender and acceptance of a cheque on

the basis that it would be held pending set-off of its amount was a sufficient payment in cash within the meaning of s.37(2) of the Securities Act 1978 which I'll refer to as the Act. Before coming to the written submissions, in my submission it is important to bear in mind two factors when reading the provisions of the Act, and in particular s.37(2). The first is that under the Act the actual allotment does not have to be completed within the four-month period specified in s.37(2). The second, in my submission, important point is that a cheque which is tendered does not, at least in terms of s.37(2)(a) which I'll come to, need to be presented for payment with the four-month period. Section 37(2)(a) is the provision that says a sum shall be deemed to have been paid to and received by the issuer. If a cheque for that sum is received in good faith by the issuer and the directors of the issuer had no reason to suspect that the cheque will not be paid, and by way of example, if the subscription closed on the last day of the four month period and a cheque was received that was within s.37(2)(a) on that last day it would not matter that it had not been presented for payment until after the expiry of the four month period. And by the four month period I refer to the opening part of s.37(2) which says that no allotment can be made unless the minimum subscription is subscribed and that amount is paid to and received by the issuer within four months after the date of the registered prospectus. So in my submissions those two propositions are clear that allotment does not have to take place within the four-month period and at least under s.37(2)(a) a cheque does not have to be presented and honoured on presentment within the four-month period. Coming then to the written submissions, I'm at page 5 of the written submissions, first I sight the provisions of s.37(2) and in particular 37(2)(a) and (b) and just looking at the provisions of s.37(2)(b), the requirement of the Act is not stated in the positive that a payment must be in cash. What it requires is that the minimum amount, that is the amount stated in the registered prospectus as the minimum subscription shall be reckoned exclusively of any amount payable otherwise then in cash and in my submission what the clear intention of that provision is, is not to define what cash is but to preclude from the minimum subscription anything that is otherwise then in cash and by that in my submission what the legislation is referring to is that it can't be in the form of a loan which creates the liability and it cannot be subscribed in assets such as property that are not cash or the equivalent of cash – in other words assets that have variable value. And in my submission if payment is tendered in a form that is money or readily realisable or convertible into money, then it is a sufficient payment within the meaning of the Act and by way of example I would submit that in principle under the Act if a person when they've sent in their subscription or their allotment, their subscription form, tendered with it an absolute assignment of Government stock for the value of the subscription, that would be a sufficient payment in cash within the meaning of the Act.

Tipping J Is there something to be made here out of the fact that the section makes it clear that not only must there be payment to but receipt by?

Taylor Yes.

Tipping J That's something that needs to be carefully borne in mind and you're not doubt going to come to that Mr Taylor are you?

Taylor Yes, yes. Well in my submission the requirement that there be receipt by is simply receipt of the tendered payment. In other words it has to be received within that four-month period

Tipping J It has to be capable of receipt in the sense in which the word is used in the Act.

Taylor Yes, well it has to be in a form that's capable of receipt and in my submission taking the Government Stock example if that was tendered and received, paid to and received by the issuer within that four month period then it would be a sufficient payment in cash because it's in a form that is readily convertible into cash and the fact that it was not converted into cash within the four month period in my submission is neither here nor there. In my submission the reference to 'received by' simply confirms that the issuer actually has to have receipt of the payment in whatever form it is tendered.

Tipping J Does that mean receipt of the means of getting cash? Is that your submission?

Taylor Yes and in my submission that's confirmed in s.37(2)(a) which says 'the receipt of a cheque is deemed to be a sufficient payment in those circumstances'.

Blanchard J What would have been the position if there'd been no cheque tendered, and forgetting about the problem of going over the four months, would it have been sufficient compliance just to have an agreement set-off?

Taylor I would have said I would say that it would be sufficient compliance if it was acceptable to have an undertaking to set-off, so my answer to that question is 'yes' and in my submission even without the cheque and undertaking to set-off would be sufficient compliance.

Tipping J Are you using the word 'undertaking' in any different sense from my brother's agreement?

Taylor Yes, simply because the Court of Appeal I suspect rightly said well there can't be any agreement between the partnership and Mr Hadlow when he gives that undertaking because at the time of the undertaking being given there is no partnership in existence, so in that sense there's no agreement between the partnership and Mr Hadlow agreeing to a set-off.

Blanchard J Well does that make the cheque an essential element?

Taylor I would say the cheque makes it absolute in the sense that it ensures compliance with the Act but I would also submit that the undertaking itself to set-off without agreement of the partnership but acceptance of the undertaking as a sufficient payment would be in compliance with the Act.

Tipping J But the set-off means that payment's going to be made after allotment isn't it?

Taylor It means that, well essentially it would be made simultaneously with allotment if we assume that allotment occurs at the time when the

Tipping J Well no logically it must be a fractious and teller of time afterwards surely?

Taylor Yes, yes

Tipping J And that's what the Act strikes against.

Taylor Well that is so if no payment is made.

Tipping J That's why the cheque is an essential ingredient in the exercise.

Taylor Yes, yes.

Tipping J I don't think you can dodge that Mr Taylor.

Taylor No, well I'm quite happy to accept that really.

Gault J Mr Taylor aren't you taking on more than you were meant to?

Taylor I am Sir.

Gault J Let's assume that 37(2)(a) were not there, do you think you could maintain your argument about an assignment of Government Stock?

Taylor Yes.

Gault J Under the provision which says 'the amount is paid to and received by'?

Taylor Yes. In the context of the Act I would say yes because the question under the Act is whether the minimum subscription is otherwise then in cash and what I would submit is that that the tender of Government Stock with an absolute assignment of that Government Stock is not a payment otherwise than in cash, it is a tender of cash or its equivalent, it's readily convertible.

Blanchard J Is it really an equivalent just because it's readily convertible when there's a market for it and the market price is moving around?

Taylor Well the bonds themselves, assuming that they can be realised or redeemed within the period are equivalent cash. This question was actually looked at in a different context under the Act in the, I think it's the decision of Justice Barker in the *Ramsay* case that I referred to where he said, and this is in a different context because it was in describing the cash assets of the company that was promoting the offer, he accepted that assets that were readily convertible into cash were cash within the meaning of those provisions of the Act and in my submission the question that has to be addressed here is that if somebody tendered the Government Stock with an absolute assignment of that Government Stock, in other words they could be converted into cash or readily convertible into cash, then that's not a payment otherwise than in cash within the meaning of the Act, and that is the actual test, was this a payment or was what was tendered a payment otherwise than in cash.

Tipping J You're asking us to read cash as including the commercial equivalent of cash?

Taylor Yes.

Tipping J That's really what it comes down to isn't it?

Taylor Yes, yes. And certainly cash in the context of the Act cannot mean legal tender in the sense of notes and coins. It would include that in my submission but it's not confined in meaning to that, it is

Tipping J It wouldn't have included a cheque

Taylor Well

Tipping J Otherwise there's no need for the (a) and (b).

Taylor Well no I wouldn't agree with that Sir because that would be to suggest that s.37(2)(a) essentially states the only mechanism by which payment can be made, and that in my submission is not what is intended to do, it is intended to say that a cheque received in these circumstances will be deemed to be a sufficient payment to a receipt, but it doesn't in providing that deeming provision or that recognition of the commercial reality exclude payments in cash in some other form or payments otherwise than in cash.

Tipping J My only point was this and it may not be a good one but I'd just like a bit more help on this. Without paragraphs (a) and (b) are you saying that a personal cheque would have qualified as payment and receipt.

Taylor Yes, because the

Tipping J Before presentation

Taylor Yes

Tipping J Risk of dishonour, all that?

Taylor Yes.

Tipping J You still would say that?

Taylor Yes I would.

McGrath J But could it be rejected?

Taylor It could be rejected, yes, yes, because

Gault J Mr Taylor you're reading a lot into (b), this amount otherwise than in cash.

Taylor Yes.

Gault J But isn't that directed to a slightly different point, that's directed to the amount specified in the prospectus as is required, not as to payment?

Taylor I understand that and I agree with that, it's not dealing with payment but it is saying that the amount must be calculated.

Gault J Well at the total amount the prospectus is offering

Taylor The 1.3 million, yes.

Gault J Is reckoned without considering contribution to other than in cash well you are then treating that as influencing how amounts that are subscribed are to be paid and that seems to be a bit of a long step.

Taylor Well it doesn't get me the whole way there I accept that but what it does indicate and consistent with the statements by the Courts in earlier cases about what the policy of the Act is, the object of it is to ensure that there is sufficient capital or cash available for the venture to proceed so that's what the minimum subscription is all about and what s.37(b) is saying is that minimum subscription cannot be in a form which is otherwise than in cash but that still leaves open the question of how you determine whether it is otherwise than in cash.

Tipping J Why do we need to go into all this here? It's the cheque; it's the cheque.

Taylor Yes, absolutely.

Tipping J You're in on the cheque or your out on the cheque.

Taylor Well absolutely and I don't want to be in a fallback position. I was answering a question from His Honour as to whether the undertaking in itself would be sufficient and I would say it would but that is essentially hypothetical in this case because the real question in my submission is whether there is any bar to the issuer in this case, with the concurrence of Trustees Executors, accepting the cheque on the basis tendered as a payment under the Act. In other words when that cheque was tendered, paid to and received by the issuer and Trustee Executors in this case, was Trustees Executors and the issuer entitled to accept it on the basis tendered or is it precluded under the Act from doing so and in my submission sections 37(2)(a) and (b) give a guide, a strong guide, to what the answer to that question is, and I also argue in the alternative that in any event the tender and acceptance or the receipt of the cheque in those circumstances is within the provisions of s.37(2)(a), so I argue for both legs of the double as it were

Tipping J What was the first leg, I'm sorry I just

Taylor The first leg is whether in terms of the policy of the Act and the way the Act is framed, receipt and acceptance. In other words acceptance of the cheque on the basis tendered is a sufficient payment to and receipt by within the meaning of the first part of s.37, ss.2.

Tipping J You mean the fact of acceptance even if they shouldn't have accepted it?

Taylor No, the question is whether they could. Whether they could in terms of the Act they were entitled to accept it on that basis. In other words in ordinary commercial usages this Court and other Courts have recognised if a person has an obligation to pay money or it wishes to perfect a contract by the payment of money and that's the George Clooney, not George Clooney, the *Cluning* decision, the well-established commercial rule is that although a person, the issuer in this case, is not required to accept the personal cheque, it is does it accepts the cheque in discharge of that obligation and that is the

Tipping J Subject to payment of the cheque.

Taylor Subject to payment of the cheque, yes, but then we get into that argument about

Tipping J You're back to the same point aren't you?

Taylor Well yes indeed, and what I would submit is this, that s.37(2)(a) in stating the rule in that section, is stating a rule which is consistent with the policy of the Act. It's recognising that payment by personal cheque is going to be the most common, if not the only means by which persons subscribe or pay the amount that they're required to subscribe

for under the Act, and it also recognises that the issuer or Trustees Executors supervising the issue may not know with any certainty whether or not that cheque when presented will be honoured by the bank, and what s.37(2)(a) in my submission is clearly intended to achieve is to say in those circumstances that's okay providing in good faith you have no reason to believe that the amount of the cheque won't be paid.

Gault J Excuse me Mr Taylor, bearing in mind that provision would it be possible if the allotment were made within the four-month period for it to be made before cheques are presented? It would seem so wouldn't it?

Taylor Yes, absolutely, it must be so, it must be so, because it's in a sense the first example I gave was that the cheque is received on the day; you could make the allotment the following day; we've got all our subscriptions here; we've got all these cheques; we run through them; we've got the minimum subscription; we allot the securities the following day and in the case of shares presumably by entering them in a register or issuing share certificates and they could do that before the cheques are actually presented and cleared and that would not be in breach of the Act.

Gault J No, it all hinges on reason to suspect that the cheque

Taylor Yes but I suppose the essence in my learned friend's case is well, and indeed the approach of the Court of Appeal was well you can't bring yourself within s.37(2)(a) because you didn't believe that the cheque was likely to be presented. That seems to be the thrust of it, but when you look at the policy of that section in a situation where we've accepted a cheque, a personal cheque, which in commercial terms would normally be open to the person receiving the cheque, not only in the belief that the person is, or regardless in a sense of whether the person if the cheque was presented the next day was good for it but in circumstances where there is absolute certainty of payment, my learned friend's case is well you're not within s.37(2)(a) because that only deals with payment on presentment to the bank and you can't have believed that he had money at the time that would mean the cheque was honoured if you banked it the next day because otherwise why would he be asking you to hold on to it and therefore you haven't brought yourself within s.37(2)(a) but when you look at the circumstances of this transaction, and it's recorded in the affidavit of Miss Bognar, what it refers to is a proposal that he send the cheque on the basis that we hold it and present it on settlement and we had proposed to a net settle in order to avoid any credit risk, so what they are doing is saying well this is the idea, you tender the cheque, you present it on settlement and they say no actually we propose that we do a net settle on the day to avoid any risk.

Blanchard J Are you arguing that that amounts to a payment of the cheque?

Taylor No, what I'm arguing is that on the ordinary rules that a person can accept a cheque, a personal cheque, as payment of a debt or payment of a cash obligation that it's open to a person to do that, in the circumstances here there is no reason in principle why that commercial rule should not apply so that it was open to the issuer and Trustees Executors as supervisor to accept a cheque on that basis. Now there's no question that they could have said no, we're not prepared to do that, for whatever reason they could have said no but the question is if they say yes and they receive that cheque then is that a sufficient payment or payment to and receipt by the amount of that cheque.

Tipping J I would have thought the ordinary connotation of a cheque being paid is being paid by the drawer's bank.

Taylor I've no question that that's

Tipping J You accept that?

Taylor The ordinary connotation, absolutely, yes.

Tipping J So why doesn't it apply here?

Taylor Well I think that's the

Tipping J I mean the Bills of Exchange Act, the Cheques Act, all the books when talking about payment of a cheque talk paid by the drawer's bank, I mean it's basic, so why do you say we can read it in some other way?

Taylor Well because, because paid, well this was the view taken by Master Lang in the High Court that paid in that sense means its equivalent amount received and he says well, and I accept fully that when the drafters of the legislature drafted s.37(2)(a) what they are obviously contemplating is presentment of the cheque and payment by the bank, so certainly

Tipping J You see the drawer's not even liable on the cheque until presentment and then if it's not presented then you have to go into all sorts of questions of dishonour and so and we decided that in the *Thomas Cook* case.

Taylor Yes, yes.

Tipping J I mean if you can't even stretch the idea of payment by the drawer's liability on dishonour.

Taylor I'm sorry Sir, you can't

Tipping J You can't stretch, because the drawer has some residual liability, that's not regarded as the drawer paying the cheque, it's the drawer being liable on dishonour.

Taylor Yes.

Tipping J If the bank doesn't pay the cheque.

Taylor Yes, but what, what the cheque represents is an unconditional promise on the part of the drawer to pay the amount.

Tipping J It didn't here because of the reservation with which it was tendered.

Taylor Well in my submission that's not correct Sir and that is because the condition is an agreement as between the payee and or the drawer and the drawee or the drawer and the payee of the cheque, and the cases that I've cited in the submissions make it clear that a condition as between them does not affect the unconditional promise to pay which is contained in the cheque, so

Tipping J It's a promise to pay but it's not payment by means of the cheque, it seems to me, this section in my tentative view envisages payment by means of the cheque not by some collateral means that might be substituted for the cheque.

Taylor Section 37(2)(a) I would accept that in terms of what the legislature had in mind I would accept that what they had in mind was payment by the cheque or presentment of the cheque and honour by the bank, so when the word paid is used in that subsection I'd certainly accept that that is what the legislature contemplated.

Blanchard J How was this payment by the cheque going to occur?

Taylor Well the amount of the cheque was going to be paid. The unconditional promise to pay was secured (1) by the cheque because it could have been presented, it wasn't likely that it would be but it could have been. It's validity wasn't affected in anyway whatsoever, or it's cash equivalent

Blanchard J But there was no expectation that would ever be paid by being negotiated through a bank account.

Taylor At the time it was received it was on the basis that what was proposed was a net settle but there would have been nothing to prevent the Trustees Executors or the issuer actually banking the cheque on the day

Blanchard J But they wouldn't have had any expectation that it would be paid.

Taylor Well they would in those circumstances because there would have been a money-go-round in the bank account.

Blanchard J The only way in which payment was going to be achieved was by set-off.

Taylor No Sir that's not completely correct. That's exactly what the parties contemplated that the payment would be achieved or the cheque would be honoured in that sense by way of set-off rather than presentation of the cheque, but if the cheque had been presented on the day there would simply have been a money-go-round in the bank account. There would have been the payment of $1.3 million into the bank account and a cheque out for $936,000, so at least on that day it could have been presented, even assuming if on previous days there weren't sufficient funds in the bank to meet it.

Gault J No this is a statutory deemed payment isn't it? An actual payment and I suppose if one contemplates the situation where a cheque is provided with an application for subscription and it is understood it will not be presented until a certain date, but as you indicated before allotment could be made before the cheque is presented and so would the allotment therefore the issue be invalid if subsequently another form of payment were made in substitution of the cheque?

Taylor Well in my submission no Sir.

Gault J It would because there's already been a deemed payment.

Taylor Yes, yes, absolutely, and in fact it's in all probability if you're receiving a cheque for $1 million from someone you don't know and you bank the cheque because you've go no reason to believe that it won't be honoured on presentment, it's perfectly conceivable that after the allotment's made the cheque won't be presented, in which case the remedy is not then that the allotment is void, the remedy is to sue on the cheque.

Blanchard J Well is the argument then that the issuer did think that the cheque would be paid if it ever came to the point when it was necessary to present it?

Taylor Yes, I mean what the issuer did, the original proposal as described in the affidavit of Miss Bognar was that it simply be held pending settlement. The requirement under the Act or the obligation under the Act is that if you present the cheque then the funds have to be held in trust on behalf of the subscribers, so Mr Hadlow comes along and says well look I don't want you to bank it and put it in the trust account because that's probably going to cost me more than if you just hold onto the cheque and you present it on the day and then Trustees Executors well actually what we proposed was a net set-off on the day to avoid any of that risk on the cheque, so if we look at what the policy behind s.37(2)(a) is, and putting to one side whether it actually applies to this transaction, if we look at the policy of what that section is

saying, they've actually agreed to accept a cheque as payment in circumstances where they really had absolute certainty that the amount of that cheque would be paid.

Tipping J Why do we have to strain the language when under the current statute as I understand it and I may have misled myself under these sections that were introduced in 2004, there's a power to the Court to make a relief order in relation to invalid allotments under s.37 if there's no harm come of it. Now you might well have quite a good argument. There's absolutely no harm come of it therefore you're a monty for a relief order and therefore it's better to keep the law pure so to speak rather than to

Taylor I understand what you're saying. I think one of the problems was that at the time this initially arose those provisions weren't there.

Tipping J I know but they now apply retrospectively don't they?

Taylor Yes they do, yes, and certainly if this matter has to go back to the High Court then

Tipping J Well isn't that the better way to approach it, because you then apply for your relief order and we don't have to strain this language in order to bring you in?

Taylor Well I'm not sure that it requires straining of the language. It probably does to some extent if the Court says that s.37(2)(a) is the only circumstance in which a personal cheque can be accepted and I without conceding the point can see difficulties with the concept that the words 'no reason to believe that it will not be paid' means something else than 'honoured on presentment'.

Tipping J Well they had every reason here to think that it wouldn't be paid because they had devised this other method.

Taylor Well no

Blanchard J But your argument is that they still could have presented the cheque if the set-off somehow didn't occur

Taylor Absolutely, absolutely

Blanchard J And in those circumstances it would only be presented if they were entitled to present it, in other words they'd fulfilled their part of the bargain and therefore they believed that in those circumstances where there might be presentation there would be money in the bank account because they would have done their part?

Taylor Exactly, absolutely.

Blanchard J That's the argument.

Taylor That's absolutely the argument and in fact what you might conclude is that they would have been better off simply to have said okay we'll receive it and we'll hold it and we'll bank it on the day, because then there could be no question

Blanchard J The money-go-round would be done.

Taylor The money-go-round would be done and instead of doing that they said no, no, why don't we just do a net settle on the day and that was what was agreed.

Tipping J I think that's a good point, they could have presented on the day. They didn't have to be within the four months for presentation purposes so that is getting very technical.

Taylor It's technical in the extreme when you actually look at the circumstances and to answer your question do we need to strain the language etc etc, I'm not really asking you to strain the language of s.37(2)(a) because in the unlikely event that the set-off didn't take place, there was absolutely no bar to presenting the cheque and requiring it to be enforced and that's the effect of the cases that a condition as between the drawer and the payee doesn't bind the bank

Tipping J Was this put to the Court of Appeal?

Taylor Sorry Sir?

Tipping J Was this argument put to the Court of Appeal in these terms?

Taylor Yes.

Tipping J It was?

Taylor Yes, yes, it was, yes in fact I could show you my submissions where I

Tipping J No, no, I accept that from counsel.

Henry J Mr Taylor could I have your help on another approach which is one which I think doesn't appeal to my brother Tipping. The Court of Appeal

Taylor Forewarned is forearmed Sir.

Henry J The Court of Appeal seemed to treat the cheque as a, I think they called it a red herring, because it was never paid and never intended to be paid was the source of the argument. As I understand it a Bills of

Exchange, including a cheque, can be paid by the drawer as well as by the drawee or an endorser.

Taylor To be honest Sir it sounds right to me but I

Henry J I'm sure that is the position. I think it's recognised in the Bills of Exchange Act and I'd just like your help on the proposition that the arrangement here was that the cheque would be held on the basis that the drawer would pay it, payment being effective by the set-off and when that was carried out the cheque was in law and in reality paid but by the drawer.

Taylor Well Sir I fully accept that proposition, if the first part of it is correct that a cheque can be paid by the drawer and I mean again it seems absolutely, correct me, I confess I haven't looked at that from that perspective and perhaps I should have.

Henry J Yes I think s.59 recognises that if the drawer pays the bill then the drawer steps into the shoes of the drawee.

Taylor Which is exactly what the arrangement was here, yes, I'll have a look at s.59 in the adjournment.

Tipping J Don't be deterred by anything that I might be vaguely thinking Mr Taylor.

Taylor No not at all Sir.

Tipping J I think there are problems with it but I prefer frankly this idea that you know it is far-fetched to say that if it could be paid on the day outside the four months that if they needed to they present it on that basis.

Taylor Yes, yes and there was absolutely no bar to them doing that and that is clear from the cases that I come to in the written submissions

Gault J There's be no point in giving them the cheque unless it was recognised that it was a security that could have recourse to.

Blanchard J Well I think the letter certainly bears out that interpretation.

Taylor Absolutely and indeed the discussion as recorded in the file note of Miss Bognar as to how it came about because that's exactly what they were doing. The cheque essentially was security for the obligation to set-off, that's really what it was and put it this way, if the set-off issue hadn't been raised in what appears on the evidence to have been a sort of almost additional step to avoid any credit risk whatsoever on the cheque, if it had simply been look here's the cheque, I waive my right to have it put in the Trust Account, just hold it and present it on settlement. If that had been it, it would have clearly have been within s.37(2)(a) and what the Court of Appeal said is no look the cheque is a

complete red herring, it's valueless, it was never intended to be presented and in a sense it's right to say that it wasn't intended to be presented, what was intended was that it would be paid by way of the set-off. Its amount, its value would be paid by way of the set-off and therefore presentment would not be necessary.

Tipping J Well it's the never that's the vice isn't it?

Taylor Exactly, exactly.

Tipping J It was remote because of course the set-off was cast iron.

Taylor Yes, exactly and the chances of it not happening were almost nil I would have thought but if for some reason if Mr Hadlow had come along and said when he was presented with the settlement statement said no I'm not allowing that set-off then there would have been no bar whatsoever to Trustees Executors banking that cheque.

Tipping J Is it in your submissions the exact terms of the arrangement?

Taylor Yes it is, yes, in fact it's probably useful to go to the affidavit of Miss Bognar. It's paragraphs 11 to 15 and the exhibits that are referred to there.

Henry J The critical one is number 11 I think.

Taylor Yes that's the actual letter 'as discussed please hold this cheque and offset the same value against the amount payable to us on settlement of the purchase of the forest, so that's the basis upon which the cheque is tendered and accepted and the antecedent discussions that are referred to previously are at exhibit, it's exhibit ZB13 which is Miss Bognar's file note and it says 'I spoke this afternoon with Jenny Morel regarding subscriptions for the Mt Auckland issue. She advised that yes, they will be short and the original vendor would take up the shortfall. We have agreed that he will provide us with an application and a cheque. This cheque will not be banked until settlement and in fact we proposed to a net settle.

Tipping J What number is that?

Taylor Exhibit ZB13.

Tipping J And we find that on what?

Taylor Miss Bognar's affidavit which is in the case, it's in the green bundle Sir the case on appeal. So it's volume 2 of the

Tipping J Thank you.

Blanchard J That letter at ZB11 is also consistent with Justice Henry's thesis.

Taylor Yes, absolutely.

Blanchard J Because it's really saying pay the cheque by offsetting the value.

Taylor Yes, absolutely.

Henry J And after that had been done the cheque couldn't be presented to the bank because it had already been paid.

Taylor Exactly and that's why it was returned, and my learned junior very kindly has put s.59 in front of me and it does seem to be within s.59(1).

Tipping J Well I don't think I want to raise where I see the problems because it could be academic in the circumstances.

Taylor Yes, but coming back to the issue that was really being raised, if the correct construction of s.37(2)(a) is that paid in the context of that section only means paid by presentment, by being honoured on presentment, and as I've indicated I certainly accept that that would have been what the legislature was contemplating, the issue still is live as to whether in terms of the policy of the Act receipt and acceptance of the cheque on the basis tendered is a sufficient payment. Payment to in receipt by of an amount otherwise than in cash.

Tipping J Is this a way of putting your point that the, the issuer and the Directors of the issuer could have said to themselves, if we have to present this cheque we are satisfied it will be paid because the money will necessarily be fed into the account to meet it?

Taylor And in a sense the extraordinary thing is and the thing that appears to have got us into trouble in the Court of Appeal was what Trustees Executors clearly thought was an additional protection which was we'll do a net set of and then we don't have to worry about the cheque, we don't have to worry about whether it's presented when we settle it on the day, even though if they settled on the day they could be absolutely confident that the funds would be there to meet it.

Tipping J I understand the force of that point. The presentation is a contingency but it's entitled to be a contingency because payment of the cheque if it's needed it will be made whether it be by my brother Henry's route or by my route, it's going to be paid.

Taylor Exactly, exactly.

Tipping J So we don't really need to worry about which route.

Taylor No.

Tipping J Whether it be drawer is paying it or bank is paying it, if we need to have resort to this cheque it will be paid.

Taylor It will be paid. We have absolutely no reason to believe that it won't be, in fact we are certain it will be.

Blanchard J Well does that deal with the s.37 point?

Taylor I think it does. I don't know if the Court wants me to go through those cases about conditions on cheques and when they effect the unconditional promise to pay and when they don't. They're there and I think they're well established principles, so I don't think I need to address those in any detail.

Tipping J Well this argument doesn't resorting to those cases does it?

Taylor Unless the condition affected the conditionality of the cheque, it may in those circumstances

Blanchard J Not as between the parties to it though.

Taylor Well there's a condition in a sense as between the parties to the cheque but that condition is not binding on the drawee, the bank, it's not binding. That's what those cases say that unless there's a,

Blanchard J Well I didn't understand that to be in dispute but we could come back to it in reply if need be.

Taylor I will Sir because my learned friend doesn't seem to address it in his submissions. Sir if I could, well members of the Court if I could just summarise. In my submission when one looks at the underlying concern of the plaintiffs in relation to this cheque it seems to be that because the Hadlow's actually ended up purchasing some of the units the issue was a commercial failure and if they'd known about this money-go-round then they might have said well we don't want to be involved in a commercial failure or what we see is a commercial failure. That seems to be the sort of fundamental underlying issue, albeit one that's raised nine years after the event.

Blanchard J But that's got really nothing to do with this argument.

Taylor No, no because in my submission the argument is as we've discussed it, was this a sufficient payment in terms of the Act?

Tipping J If it wasn't a sufficient payment in terms of the Act, if it's very hard to see that to the extent it was insufficient payment having actually been made there was any vice in it at all.

Taylor Absolutely, exactly, exactly.

Tipping J It seems a very sterile argument this really from the causation point of view. The problem is of course it makes it void doesn't it?

Taylor Yes absolutely.

Tipping J And that's the plan to get your money back but in any practical causative sense it was a no starter.

Taylor Yes and you'll recall Your Honour that I actually sought leave to appeal on the causation issue as well and that was refused but, and not surprisingly I accept, but yes, you're absolutely right.

McGrath J Mr Taylor it's apparent that by the 19th December there's an assurance being given that the cheque would be returned back to the solicitors for Mr Hadlow.

Taylor Yes.

McGrath J Was the arrangement more tentative though back on the 1st December when in this key sentence you've highlighted in the file note, it actually says the cheque will not be banked until settlement and then goes on to refer to the next settlement, but was there some prospect that at the earlier date the cheque might be banked? I don't quite see how but that's what the file note says.

Taylor No I don't think it was every contemplated that it would be banked prior to settlement, I don't think it was ever contemplated that it would be banked prior to then.

McGrath J So that statement by Miss Bognar is just perhaps an imprecise recording of the arrangement or perhaps a slight misunderstanding of it?

Taylor Yes, yes, and indeed we received a letter that comes in on the 2nd from Mr Hadlow. He says 'destroy it after settlement'. So you hold a cheque until settlement, that's ZB11, 'once settlement has taken place for the offset amount we request you destroy the cheque'.

McGrath J Well that was before the discussion between Miss Bognar and Miss Morel though wasn't it?

Taylor No it was, well it was after. There's a slight difficulty in that the file note is dated the 1st December but when one looks at the actual chain it's quite clear that she's talking about a conversation on the 30th November which was the final day.

McGrath J And Mr Hadlow's letter of 30th November follows that conversation. That's what you're

Taylor Exactly, exactly Sir.

McGrath J Thank you.

Taylor And he was out in Warkworth so his letter and his cheque don't actually arrive until the 2nd December. So that deals I think, combined with my written submissions, with the cheque issue and we then come on to the s.28 issue which obviously if Trustees Executives succeed on the first issue will fall away and before I go to the written submissions again if I can just summarise a few points, and I'm really deriving this from my learned friend's submissions in at least identifying the issues where we are in agreement and surprisingly there are some of those. The first submission I would make is that I accept, well the appellant accepts for the purposes of this case that the test put forward as suggested by my learned friend is objective dishonesty as found in *Royal Brunei* and explained following *Twinsectra* by the Privy Council I think it was in *Barlow Clowes* being the cases referred to my learned friend and indeed as indicated by the New Zealand Court of Appeal in the *US International* case that my learned friend cites. So although I'm not

Tipping J We didn't actually have to go into it in that case in any degree of commitment.

Taylor No, no, but the issue is still live as to whether there's some difference between *Twinsectra* and *Royal Brunei*, but at least for the purposes of this hearing I'm happy to accept that the standard is as stated in *Royal Brunei* which is objective dishonesty.

Blanchard J Does that difference exist even subsequent to *Barlow Clowes*?

Taylor Well not in the House of Lords I suspect because they really say well *Twinsectra* is not saying what people say it says in *Barlow*.

Tipping J Well Lord Hutton wasn't saying what he was actually saying.

Taylor Yes, yes exactly but I suspect that in light of *Barlow* at least in any jurisdiction where the House of Lords or the Privy Council is sitting *Twinsectra* won't stand for a proposition that there is a subjective element of the objective dishonesty.

Blanchard J I'd like to have seen Lord Millet's face when he first saw the judgment in *Barlow Clowes*.

Tipping J Could have saved himself an awful lot of trouble.

Blanchard J Why didn't anyone tell me, I wasn't really dissenting.

Taylor Well exactly. The second proposition I want to make to at least refine where the issues are is that I disown the proposition in para.34 of the respondent's submissions and I'll just turn to that because it makes it

easier that the onus is on the plaintiffs or that I say the onus is on the plaintiffs in the context of a strike-out application of this nature to prove fraud to a standard that would apply at trial, because that is not my submission. What I do say, and it's made absolutely clear at paras.4.35 and 4.36 of my written submissions is that there is an onus on the plaintiffs to establish an arguable case, or to use the words of the Court in *Matai* 'a fair argument that there is fraud within the meaning of s.28'. And that's in a sense I think the counsel for the plaintiff at para.35 of his submission it seems to accept that there is such an onus on the plaintiff although he says that the onus in an application of this nature is to show that the conclusion of fraud is open, that's how he describes the test and I'm not sure if there's any material difference between that

Tipping J I wondered if you would agree to the proposition Mr Taylor that it's rather like the frivolous vexatious abuse in reverse in the sense that you can't just stand up and say I'm going to plead s.28. That without anything to back it could be described as frivolous vexatious or whatever. You have to cross some sort of very low but

Taylor Very low threshold

Tipping J But some sort of threshold.

Taylor Yes, yes, absolutely Sir and that's exactly

Tipping J The same sort of idea but the other way around.

Taylor Yes, yes.

Tipping J You'd strike out the pleading of s.28 as frivolous or vexatious unless there's something there that can be shown to be tenable.

Taylor Yes exactly and I'm quite happy in a sense whether you use the words open, tenable or fairly arguable

Tipping J Any formula of that general kind, yes, but conceptually that's what it's all about.

Taylor Absolutely, absolutely.

Henry J Mr Taylor do we have anywhere set out what the allegations are which are said to constitute s.28 fraud under either (a) or (b)?

Taylor No.

Henry J Normally that's happened I think because of the strikeout procedure being used. Normally one would have the statement of claim, an Affirmative Defence of Limitation Act and a response saying s.28 and then relying on certain allegations establishing fraud.

Taylor Yes, and in fact it's

Henry J But I've had difficulty in finding those spelt out.

Taylor It's a point that I actually make in the submissions that in fact the s.28 issue was not issued, notwithstanding the third defendants' application which is at tab 4 of the case on appeal, that's the white volume, which clearly stated as a ground of the strike-out application. It's at page 30 and at page 32. The application states that on the grounds that the second amended statement of claim is frivolous, vexatious and an abuse of process and in particular: The causes of action are statue barred by virtue of s.4 (1) (a) in the case of the deed, although I subsequently conceded that I'm stuck with the 12 years on the deed. The negligence cause of action to which s.4(1)(a) applies and s.21(2) which is the particular provisions of the Limitation Act which deal with causative action for breach of trust. So no question that the application itself put the plaintiffs squarely on notice of what the grounds of the application were but as I pointed out in my submissions in fact there was no notice of opposition actually filed to that application let alone any affidavit evidence in support of a notice of opposition which raised the s.28 issue and indeed the first time it was raised, which may explain to some extent the way the evidence developed was in the hearing before the High Court. So it was raised for the first time in the submissions of my learned friend. So

Tipping J What without any evidence to support it?

Taylor Yes Sir, yes, with no evidence whatsoever. Sir I'm just checking because I may have misled you. I hope I haven't. No I'm sorry Sir just to explain the slight confusion I haven't misled you. Initially there was an application to strike out the first amended statement of claim, then I think an application for further particulars at the same time. That application there was a notice of opposition filed to it but in that initial application the time bar wasn't raised in this the second amended statement of claim was filed then a further application was filed to strike out that and in that application, which is the one I've just referred you to, the time bar issue was raised and there was no notice of opposition to that so the first notice that I received that s.28 was being relied upon was when the submissions were made by my learned friend in the High Court and as I've said without any evidence whatsoever.

Gault J Well what was the basis of it being raised that there was a breach of a duty of disclosure?

Taylor I confess I've never quite understood exactly what the basis is. I've tended to sort of take it from the submission and in this Court I've taken it from the submissions that are made by my learned friend on this issue, but perhaps one of the starting points is to actually look at

the statement of claim as it appears against the third defendant Trustees Executors.

Tipping J But before we do that, I agree let's do that, but there was evidence that wasn't the subject of any rejoinder wasn't there from your side saying you were acting on legal advice?

Taylor Absolutely.

Tipping J So the idea that you'd sort of concealed by fraud some cause of action that you didn't think existed seems rather far-fetched.

Taylor Absolutely, absolutely, yes, but what my learned friend attempted to do in the High Court and again in the Court of Appeal, with some success in the Court of Appeal, but for reasons which I will come to on a misconceived basis, was to say well look just looking at these facts that are in Bognar's affidavit, there are all sorts of inferences that I can draw from that and there may be some fraud but we just don't know but there might have been, and that's all I need to do to discharge my onus.

Tipping J Well if you'd read s.37(2) wrong

Taylor Yes, yes

Tipping J If, you can be perhaps forgiven for doing so because it's not sort of absolutely plain on its face and you had a legal opinion as I understood that you were entitled to do this.

Taylor Exactly, exactly.

Tipping J So it's stretching credulity a bit to think that you were fraudulent and (a) realising you'd stuffed up if I can put it so crudely and (b) you had a duty to tell them.

Taylor Yes, yes, yes, and I approached the submissions on two bases – (1) no way has my learned friend discharged the onus on his to establish an arguable case and (2) even if the onus is on us to negative s.28, the affidavit evidence before the Court is sufficient to negative it in the absence of something that contradicts, so in my submission whatever way you look at it there's no basis upon which the Court needs to be concerned that this may not be frivolous or vexatious because on the evidence before it there's a sufficiently arguable case that there's been dishonesty by Trustees Executors. So

Gault J You were going to take us to the pleading of fraud.

Taylor Yes I am going to take you to the pleading. That is at page 6 of volume 1 of the case on appeal. Now my learned friend accepts that in least of s.28(a) which is that the basis of the cause of action is fraud

that that can't apply to the action on the Deed or the negligence cause of action because it can't be suggested that they are actions based on fraud. One's breach of a duty of care in tort, the other is action on a deed

Henry J Does that leave the ninth cause of action as the only one?

Taylor Against Trustees Executors, yes Sir. And so we then turn to that cause of action and that appears at page 23 of the case on appeal and it says 'the third defendant paid the plaintiff's subscriptions and cash cause for a personal person other than the plaintiffs. Because the allotments were void such payment was in breach of trust and accordingly the third defendant is liable to account'. And it pleads as the preliminary paragraphs, paras.1 to 17 which really just recite the facts as we know them. Paragraph 37 which certainly asserts that a proper disclosure had been made by the first and second defendants, that's the Morel interest, the plaintiffs would not have subscribed for the participating securities they did and then it pleads at para.38 which says that under the deed of participation included in the prospectus the third defendant undertook the role of statutory supervisor, none of which of course, well certainly the latter one is not in dispute.

Tipping J This cause of action at 23 looks like on its face, and forgive me if I haven't got a full draft of the whole pleading Mr Taylor, it looks like a common law action for account, it doesn't even look like an action in equity for

Taylor Well I think the argument, I mean what it asserts is that there was a breach of trust so how that trust arises I'll actually come to, I think I understand where my learned friend

Tipping J Well I suppose that's right, yes,

Taylor Yes, but what it is is a breach of trust simplicitor. There's no allegation here that there has been some fundamental breach by the Trustees of the basic fiduciary duties such as loyalty or making a profit or whatever which might constitute fraud in certain circumstances. There's no allegation of that nature at all against Trustees Executors.

Blanchard J Why were the allotments said to be void in para.47? Was that just the s.37(2) point?

Taylor That's exactly yes just the s.37(2) issue.

Henry J There's no other argument under which they'd be void I don't think.

Taylor No, and in fact my learned friend accepts and has conceded both in the High Court and the Court of Appeal that if Trustees Executors is right on the cheque issue, the s.37(2) issue, all of the causable action except

the tenth one, which is misleading statements in the prospectus, fall away. I think I'm right in that.

Henry J Number 6 and number 10 I think. I think the 6

Taylor What was number 6, I can't even

Henry J Which is against the Morel's only and not against Trustees.

Taylor Yes. Where's number 6? I just can't recall what number 6 was.

Henry J I think it starts on page 18 of the case in para.35.

Taylor Right.

Blanchard J That para.37 relating to profit disclosure, that's pleaded against the Morels. It drifts in again on page 23 but I don't see what it's got to do with the allotments being void.

Taylor No, well it's got nothing to do with it and it's not part of the cause of action against Trustees Executors.

O'Callahan Would it help the Court if I indicated that there's a typographical error in that repetition and that because of some amendments made to the proceeding over the course of time it shouldn't be to 37 and 38 but to 38 and 39, so 37 is irrelevant.

Blanchard J Does that help Mr Taylor?

Taylor I'm not sure. 38 and 39

Blanchard J Well that's just about the mechanics of the role that was being played

Taylor Oh I see, yes, yes and

Blanchard J So really clearly then this ninth, is it, cause of action

Taylor Yes.

Blanchard J Relates only to s.37.

Tipping J The plaintiffs say that this cause of action, the ninth, comes within s.28(a) of the Limitation Act. Could we have that just clarified?

O'Callahan Yes, (a) and (b).

Tipping J I can understand (b) but are you saying (a) as well?

O'Callahan And that it's based on

Tipping J Based upon the fraud of the defendant or his agent or of any person through who he claims are his agents.

O'Callahan The regrettable

Tipping J Just yes or no.

O'Callahan Yes, yes, but it's not properly particularised

Tipping J Well it certainly isn't, God.

Gault J You can't plead fraud like this.

O'Callahan No, no, I accept that.

Tipping J Well I think for my part you needn't bother, I mean on this, it's ridiculous.

Taylor Well Sir I'll just rely perhaps on my written submissions on that issue. The other question then is the concealment issue which obviously theoretically can apply to any of the causes of action.

Tipping J But here it's got to be pleaded. Is it even pleaded?

Taylor No, well not

Tipping J Well even if we take it as pleaded it's here that there's absolutely nothing to back it up.

Taylor Yes, yes, except the inferences that my learned friend seeks to draw in his submissions.

Blanchard J Either one draws an inference that they knew at the time that the allotments were void or the whole thing is hopeless, assuming that that isn't hopeless, because there's absolutely nothing to suggest that they realised after the event and kept it secret.

Taylor No, no, and that's exactly

Blanchard J Nothing at all.

Taylor That's exactly the conclusion that was reached by Master Lang in the High Court, but what the Court of Appeal did, and maybe I should just summarise what the Court of Appeal said. They said at para.70 they say we take the assertions in the plaintiff's claim together with any evidence relating to s.28, so we say that's what we do and then they say the respondents that was Trustees Executors had not at this stage established that the assumed breaches of trust and for fiduciary duty were not fraudulent so what the Court is saying is if you're going to bring an application to strike out a claim on the basis that it's frivolous

or vexatious you have to establish that the actions or the assumed breaches of trust and fiduciary duty were not fraudulent, in other words

Gault J There was never any allegation that they were fraudulent.

Taylor No, no, exactly, certainly not in a statement of claim and raised for the first time in the context of the hearing of the application to strike out. No affidavit evidence saying you know, there's not even an affidavit saying we didn't know about this until 2001. My learned friend just asserts that from the bar. He doesn't explain why when they first learn that the Hadlows were their new partners in the partnership, they didn't say hey, what's going on if they thought that the Hadlows being there made it a commercial failure etc, etc. There's nothing.

Tipping J Do they rely on an isolated dictum of mine in *Matai* Mr Taylor?

Taylor The Court of Appeal

Tipping J Is that where the trouble

Taylor That's where the trouble starts.

Tipping J Yes and my brother Gault says that's usually.

Taylor But what I'll submit is that your dictum and context was absolutely correct but what the Court of Appeal did in my submission have misconstrued it.

Tipping J They've deconstructed my judgment. They haven't read it as a whole might be my tentative response.

Taylor Exactly, and in fact it might be helpful if I take you to the written submission where I actually deal with that. Yes I deal with that at para.4.23 at page 22 of the submissions. What the Court of Appeal did was take out a sentence, oh the case is actually at tab 6, oh no at tab 9 of the appellants' bundle, is they take a sentence of the judgment which in my submission is completely correct when read in context that the onus is clearly on the defendants to show that the plaintiff's claim or at least some part of it is statute barred and in my submission it is this sentence which the Court of Appeal appears to be relying upon to support its conclusion that the onus of establishing a sufficient evidentiary basis for negativing s.26 rests on the defendant. But then I go and point out that on the same page of the decision Justice Tipping went on to state 'if the plaintiff in opposition to the defendants' proposition can show that it has a fair argument that the claim is not statute barred or that the limitation period does not apply or is extended for any reason, then of course the matter must go to trial' and that again in my submission is absolutely right. In that case Justice Tipping went on to hold 'the proposition is not even asserted as in this case, not even asserted let alone backed by any evidence showing either directly or by

inference that the receiver, knowing that there was a cause of action in negligence against him, wilfully failed to disclose it' and then the Court went on to hold 'there is no evidentiary basis for a finding that the plaintiff has shown an arguable case to the effect that Mr Jensen, knowing he had committed a wrong, etc, etc, and then I go on to say at para.4.29 of the submission 'it is respectfully submitted that the sentence in the judgment relied upon by the Court of Appeal in this case that the onus is clearly on the defendants to show that the plaintiff's claim, or at least part of it is statute barred, misconstrued what Justice Tipping was saying in *Matai*. In that sentence His Honour appears to be referring to the overall persuasive burden or onus on an applicant to strike out to show that it is a clear case which justified striking out. The sentence is not however authority for the proposition that in an application to strike out it is incumbent on the plaintiff to file evidence negativing s.28 or, as the Court of Appeal put it, there is no obligation on the plaintiff to call evidence on that issue when the defendant has not done so.

Tipping J It could be said actually that the defendant had done so to some extent

Taylor And that's the second leg of my argument. I'm saying well look at the evidence that the defendant has filed and where on earth in that evidence do you get an arguable case for fraud, because if anything when you look at what actually happened, the file notes of Miss Bognar at the time, where if anything, what Trustees Executors are doing is endeavouring to ensure that there's no credit risk on this cheque. They realise that there's an element of doubt. Can we accept a cheque on this basis, so they get legal advice and the legal advice says that it's okay, it complies with the Act and then they proceed to exactly implement the arrangement as contemplated at the time it was entered into and in my submission there is nothing, absolutely nothing in that evidence which suggests fraud, especially if we accept that fraud in this context has to be an arguable case that they have acted dishonestly in the circumstances, objectively dishonestly. That a reasonable and prudent Trustee in this situation could not honestly have acted in the way that it did. It may be an appropriate time to take the adjournment.

Blanchard J Yes, 15 minutes.

11.30am Court adjourned
11.45am Court resumed

Taylor If I could just summarise the argument on s.28(a) which is the first limb of s.28 and that is that the action is based upon fraud and I've already made the point that on the pleadings there's no suggestion of fraud by Trustees Executors at all and then what the plaintiffs seek to do by way of submission and without any evidence is that in reality

even though it is not pleaded it is in fact a claim based on fraud and at page 15 of the respondents' submissions they try to get to that point by saying that the Hadlows would benefit from the transaction proceeding because they would get the plaintiffs' funds. The Morels and Trustees Executors would also benefit because they would get fees if the transaction proceeds and then it's asserted that Trustees Executors may have been influenced by these competing interests and that therefore in reality this is an action based on fraud. So what the plaintiffs appear to be doing is asserting by way of submission that Trustees Executors have breached some undefined but fundamental duty of loyalty or that they may have breached some undefined but basic duty of loyalty by putting itself in a position of conflict of interest without gaining the informed consent of the plaintiffs, and in my submission that proposition is simply not justified on the evidence before the Court, the only evidence being the evidence of Miss Bognar and is misconceived in any event because if we take my learned friend's correction of the pleading and the fact that Trustees Executors established a trust fund or trust account into which the monies were to be paid can that in itself give rise to this basic fundamental fiduciary obligation of loyalty and if we refer to the second volume of the case on appeal, exhibit ZB5 at page 176 we see how the Trust account arose and in my submission it is absolutely clear, can I just take one step back, Trustees Executors as statutory supervisor has an obligation under clause 13.1 of the Deed of Participation to use reasonable diligence to ensure that the terms of the offer are complied with and except where it's satisfied that the interest of the parties to the Deed will not be prejudiced, to enforce or take all steps necessary to remedy any breach of the provisions of the offer. Now one of the obligations of the issuer, not the statutory supervisor, but the issuer under s.37(5) is to hold any monies received in trust and what Trustees Executors are doing in this ZB5 exhibit at page 176 is to say that an exercise of our responsibility as supervisor we will hold the money in trust and whenever you receive the subscription monies you send them to us and put them into our trust account. So the obvious purpose of that letter is Trustees Executors taking steps to ensure that the issuer complies with its obligations under s.37, I think it's 4, of the Act. So there's certainly no dishonesty in that. But then we have to ask ourselves well yes technically or nominally those funds are being held by Trustees Executors as trustee, but in my submission they're holding them essentially as a bare trustee, to be applied if the allotment proceeds towards subscription for the units under offer and if it does not proceed, to be returned to the investors. And in my submission while it's correct to say that because the relationship is one of trustee and beneficiary it is not one which of necessity gives rise to the fundamental duty of loyalty to the investors to the exclusion of the promoters because the position it accepts inevitably involves both of those interests.

Tipping J Is this submission effectively that it is a situation to which s.21 of the Limitation Act might apply, that is a bare trustee, not a situation to which s.28 applies, fraud?

Taylor Yes, yes.

Tipping J The limitation would be six years wouldn't it if they were being charged simply for a breach of trust but there is a clear distinction in the Act between breaches of trust simplicitor and fraudulent breaches of trust on the other hand.

Taylor Exactly, and really what I'm saying is that certainly a breach of the duty of loyalty, the fundamental fiduciary duty, could in some circumstances amount to fraud within the meaning of the Act, but what I'm saying is if all my learned friend is relying upon, and that seems to be what he's relying upon when he corrects his pleadings and says I'm talking about 38 and 39 of the pleading, he seems to say because you took on this role of trustee holding these funds, you took with it a fundamental obligation of loyalty to the investors and you acted in conflict with that fundamental duty because you paid the monies to Morel and Co.

Blanchard J But that's a mile away from the pleading, which is simply about breach of trust following on from the fact that the allotments were void because s.37 hadn't been complied with.

Taylor Exactly and in this context all I'm dealing with is the argument as it appears in the submissions of my learned friend in saying there's not even a basis, if you allowed him all that freedom and said look you can just plead to fraud anyway you like and change it depending on what level of the Court you're at, I'm saying that even if the Court were to allow my learned friend to do that, and in my submission it shouldn't allow my learned friend to do that, it doesn't provide a sufficient basis for a submission that the action is based upon fraud.

Tipping J Well it would be a simple 21(2) or whatever it is situation

Taylor It's s.21(2), yes Sir. It's a simple breach of trust.

Tipping J At best, at best.

Taylor Yes, yes Sir, so that really is my submission on the s.28(a) issue. We then come to s.28(b) which is the fraudulent concealment and I've already indicated that effectively, and not just effectively but openly, the Court of Appeal has said that there is an onus on the person seeking to strike out on the grounds of the claim being vexatious etc to negative fraud. The Court of Appeal says at one stage, the defendant doesn't have to file any evidence if the plaintiff hasn't and they say, I'm sorry, that the plaintiff doesn't have to file any evidence if the defendant hasn't and in this case the evidence filed by the defendant is woefully short of discharging the onus on it to show that there was no fraud. Now I've already made the submission that that is a complete misinterpretation by the Court of Appeal of what the Court was saying

in *Matai* and indeed what the Court was saying in *Ronex* and perhaps I should refer to the written submissions at this point

Tipping J You're sort of going over the same ground Mr Taylor. What are you actually sort of adding here?

Taylor Well I'm not sure

Tipping J And I don't mean that unkindly, I'm just trying to listen to something new as it were because you've been through all

Gault J Is there an assertion anywhere that Trustees Executors knew this was void?

Taylor No Sir, the closest it gets is speculation in the course of the submissions that they might have known. Well in fact what my learned friend says is that he cites a whole lot of propositions and he says well look there was doubt, he doesn't then go on to say well that doubt was resolved because they went and got legal advice, what he complains of is that the legal advice wasn't reasoned and wasn't detailed.

Blanchard J We don't know what the advice was.

Gault J Well just coming back to the point. At this level one would expect any untidiness of pleadings to have been fixed and there to be clear allegations and my question is, is there an allegation at all that Trustees knew it was void. Well I wouldn't have thought that until you have to reply you need to say anymore on this on a concealment point.

Taylor Yes, well I'll happily sit down in that case Your Honour.

Blanchard J Yes thank you Mr Taylor. Mr Jargose.

Jargose Your Honour I anticipated that I might have little or nothing to say and that turns out to be the case Sir, unless there's anything the Court wants of me.

Blanchard J Thank you. Mr O'Callahan.

O'Callahan Would Your Honours prefer that I address the Court from here or

Blanchard J From the Lectern please.

O'Callahan If Your Honours will give me a moment to take my papers there.

Blanchard J Yes certainly.

O'Callahan It is pleases Your Honours I will start to some extent backwards in the sense that the position of the Morel Interests in respect of the SC15 of 06 appeal isn't entirely plain because if I may refer Your Honours to

the pleading, and it may be helpful to the Court for me to just go through the pleading and summarise the causes of actions as they appear because it will demonstrate in my submission that there's a number of plain allegations against the Morel interest in respect of which the Court said are arguable in terms of s.28 of the Limitation Act and in respect of that there's no appeal by those interests and the pleading is materially different from the pleading. It doesn't suffer the problem that's been identified in argument about the way that the pleading at page 23 is pleaded against Trustees Executives and involves a number of express causes of action. Anyway taking it in sequence the first cause of action against the Morel Interests is

Blanchard J I'm sorry I don't understand why we're talking about the causes of action against the Morels when they're not appealing.

O'Callahan Well if that's the case, if there's no appeal, I can present my submission on that basis and that nothing my learned friend may have said is necessarily going to materially effect the moral position under s.28 of the Limitation Act, then I'm prepared just to leave that alone.

Blanchard J Well if we're against you on s.37, the Morel's get the advantage of that obviously but so far as s.28 is concerned the Morel's have elected not to appeal and what we might conclude, assuming heaven forbid we were against you on s.28 in relation to Trustees Executors, that wouldn't as you say flow through.

O'Callahan Yes, well that's the point I wish to make and if I can leave it on that basis

Blanchard J And they might get the advantage of a few bones flung out on the way through but in technical terms they don't get the advantage.

Henry J Mr O'Callahan can I have some help please on that. Are the two causes of action against the Morels which are not dependent on s.37 sixth and tenth?

O'Callahan Yes they are.

Henry J And the sixth as I understand it is one for which you contend s.28 has some application, and I think that's at para.35, page 18 of the case.

O'Callahan Yes it is. It's pleading a breach of fiduciary duty of disclosure.

Henry J So you're invoking s.28 in respect of that?

O'Callahan Yes.

Henry J Although there's no appeal by the Morels, can I have some help from you as to why there is a fiduciary duty as between the investor and the promoter?

O'Callahan Well it's a duty of disclosure. There's a duty, a well understood duty of disclosure on a promoter or issuer prior to

Henry J Got no problem with a duty to disclose, it's the fiduciary nature of that duty which I'm having difficulty with. There seems to me to be an extraordinary situation to say that there's a fiduciary relationship between a promoter and an investor.

O'Callahan Because of the lack of an appeal I haven't come armed with the authorities in that respect and perhaps I could assist Your Honour at a later time in the hearing with it in a succinct way rather than addressing it now if that is suitable.

Henry J But you're relying basically on the sole allegation in 35 that it's a relationship of promoter and investor which gives rise to the fiduciary relationship, or creates it?

O'Callahan Yes.

Henry J Yes, thank you.

O'Callahan On the breach of the s.37 requirements, as the argument developed before Your Honours my learned friend made a submission that the cheque could have been paid in the event that the set-off didn't in fact occur and that in that event the Hadlows would have been in funds presumably from the settlement and allotment of the participatory securities and the settlement of the lease which was being purchased from the Hadlows and that being in funds there was no reason to suspect that the cheque couldn't be paid. That's as I understood the submission as it developed, and my first response to that is that the cheque, that the allotment couldn't have occurred, or at least the lease payment couldn't have been made unless the partnership was and therefore prior to that the issuer, the persons on behalf of the issuer, the promoters, the Trustees Executors had been in funds. Because the prospectus required the funds to be received in cash. If Your Honours turn to page 125 of the case on appeal as in volume 2, para.11, all payments will be in cash, that's a contractual term in the prospectus, and then moving over to page 137, which is one of their next documents being the Deed of Participation which was to govern the arrangement between the partners. It's set at para.4, Structure of Partnership

Blanchard J Sorry which?

O'Callahan Page 137. This is still part of the prospectus documents but it's the Deed of Participation as it appeared in the prospectus which once the securities were allotted the partners would become party to this agreement. It says that apartments should be divided into 25 units. All units shall have the same rights and obligations. Each partner shall

subscribe for a minimum of one unit and no unit shall be allotted until payment of the initial contribution in respect of that unit has been obtained.

Tipping J Are you attacking Mr Taylor then on the premise that payment must be made before allotment?

O'Callahan Yes, in fact partly because of the legal position and it's further confirmed in 5.1, Initial Contribution, each partner shall make an initial contribution to the partnership by paying the amount required to be paid in respect of the number of units allotted to the partner at the time and in the manner specified in the prospectus which is payment in cash.

Gault J Does s.37 bear upon what's to be understood by payment in those passages?

O'Callahan The point I'm leading to is that s.37 is merely one of the requirements for allotment to take place. It's not a necessarily complete set of conditions. It's a regulatory bar to allotment taking place with reference to the four-month time period and which special requirements as to how that has to be met.

Gault J It's the failure to meet that that gives rise to the invalidity though?

O'Callahan Yes it is, yes it is.

Tipping J But if you've got a deemed payment within s.37(2) surely you must have a sufficient payment for the purposes of the deed of participation in the prospectus.

O'Callahan Well in respect of the purpose of the regulatory statute yes, for the purpose of there being able to be an allotment made and then settlement of the partnership's obligations to the Hadlows, it's both in my submission legally not possible firstly and secondly practically not possible for that to occur because the partnership has to be in funds. So if that is correct that the allotment can't occur until the partnership is in funds then it's my submission that the Court of Appeal is correct in the analysis that the arrangement was one that could not have been implemented until allotment and that the arrangement is principally one of set-off and it's the set-off that is the payment not the agreement to set-off and the payment can't occur until allotment.

Tipping J But what is the consequence of s.37 being fulfilled but the prospectus and the Deed of Participation not, according to your argument, being fulfilled?

O'Callahan Well if you postulate a different factual scenario where a cheque in the normal course, a personal cheque was offered in accordance with s.37 and there was as might often be the case, there was no reason on behalf of the issuer to suspect that it wouldn't be paid, then that cheque is

offered within the time period of four months and therefore s.37 is satisfied. The regulatory bar is no longer there but can allotment nonetheless proceed? His Honour Justice Gault asked that of my learned friend during argument and my answer is no if

Tipping J I'm pre-supposing that for the purposes of my question. I'm asking you what the consequence is? It's not statutory voidness.

O'Callahan Well the consequence would be in that circumstance the regulatory bar would have passed but the allotment couldn't proceed and it is likely to be void allotment but on the basis of contract not on breach of s.37.

Tipping J Why, why in contract?

O'Callahan Because the prospectus, the subscriptions under the prospectus, the exchange of offer and acceptance by the parties to it give rise to in my submission a conditional contract which is that this scheme will come into place. There shall be a partnership; there shall be participants to a Deed of Participation etc if allotment can be made and if allotment can't be made

Henry J I thought your whole case on this point was that there had been a breach of s.37 not a breach of the prospectus.

O'Callahan Well it is because I say in the circumstances s.37 is breached because the arrangement is one that is a set-off arrangement

Tipping J But you're mixing concepts. I thought we were talking now on the premise that s.37 was fulfilled and I was curious as to what the contractual position then would be, but like my brother Henry I thought the whole case was built out of statutory voidness so why are we looking at contract?

O'Callahan Well

Tipping J Is this another shift of the pleadings Mr O'Callahan?

O'Callahan No, no, it's

Gault J I think it might have resulted from perhaps a misunderstanding by you of the question I asked Mr Taylor why I asked it, I was looking at trying to see the correct interpretation of s.37 and it seemed to me that when you read subsection 2(a) it is technically possible within that section for the cheque to be presented after allotment without disturbing the allotment. I wasn't saying it occurred here, I was simply looking for how you interpret those terms in the section so I don't really think that reference to whether or not is was practically possible because of some contractual arrangement here affected the purpose of my question.

O'Callahan Well the point of this is that if the allotment couldn't occur without payment then the arrangement is one that could only be properly regarded as a set-off arrangement and that is how the Court of Appeal

Blanchard J But what if they'd simply run cheques around. What if the auditors had said we don't like you doing this by set-off we want to see a proper audit trial just run the cheques around.

O'Callahan Well that goes back to what the arrangement was. If the arrangement was that the cheque would be held for some purpose as security and then destroyed once set-off had occurred then the cheque as the Court of Appeal say, was never to be presented.

Tipping J Not never ever.

O'Callahan Yes, there is a possibility that the cheque could have been presented and there would be reason to suspect

Blanchard J If they ever needed to present the cheque they had reason to believe that it would be paid because in those circumstances there would have been a cheque going the other way. There was no reason why they couldn't have done that. They wouldn't have been in breach of any obligation of good faith to Mr Hadlow. He would have suffered nothing.

Tipping J They took a short cut, that's all that happened. They could have so easily have exchanged gross cheques, and I can't understand what the argument is that that should bring the whole thing tumbling down unless it's a very very obtruse argument about the nature of what's meant by paying a cheque, but even that I think is difficult because in one remote circumstance the cheque would have been presented and paid and that was all they needed to be concerned about.

O'Callahan Well the Court of Appeal's judgment is that the arrangement was a set-off arrangement and that the cheque is a red herring because it was never to be presented unless it was suggested that it might have been presented after allotment occurred and without set-off and the point is that in my submission allotment couldn't possibly occur especially outside the four months in that circumstance, so that renders it an impossibility under the arrangement for the cheque to have been presented and that is why the Court of Appeal reasoned it and said that the cheque is a red herring because the arrangement is one of set-off.

Gault J Did you argue that the cheque was a red herring?

O'Callahan Yes I did.

Gault J Why was it given? You just have a set-off arrangement and the cheque is irrelevant, why was it given?

O'Callahan It may have been given under the misapprehension that it would thereby comply with s.37 that by simply passing the cheque over there was a cheque and that therefore it would comply with s.37, sub.2 in terms of being a deemed payment.

Blanchard J Why didn't it comply with s.37, subsection 2? It seems to fit neatly within the wording.

O'Callahan Because it was given under an arrangement whereby it wouldn't be presented in a way that I've explained.

Blanchard J It wasn't anticipated it would have to be presented but they had the right to present it in certain circumstances and the only circumstances in which they would be doing that legitimately would be circumstances in which they would be putting a cheque the other way through the bank account. In other words take the situation I gave you a little while ago where the auditors suddenly said no we want it done in gross not in net because we want an audit trail, in which case they could have done.

O'Callahan In my submission it's still a set-off arrangement because it says

Blanchard J No it's not

O'Callahan It says that I won't present the cheque.

Blanchard J It's cash going both ways if it's done by cheque.

O'Callahan If the circumstances under which the cheque might be presented only arise when it is agreed that the arrangement will be something different and that there will be a cheque swap then in my submission that arrangement doesn't arise until the time that it's put into place, which in this case was after the four month period, namely between the 19th and 21 December because if they decided then to do the cheque swap rather than the arrangement that was contemplated, then that would be an alteration to the arrangement and only made at that time, because principally it's a set-off arrangement that might change.

Gault J What is your argument in response to the point raised by Justice Henry, that it was envisaged that the cheque would be paid by the drawer by way of set-off?

O'Callahan I must say that is not an argument that I've considered because it hasn't been raised anywhere

Gault J Well it's raised now.

O'Callahan It's raised now, yes, and I've only had an opportunity to have a look at the Bills of Exchange Act and in particular s.59 of that over the course of the morning adjournment and although I've been able to locate materials that may bear upon it I'm not in a position to address Your

Honours comprehensively on that point. If s.59 does have language which on its face may anticipate that a cheque can be paid by the drawer, but it also has various other consequences and whether the concept of paying a cheque by the drawer is a general concept or whether it exists only in special circumstances, I'm just not sure at this stage. I would ask Your Honours if that's going to be important to Your Honours' consideration?

Tipping J If I can help you if to the extent this becomes relevant you'd have to have a look at the Bills of Exchange books *Byles* and *Chalmers & Guest* and have a look at *Thomas Cook*, the decision of the Court of Appeal and you will see there whether it be right or wrong espousal of the concept that the drawer doesn't become liable on a cheque unless and until the cheque has been presented and dishonoured or presentation has been dispensed with.

O'Callahan Yes, well if that's the law then

Tipping J That's something that you may or may not find of assistance to you on that particular point.

O'Callahan Well

Tipping J My brother Henry will no doubt feel that that isn't persuasive but it's

Henry J I'm not sure that it's altogether what we've got here because what I'm suggesting is that the arrangement was that the drawer would pay the cheque was the express understanding and was nothing to do with the cheque being dishonoured by the drawee.

O'Callahan Your Honour says that or postulates that as a feature of essentially a set-off in discharge of the obligations under the Bills of Exchange there would be a set-off.

Tipping J If the arrangement by means of which the drawer was going to pay the cheque would not in themselves have satisfied the section, then there could be said to be some circulatory if you like in saying that the contemplation that the drawer would pay the cheque by this means fulfils the requirements of the section.

O'Callahan Yes and principally perhaps because query whether that makes it properly a Bills of Exchange if there is such an arrangement that the drawer will pay by way of that type of discharge

Tipping J Outside the cheque?

O'Callahan Outside the cheque

Tipping J Yes well all these things are in play on that argument.

O'Callahan Then perhaps it's not a Bills of Exchange at all or is not really to be understood as a cheque because the arrangement between the parties is something different.

Tipping J Well there is a suggestion that in those circumstances the cheque is no better than a promissory note?

O'Callahan Yes.

Tipping J If you really want to get donkey deep into this issue.

O'Callahan Yes, so if it was simply a promissory note then it would simply be a promise to pay and be no better than set-off arrangement but I've said the Court of Appeal has

Tipping J It's quite a tricky point if we need to go down my brother Henry's route but I'm not saying it's wrong, it's tricky.

O'Callahan Well the point evokes in any event what the Court of Appeal has said, because the Court of Appeal has interpreted the arrangement as being a set-off arrangement. The words used in the Court of Appeal's judgment, they say at para.32 'the Hadlow cheque was and is a red herring as it in itself never amounted to a payment or even a promise to pay'. Now it may be that His Honour Justice Henry's point may have been regarded as a promise to pay.

Tipping J What paragraph, I'm sorry?

O'Callahan Para.32, sorry, at page 70.

Tipping J Thank you.

O'Callahan It is clear from the documentation next to Miss Bognar's affidavit that the cheque was provided on a condition that it never be presented and Your Honours have said well, and my learned friend says it can't be never. There may have been a circumstance in which it might have been presented and it's been postulated there might be two such circumstances, one being if allotment occurred without set-off and the other being just a decision to change the arrangement

Gault J Is the Court statement there an accurate reflection of what was discussed as appears in the file note of Miss Bognar at ZB13? The cheque will not be banked until settlement and in fact we propose a net settle?

O'Callahan Well it may not be consistent with the first part of that record by Miss Bognar. If the arrangement had in fact that it won't be banked until settlement then that may imply a form of arrangement whereby there'll be a cheque swap. But she goes on to say 'in fact we propose a net settlement' and Mr Hadlow's letter

Gault J That doesn't suggest that the cheque is a red herring to me. It suggests that it is a security. It is a real part of the arrangement.

O'Callahan Well in my submission it's a security that can't legitimately be exercised and in any event can only be invoked if the principal arrangement doesn't work and in that situation, especially where the allotment occurred outside, or was intended to occur outside the four month period, it really simply becomes

Blanchard J What do you mean by intended?

O'Callahan I'm sorry Your Honour has picked up that word in a sentence I just used.

Blanchard J You said that it was intended to be done outside the four-month period. Is that based on

O'Callahan No, I shouldn't have said that at the outset it was intended to be done outside the four-month period. It's not clear from any of the papers whether it was intended from the outset to occur before or after the four months but in fact it occurred outside the four months.

Tipping J There isn't an exact coincidence between the file note and the Hadlow letter.

O'Callahan No there isn't.

Tipping J Now I would have thought if one is taxing the Trustees Executors with some breach of the legislation and consequentials we ought to be going on Zsuzsanna Bognar's note rather than the terms on which Mr Hadlow put it in.

Gault J Particularly since this letter says 'as discussed'.

O'Callahan As discussed. Well it may depend who's recollection of

Tipping J Well this Bognar file note looks to me to be both shall we say precise and exactly what one might have anticipated and it's that arrangement that Gordon Wong confirmed apparently met the legal requirements, so it seems to me frankly that we should be going on the Bognar file note as to what was intended to happen rather than on the rather looser terms of the Hadlow letter. Neither are reflected precisely by the Court of Appeal's summation.

O'Callahan Well Mr Hadlow says 'please hold this cheque and off set the same value against the amount payable to us on settlement of the purchase of the forest. Once settlement has taken place for the off set amount we request you destroy the cheque'. There's no suggestion there that the

cheque was actually to be presented and that's the drawer of the cheque speaking.

Tipping J Well the Bognar thing is slightly internally inconsistent too just to add to the mix.

O'Callahan Yes it is, it is.

Tipping J So may be this is something that's difficult to resolve on a strike out but Mr Taylor doesn't like the thought of that.

O'Callahan Well the Court of Appeal's judgment must obviously be read in the context of a strike out application because obviously at a trial of the matter things may well come to light that shed some clear light on this but the Bognar file note

Tipping J Tab 13 it is of the bundle.

O'Callahan The cheque will not be banked until settlement and in fact we proposed to a net settle in order to avoid any credit risk. Now that may just be an element of stream of consciousness in the sense that it had been thought that maybe there might be a cheque swap but then when everybody worked out what was going to happen

Tipping J Well a net settle implies a set-off.

O'Callahan Yes a net settle would be a set-off, which is consistent with Mr Hadlow's letter which says off set this value, the same value.

Tipping J But it doesn't mean that if that wasn't what actually happened they were never going to bank the cheque. This is getting a little subtle but not aided by the different means of expression but I still have some difficulty with the idea that the cheque would never be banked, never ever be banked. It wouldn't if what was proposed went ahead.

O'Callahan Yes well what situation are we in factually if what was proposed didn't go ahead. That's the difficulty for my submission for my learned friend's argument, because if, if there was no particular obligation to hold onto the cheque, then the cheque could have been banked at any time, it could have been presented at any time and there was reason to suspect that it wouldn't have been honoured unless it was presented in a particular way at a particular moment in time, namely contemporaneously with something occurring or in fact after it occurred, so there would have in my submission been

Blanchard J Well that would be the only time they'd be entitled to present it.

O'Callahan Well if it was a normal cheque and normally open without condition and able to be negotiated in the usual course then they would have been entitled to have presented it the moment it was received and in fact any

day thereafter and if it had been presented at any time from there up until some time prior to settlement there is reason to suspect that it wouldn't have been honoured because presumably this arrangement was being made because of Mr Hadlow didn't have money in his bank account. So then one says well if that's not the case, if it's not a cheque that could be negotiated at any time, then it must be under some conditions and what are the conditions? In my submission the conditions, at least arguably for the purpose of a strike out application, are that it was to be held pending set-off, so therefore the only time that it's contemplated in which it might be banked is if settlement occurred without set-off and in my submission settlement couldn't have occurred without set-off, so the proper analysis of the arrangement is as the Court of Appeal have said, the cheque was never to be banked.

Blanchard J Why do you say that settlement couldn't have occurred without set-off?

O'Callahan Well settlement couldn't have occurred without the partnership being funds and the only source of funds were the bank loan stipulated and a prospectus and the contributor's funds, the subscriber's funds.

Blanchard J But you can negotiate all the cheques at the same time in each direction. It happens all the time. In other words you just do it on a gross basis and the netting is done through the balancing of the cheques.

O'Callahan Well that comes back to the point I was just attempting to make which is that it depends on what the conditions of the cheque are. If there are no conditions and just an open Bills of Exchange with a gentleman's handshake to leave it until a moment in time then in my submission that wouldn't satisfy the section because if a day were to be presented and if they'd been entitled to present it and they had reason to believe that upon presentation it wouldn't be paid then it doesn't satisfy the section in my submission.

Tipping J I wonder if we're becoming a little distracted by this concept of never. The cheque is only a deemed payment. If the directors of the issuer have no reason to suspect that the cheque will not be paid up, forget the drawer for the moment, they had every reason to suspect this cheque would not be paid by the bank because that was inherent in the signed agreement.

O'Callahan Exactly.

Tipping J Now is that your best point really? Just apply the words of the section as they've just been read? Is it no more subtle than that?

O'Callahan Quite plainly that's the point.

Tipping J Just apply the literal words of the section and simply say they had every reason to suspect the cheque would not be paid, because that was the arrangement.

O'Callahan Because the arrangement was for that reason.

Tipping J It would be a very very literalistic approach but it's probably your best and I'm not expressing a view one way or the other. Maybe that's just exactly the way it's designed to be read so as to get around all this incredible foot work that's come all the way to this Court, if only they'd done it the conventional way.

O'Callahan Yes Sir, and the remainder of the argument, the complication becomes when it's postulated that there was a set-off arrangement and that the set-off arrangement could be sufficient payment

Tipping J Payment of the cheque.

O'Callahan Either of the cheque or of the, and I understand my learned friend to put it higher than that, that it's not just

Tipping J No he really came back to the, he came back to the cheque in the end. He flirted with great skill with the other point but he came back to the cheque in the end.

O'Callahan Yes well if it's the other point which it set-off itself as payment well that might be good if set-off had occurred within the four months and I've always accepted that, that it might be good. In fact subsequent decisions since the Court of Appeal of this Court have indicated that I think it's

Tipping J We don't have to worry about that because it didn't

O'Callahan It would be sufficient if done within four months, but it didn't, it wasn't done within four months and as the Court of Appeal observed, a promise to pay isn't payment.

Tipping J Well I don't know how much more can be said without depreciating your argument at all, that you simply ask us to read the words and apply them

O'Callahan Yes.

Tipping J And no director put his hand on his heart and said I have no reason to suspect that the bank will not pay this cheque.

O'Callahan Yes. Now because I may not have any further

Tipping J I'm not trying to chuck you off Mr O'Callahan but I was just exploring whether you can put it any higher or better than that.

O'Callahan Well I'm just considering the extent to which I need to reply to the points that have been raised in debate with the bench, both for my learned friend and myself.

Tipping J Well I think you should, but I mean I'm not expressing a view.

O'Callahan Yes, yes, the other point as I understand it is that if this arrangement is interpreted, and I say it can't be interpreted in this way because it should be interpreted as a set-off arrangement with a possibility that's a legal impossibility if the cheque had been presented after settlement, but if it was to be presented contemporaneously with settlement, that was possible, then perhaps the arrangement is akin to a post-dated cheque and would a post-dated cheque satisfy the regulatory requirements of s.37?

Tipping J Why not.

Blanchard J Depends on when it's post-dated to.

Tipping J Yes.

O'Callahan Yes, if it's post-dated to past the four months, and in my submission it wouldn't,

Blanchard J But it isn't and there's nothing to suggest the time the cheque was taken, it was intended that things should occur outside the four months.

O'Callahan This is the point that Your Honour Justice Blanchard has put to me that if it was simply to occur simultaneously by a cheque swap then the cheque couldn't legitimately be presented by Trustees Executors until the parties were in a position to do that cheque swap which is things are in place, allotment was to occur.

Blanchard J Which could have occurred within the four-months looking at it from the beginning of December.

O'Callahan Yes it could have, but in this case it didn't.

Blanchard J So!

O'Callahan And so that is akin to saying that there was a, it's not exactly the same but for the present purposes I say the analogy is a good one, that that's akin to a post-dated cheque for the time of the allotment.

Blanchard J I don't see how you can argue that when from the perspective of December it wasn't known when all this would occur.

O'Callahan No but the certificate though wasn't given until the 19th

Tipping J I think this is a real red herring. It's when the cheque is received that you've got a deemed payment or not. That's all we're talking about. We're not worried about what happens downstream

O'Callahan And if the post-dating, if the effect of essentially post-dating is uncertain then in my submission that wouldn't

Tipping J Well forget post-dating, this cheque was not post-dated was it and it was received and the only issue is whether it was received in circumstances which officiated the deeming provision.

O'Callahan And I say it was, yes, that's my point on that. Unless Your Honours have any further questions I

Henry J Could I have help on one other point? The set-off when it was effected, did that discharge the liability of the drawee under the cheque?

O'Callahan Section 59 would say that it didn't. I've only read s.59 very briefly and I don't actually have it in front of me but I think there is a provision to that effect in s.59.

Tipping J Yes, I think you're right.

Henry J One talks about payment in due course and that discharges the bill, but my query was whether implementing the set-off would discharge the bank's liability under the cheque?

O'Callahan Yes, s.59 talks of payment in due course. Sub.1 says a bill is discharged by payment in due course via on behalf of the drawee or acceptor and then it defines

Henry J Is that not what occurred here?

O'Callahan It defines payment in due course as meaning 'payment to the holder of the bill made at or after maturity thereof in good faith and without notice of a holder's title if defective. Whether that's a complete or whether it's only curing an aspect of uncertainty is not clear

Tipping J It would be fraud on Trustees Executors' part to present the cheque after having achieved set-off but it wouldn't have withdrawn the mandate would it?

O'Callahan No and that's the point, that's the point that I think s.3 gets to which is ss.3, which says 'subject to the provisions hereinafter contained when a bill is paid by the drawer or an endorser it is not discharged but where a bill payable to or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor but may not reissue the bill'.

Tipping J Well there are certain provisions in the Bills of Exchange Act that don't sit in parallel with cheques, so I think one has to read it in that context and the Cheques Act has certain provisions which may be relevant.

O'Callahan Yes and other provisions which come in and as between them there may be cross-indemnities. Alright I haven't got the Cheques Act in front of me so I can't say whether there's anything in that which says it discharges it. It may well be that it doesn't discharge it but there is cross-indemnities between the drawer and the acceptor or the drawee, and it may be that there's also contractual arrangements as between the drawer of the cheque and the payee, but in terms of the technical law, whether it discharges or not, it may not. But because this issue is only raised today I'm really not in a position to help Your Honour any further today. I'm happy to do so at a later time, either the course of his oral hearing or by way of further written submissions. So that, unless Your Honours have further questions, that concludes my submissions on the void allotment. And so now we come to whether there is a claim that is based on fraud and I accept that on the pleadings as they stand, a cause of action in fraud is not plainly alleged against the Trustees Executors.

Tipping J When you say not plainly alleged, I would have said not alleged.

O'Callahan Well I think Your Honour's correct.

Tipping J I don't think it's even implicit.

O'Callahan And this may well be counsel's fault. It was at an earlier stage thought that the allegation of trust was sufficiently opened, especially the way the matter was dealt with in terms of the Court of Appeal and the way in which the parties have exchanged submissions throughout the Court process on the basis that there is able to be alleged within that aspects of equitable fraud.

Gault J I'm afraid I have real difficulty with that. I have always understood that there is a very onerous obligation on counsel alleging fraud and you can't come to a final Court when issues of pleading should be well closed and say well there are some inference about or might have been interpreted as fraud. I can't accept that.

O'Callahan Well I accept that I would need to amend the pleadings and if I was

Gault J Well where is your draft amended pleading?

O'Callahan Well I don't have one right at this moment to give to you.

Blanchard J I don't see that on the material we've got before the Court you could justify a pleading of fraud against Trustees Executors.

O'Callahan Well what I have done, without producing a draft for Your Honours, what I have done is said in my written submissions the extent of the allegation that in my submission can be made responsibly.

Blanchard J Well what's the high water mark of that?

O'Callahan The high water mark of that, I'll go to the written submissions, and having reasoned this through I come to it at para.13, it's at page 7. I say 'it is a reasonable inference from the Bognar affidavit that Trustees Executors had some doubts about whether the set-off arrangement was permissible. I say that because of the file note dated 1 December 1994 which says "I have talked with Gordon Wong about this process and he has confirmed that this meets the legal requirements".

Blanchard J Well that doesn't suggest doubts, that suggests they've taken legal advice which has told them it's kosher.

O'Callahan Well in respect of that I say the so-called legal advice. It's not clear what this process is that Miss Bognar is referring to and whether it included any suggestion that the matter might occur outside the four-month period and we don't have

Henry J Mr O'Callahan is what you're saying here an allegation that Trustees knew this arrangement was in breach of s.37?

O'Callahan What I'm saying is, and I say I don't need to put it any higher than this to establish equitable fraud in respect of the way that is defined especially under *Royal Brunei* formulation is that

Henry J Can you articulate for me the proposition or the allegation that you wish to make?

O'Callahan The proposition is that there was at least doubt as to whether it complied.

Tipping J But they resolved that doubt.

O'Callahan Well whether they did or not is not clear in my submission because

Tipping J Well they wouldn't have gone ahead would they if they had not had their doubt resolved? I mean that must be a reasonable inference.

Blanchard J Has confirmed this meets the legal requirements.

O'Callahan Well in order for the doubt to be properly dispelled in my submission it's necessary for it to be clear what the proposal was that had been put to solicitors for advice.

Henry J And we just again articulate the allegation you wish to make. Is it that Trustees had doubts as to the validity of the transaction?

O'Callahan Yes, and that the actions they took in respect of those doubts were not sufficient for an honest and reasonable professional Trustee in this position to dispel those doubts and that they nonetheless went ahead.

Tipping J And that on this material the Court could draw the inference that they were acting in an objectively dishonest manner?

O'Callahan I say yes and I say yes with this very important context, and that is in my submission there is really no way that the plaintiff parties in this proceeding could have under their control, or obtain under their control without the procedures of discovery interrogation available through the Court process. Access to or knowledge of any material that would go further or assist in any way

Tipping J I can understand

Henry J Being an allegation of fraud and rely on discovery to see whether or not you've got a basis for it.

O'Callahan Well it's an allegation of equitable fraud which in my submission doesn't attract the very strict rules that an allegation of actual fraud would under common law - that's the first point, and the Court of Appeal was quite proactive in emphasising in their judgment that there was no suggestion of actual fraud and that it was equitable fraud and that was to a much lesser standard and that it's enough to be able to say, in proper circumstances, and I say those proper circumstances exist here, it's enough to say from the circumstances that are known that this allegation is open because it has to be a responsible allegation and in that context given the nature of the fraud alleged, or to be alleged in an amended pleading, and the situation.

Tipping J Well Mr Taylor has accepted that fraud within *Royal Brunei* is within the meaning of fraud in s.28. He hasn't accepted any less than that and if you're just bandying around terminology like 'equitable fraud' which classically people have said is a contradiction in terms, doesn't it behove you to give us a very clear idea of what you mean by equitable fraud in this context and what authority there is for suggesting that what you mean is within s.28?

O'Callahan Okay, I've done that, or attempted to do that at least in the written argument.

Tipping J Yes well I read it with interest but I'm not sure that I've got the full grip of what you're actually saying 's.28 fraud includes'. We all know it includes *Royal Brunei* fraud, I mean no-one's going to dispute that but you seem to be suggesting it includes something less.

O'Callahan Well, no I'm not, that's not my submission. I'm not saying that there should be something less than *Royal Brunei*, I'm relying on *Royal Brunei*.

Tipping J So your equitable fraud is *Royal Brunei* fraud as clarified in *Barlow Clowes*?

O'Callahan *Clowes*, yes. And it's just a matter of applying that.

Gault J What does that mean? It's dishonestly acting for an improper purpose would that be the equitable fraud that you're articulating?

O'Callahan Well what their Court says in *Royal Brunei* is this 'acting dishonestly with lack of probity which is synonymous means simply not acting as an honest person would in the circumstances'. That is on an objective standard

Tipping J The trouble with *Royal Brunei* as is elicited in *Twinsectra* was that Lord Nicholls didn't steer with great respect a wholly consistent course within the judgment in *Royal Brunei*, but the essence of it now is that speaking colloquially an ordinary sensible person would say that was dishonest to do that, whatever.

O'Callahan Yes, yes.

Tipping J That's the essence of it isn't it?

O'Callahan Yes, and dishonest at least for the person being judged and

Tipping J Well they're going for the subtleties but you know the objective person has to say that was dishonest to do that in all those circumstances.

O'Callahan Yes, yes, and some of the comments that are made – I've set it out at the bottom of page 10 in my written submissions 'unless there is a very good and compelling reason an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears or deliberately not ask questions lest he learned something he would rather not know and then proceed regardless.

Blanchard J Where is the evidence that Trustees Executors acted in any of those ways?

O'Callahan Well before I come to that Your Honour if I put my answer to that on hold for one minute and finish what I say in the written submissions about the standard, because my answer to Your Honour's question is necessarily linked with the standard. What I say of *Royal Brunei* at para.16 is 'the Privy Council then discussed risk-taking, distinguishing the risk inherent in all investment from the case where a trustee, with

or without the benefit of advice is aware that a particular investment of application of trust property is outside his powers, but nevertheless decides to proceed in the belief or hope that this will be beneficial to the beneficiaries, or at least not prejudicial to them. He takes the risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it, that's plain. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly. The Privy Council identified this type of risk as being that which was addressed in *Baden* where it was accepted that fraud includes a risk to the prejudice of another's rights which risk is known to be one where there was no right to take'. And then 'this situation was in turn distinguished from the case where there is a genuine doubt about whether a transaction is authorised or not. There is a gradually darkening spectrum which can be described with labels such as clearly authorised, probably authorised, possibly authorised, wholly unclear, probably unauthorised and finally clearly unauthorised. An honest person knows there is doubt so what does honestly require him or her to do.' The thing is when it gets into that gradually darkening scale the Privy Council doesn't say that these are outside the test, it doesn't appear in the facts before them.

Gault J We haven't got even any shade here.

O'Callahan Well in my submission I say we do because in my submission there was a doubt

Gault J Where was the doubt?

O'Callahan Well the doubt arose as to whether this arrangement, whatever it was, was compliant with s.37 and whether the matter could proceed.

Blanchard J So they take legal advice

O'Callahan Well apparently they take some legal advice. All we know about that advice is what is recorded in that file note, so we don't know exactly what was asked, what was put to Mr Wong as the process and we don't know precisely what Mr Wong said in reply

Blanchard J That's entirely speculative. At face value the final sentence of the file note when it talks about this process is the process which has been described above and he has confirmed that this meets the legal requirements.

O'Callahan Well just on the question of what we know about it, that would be very easily cleared up by seeing the advice if it was written or by having Miss Bognar

Gault J That's saying we complete fraud so we can go on a fishing expedition.

O'Callahan Well in my submission Your Honour it's not that, it's not let's just allege fraud and see what turns up. It is is there some reason in the particular circumstances to say that a professional Trustee like this should have been aware of legal uncertainties and have acted in a cautious manner.

Blanchard J Well they do, they got legal advice.

O'Callahan Well what if the legal advice, what if the proposition had been that we're going to do a cheque swap and we're going to do it before the four months or if it was open what if Mr Wong had said well that's fine as long as you do it within the four months, or what level

Blanchard J But that's complete speculation.

Tipping J There's got to be some clarity in the line between negligence and equitable fraud and I can understand an allegation that they were negligent and I'm not supporting it but to say on this material they're dishonest is really pulling a very long bow.

O'Callahan We don't have the rest of it. My proposition is really this and this is what the Court of Appeal accepted and that is there's enough that we're not sure, we don't know, there's enough to say that it could well be the case

Tipping J Well the Court of Appeal went further and said you didn't have to produce anything, you could just sort of dream it up out of the sky.

O'Callahan Alright so perhaps the question is whether that's correct

Tipping J Well if you can hold that you're going to hold on aren't you. That seems to me to be problematical 2 but we can no doubt deal with that after lunch.

Blanchard J Yes, we've arrived at the time for the luncheon break.

Henry J I wonder I could just try and analyse where this is heading and then if we could take the break then if that's alright. As I understand it your allegation as you want to frame it now is that Trustees had some doubts as to whether s.37 was breached at the time it proceeded to approve the implementation of the arrangement?

O'Callahan Yes.

Henry J And you base that allegation solely on the file note which you have got set out on para.13?

O'Callahan Well in terms of basing the allegation, if it wasn't for the file note I would have said that it is reasonable that they ought to have had such doubts.

Blanchard J That's a negligence allegation.

O'Callahan Yes well but in terms of fact at trial has shown to have such doubts

Tipping J I think they're worse through having got legal advice on your formulation.

O'Callahan Well

Henry J I thought you'd accepted my formulation of your proposition which was that in fact they had doubts.

O'Callahan Yes I did, that is the proposition.

Henry J So negligence doesn't come into it?

O'Callahan No they had doubts.

Henry J And would you have sat on the file note? You base that allegation on the file note.

O'Callahan Well it's when Your Honour asks me to base the allegation that I start to essentially

Blanchard J Well you've got to base it on something and at the moment I just don't see it.

O'Callahan I make two propositions, I make two propositions. One is that if it wasn't for the file note I would say that it's reasonable in the circumstances to expect that they ought to have been aware

Blanchard J That doesn't mean that they were aware and dishonestly decided to proceed and it's irresponsible to make that kind of allegation in a vacuum.

O'Callahan Just on that point, if it is reasonable to assume that they ought to have been aware then a plaintiff who is starved of information in my submission is perfectly well grounded to make the allegation a positive allegation that needs to be made that they were in fact not aware.

Blanchard J So if they might possibly have been aware it's okay to make the allegation that they were aware in order to flush that out?

O'Callahan In the context of an information starved plaintiff which is necessarily so in these circumstances, because on what else could it be based is my submission. But in this case because of the exchange of affidavits we in fact know that there were doubts so that's the second of my proposition

Blanchard J The exchange of affidavits, what are

O'Callahan The exchange of papers and the affidavit that has been filed.

Blanchard J Are you back to the file note?

O'Callahan Yes, yes.

Blanchard J So that's what you're basing it on?

O'Callahan I suppose it would be correct I am basing it on that and I'm also submitting to Your Honours that I could base it on the absent file note, I could have based it on the proposition that they ought to have been aware in order to found, responsibly found the allegation that they in fact were aware where there's no other way of the plaintiffs knowing that until further exchange of information is made in the proceedings.

Blanchard J Right, thank you, we'll take the lunch break until 2.15pm.

1.06pm Court adjourned
2.17pm Court resumed

Blanchard J Yes Mr O'Callahan.

O'Callahan Thank you. I'd like to take Your Honours back to the Privy Council's decision in *Royal Brunei*, because in my submission what I say about the facts of this case and how the requisite dishonesty arises and how it

Tipping J Is it the whole case? Is it the whole case or just the bits that are in your submissions?

O'Callahan Well in fact particularly the bit that actually follows what I've put in my submissions because if Your Honours turn to the case it's at tab 1 of the bundle that labelled First Respondents' Bundle of Authorities with a date of 8 June 2006 and I want to pick up the reference at page 390 of the report and looking down through section E to F we have this shades of degree quotation that I referred to earlier and just picking up the end of that 'the analysis of the position of the accessory such as the solicitor who carries through the transaction for him does not lead to such a simple clear-cut answer in every case. He is required to act honestly; but what is required of an honest person in these circumstances? An honest person knows there is doubt but what does honesty require him to do' is the question posed. The answer is 'the only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Justice Knox captured the flavour of this in a case with a commercial setting when

he referred to a person who is guilty of commercially unacceptable conduct in the particular context involved. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might for instance flatly decline to become involved. He might ask further questions. He might seek advice or insist on further advice being obtained. He might advise the trustees of the risks but then proceed with his role in the transaction. He might do many things. Ultimately in most cases an honest person should have little difficulty in knowing whether a proposed transaction or his participation in it would offend the normally accepted standards of honest conduct. Likewise when called upon to decide whether a person was acting honestly, a Court would look at all the circumstances known to the third party at the time. The Court will also have regard to personal attributes of the third party such as his experience and intelligence and the reason why he acted as he did. And before leaving cases where there is real doubt one further point should be noted. To inquire in such cases whether a person dishonestly assisted in what is later held to be a breach of trust is to ask a meaningful question which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of knowingly assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the sort of knowledge required when the truth is that knowingly is inapt as a criterion when applying to the gradually darkening spectrum where the differences are of degree and not kind'. So it's applying that where I say that there is enough on what we know and what can be reasonably potentially inferred that this is not a frivolous or vexatious claim and I particularise it at para.13 of my written submissions which I took Your Honours to before but I didn't get to finish it. And I make a series of propositions that are open on material and say that these propositions can lead to a finding of dishonesty in the equitable sense as understood by *Royal Brunei*. Para.13 of my submissions, page 7, the first proposition at sub.para.(a) the Trustees Executors knew that the Hadlows did not have available funds to make a subscription payment of $936,000, or I could say that there's reasonable suspicion to doubt they had funds that would be sufficient; that Trustees Executors was aware of doubts concerning the validity of the set-off arrangements; that Trustees Executors may have received some legal advice about the situation but such legal advice firstly was not reasoned. We don't know whether it was or not. We can assume from the facts it wasn't reasoned and that it did not address the question of timing. We can also infer that as a reasonable prospect as far as evidence will turn out. That Trustees Executors as a professional trustee agency familiar with offers to the public was aware of the four month time limit; that after a

time after the four months, namely 19 December 1994, Trustees Executors purported to advise that all units had been subscribed for, at a time when Trustees Executors knew that there had been no allotment and no set-off; that Trustees Executors knew that there was no purported allotment until 21 December and that the purported set- had not occurred until that time; Trustees Executors chose not to formally clarify the situation concerning the reasons for the set-off arrangements satisfying the provisions of the Securities Act nor the position concerning timing; and that Trustees Executors paid the plaintiffs' money to Morel and Co on 21 December; and that Trustees Executors chose this course without disclosing any of the arrangements to the plaintiffs and made no such disclosure until 2001. Because that last point, what they could have done was disclose it and seek the views of the participants and that may or may not had the effect of allowing the scheme to proceed. It may have resulted in some delay in the allotment if there was some doubt and dispute about it until that was resolved satisfactorily, but instead of doing that they just chose to go ahead, and when I come to fraudulent concealment it's that part

Tipping J On the question of honesty what weight should one give to the fact that payment by set-off, even if technically outside the section, was an assured method of payment, surely one must lift one's gaze from the technicalities if one's assessing people's honestly, whether people would, sensible people would see this as dishonest. There was never any doubt that they were going to get paid. I mean that's the practical reality of it and to allege dishonesty against that practical background seems very very difficult.

O'Callahan Well with respect I would accept that Your Honour's correct in terms of that has to be one of the factors to be taken into account because that passage I referred Your Honours to from *Royal Brunei* would indicate that that sort of consideration needs to be weighed in the balance of all the others in judging standards of honesty.

Tipping J I for myself would regard it as the most overwhelming consideration when you're talking about people's honesty. They may have got it technically wrong, but dishonest?

O'Callahan Well this brings me to the point that I've made in my written submissions and what my learned friend referred to as the point which is the concern, and that is in attempting to understand why there might be regulatory rule like this, or even if it's not part of the legislature's intention but nonetheless creates an environment in which people conduct themselves, investors conduct themselves, is that these allotments, a potential investor may well have some comfort in the fact that if the market doesn't support an offering that might be some indication that it's not viewed as a potentially successful offering and that without sufficient support, and if that occurred then the investors' funds would not be at risk because if they themselves had made a bad decision, hopefully others wouldn't make such a bad decision. You'd

need a number of people all making the same mistake or you'd need somebody prepared to risk a large sum of money in respect to it to have also made an even worse mistake because you'd expect that the larger sum you're risking the more inquiries you make to satisfy yourself as to the potential security of the scheme. In this case what effectively happened was that the Hadlow's ended up utilising this not by committing themselves to a new risk but by essentially receiving some liquid funds to ameliorate an existing risk and it may be if that was known, and certainly it's been asserted in the pleadings that if that was known, the plaintiffs wouldn't have proceeded with the scheme and it may have some difficulties in respect of causation if causation is necessary, but nonetheless for the purposes of the present argument in its relevance to honesty, it may well be viewed as one of those subtle matters that are important to investors and that a professional trustee administering these schemes should be alive to the rules and the types of matters that might influence these parties.

Tipping J And the motive for being dishonest is what personal gain, is that why an ordinary person would ascribe to the Trustees for some sort of rationale for being dishonest?

O'Callahan No well it doesn't have to be personal gain.

Tipping J But why would they? It's a matter of common sense people aren't dishonest unless there's something in it for them or there's some advantage or something, I mean why would they, I can understand the contention they were negligent but it's the uplift of dishonesty I can't understand.

O'Callahan The *Royal Brunei* lines of authority originating back to well the *Barden* ***Delvo*** case which summarised a number of cases before that and then leading into *Royal Brunei* and the subsequent cases. There's no suggestion amongst the analysis of all that, that there is necessarily an element of personal gain involved.

Tipping J I know that, but I mean as a matter of common sense personal gain being absent, the inference of dishonesty is much harder to draw.

O'Callahan Well it may be

Tipping J I mean why would they be doing it?

O'Callahan Well there may well be other motivations such as being seen in the marketplace for their services to effect these sorts of offerings in a smooth and efficient way. They're being paid out of the allotment funds. Now that doesn't necessarily mean that it's personal gain for that but a subtle yet still wrong willingness to prefer the interests of getting the scheme allotted and getting the participants paid out may be relevant in the mix of how their conduct will be judged.

Blanchard J Well I can see that it might be arguable in relation to negligence but as I said before lunch it seems to be irresponsible on the evidence that you have here to be putting it up on the basis of fraud, even fraud within the *Royal Brunei* meaning.

O'Callahan Well I've set out at para.13 the extent of

Blanchard J Yes, you've taken us through that and I don't really think there's much more you can say is there?

O'Callahan No well that's what I say about it.

Blanchard J Yes.

O'Callahan And it may be repetitious. Your Honours will each have a view on that. Perhaps I could advance matters by moving to the s.28(b)

Blanchard J Well you won't get anywhere at 28(b) if you don't get home on 28(a). You've got absolutely nothing to fly on for any suggestion that at some point after they did it they suddenly became aware that they had done something that was wrong and concealed it.

O'Callahan It arises out of, the 28(b) argument arises out of the last of my factors at para.13. The point

Blanchard J But they have to have been aware that they were committing a breach of s.37, or might be committing a breach of s.37.

Tipping J You can't conceal something of which you're unaware.

O'Callahan Well in my submission we don't actually know whether they were aware of it or not.

Blanchard J Well you shouldn't be making the allegation.

O'Callahan Well in that situation I ask this question as a semi-rhetorical question, how is it that where there are circumstances which raise the possibility of these inferences, how is it ever possible to make the allegation without obtaining all the files and reviewing all the correspondence and having an opportunity to

Blanchard J The fact that you haven't got access to information doesn't give you a licence to go making allegations of fraud with no proper basis. If it transpired in the course of discovery in a negligence action for example, there was more than negligence, then it might be appropriate to change the pleadings and make the greater allegation but it's not proper to do it with no basis simply on speculation that there might have been something dishonest.

O'Callahan Well I suppose where Your Honour's proposition and mine depart is in fundamentally what could give rise to, what inferences can reasonably be drawn from the facts and insofar as they're relevant to the *Royal Brunei* criteria, because in my submission if inferences can be drawn that in the face of full and adequate, well in the absence of full and adequate explanation either by the files or by explanation to give rise to an argument under the *Royal Brunei* criteria, then it's a responsible allegation.

Gault J Unless you feel that it's just the presiding Judges view, let me add I think this is wholly improper.

O'Callahan Well

Tipping J Well let's get on with 28(b) and that's about the last word isn't it.

O'Callahan Well I don't really have much more to say about 28(b).

Tipping J No.

O'Callahan I'll comment that the Court of Appeal didn't regard it as an improper allegation. The Court of Appeal was satisfied that the circumstances gave rise to the possibility of the equitable fraud such that it would require some explanation by both Morel and by Trustees Executors and that such explanation as was given was not sufficient.

Tipping J Sorry what I meant was 28(b), I didn't really mean that, I meant the onus point.

O'Callahan Oh the onus point, yes.

Tipping J You've got to defend the Court of Appeal's apparent view that you can make an allegation like this without anything to support it which I suppose in a sense is what we've just been traversing, for that we can add salt to the

O'Callahan Well the Court of Appeal's view, if we break it down into the view one takes of what threshold one has to meet in order to make a responsible plea as a proposition in itself and then secondly the proposition as to how the onus rules work in the context of a limitation strike out matter, they seem in my submission to be, well one relies on the other in this sense that if the Court of Appeal is correct in saying that the circumstances give rise to sufficient inferences such that the plea is responsible, then in my submission the Court of Appeal has to be right on the second proposition

Tipping J Yes I agree with that but it's the first step, it's the conceptual point that I'm having difficulty with. Can I ask you do you support the Court of Appeal's stance by the *Matai* case?

O'Callahan Yes I do.

Tipping J You do?

O'Callahan Yes, well in a sense, well if I can say why that is because in my submission in *Matai,* the essential allegations in *Matai* were allegations of negligence and although there was a plea of a fiduciary relationship in respect of which there was no strike out application as to that being a reasonable pleading, there was no suggestion in fact, it was Your Honour Justice Tipping's judgment and analysis of that judgment indicates that Your Honour was of the view that there was no suggestion that there was a breach of the core duties of the fiduciary duty in terms of the conflict of profit rules or that the conduct was otherwise fraudulent except in respect of there being a plea of fraudulent concealment.

Tipping J Can I put it to you directly? I don't think I said, and if I did I would recant that there is some ability to rely against what is something that is prima facie statute barred, like more than six years has gone by, to rely on an extension or an exception without some foundation. Are you with me?

O'Callahan Yes.

Tipping J Now I don't honestly think that's what I said in *Matai,* but if I did say it as at present advised, I would disown it.

O'Callahan Well perhaps we're talking slightly cross-purposes on that because my respectful interpretation of the *Matai* judgment is that there needs to be a foundation. It's a question of what that foundation is and in this case

Tipping J Well arguable case, fair argument, all those formulations, you agree with that do you?

O'Callahan Yes I do.

Tipping J Okay well we're not in any way - we are addendum.

O'Callahan Yes, there needs to be something fairly arguable open and depending on the circumstances that may require robust exchange of affidavits.

Gault J As I read the Court of Appeal judgment in this case, their view was rather inconsistent with that. They've seemed to think that it was on the defendant to negative the s.28 assertion and that I have some difficulty with and I regard that as certainly not supported by *Matai*.

O'Callahan Well I think, I'm just re-reading the Court of Appeal's decision to address Your Honour's point. What the Court of Appeal says at para.60, this is page 78, they say 'the two cases, that is *Ronex* and *Matai* establish that the onus is clearly on the defendants to show that

the plaintiffs' claim or at least some part of it, is statute barred' and I doubt that

Tipping J That's step one, that's step one?

O'Callahan Yes. Evidence can be tendered either way by affidavit and then they say that counsel's point was that in the present case there is no evidence at all from Morels. Miss Bognar's affidavit tendered by Trustees Executors is limited to exhibiting documents to support the chronology, it does not provide any evidence about the subjective state of mind of any of the defendants, and they say that in their view that was a good point and go on to analyse the situation and say that no evidence from Ms Morel as to whether or not she realised there was a problem once, no

Blanchard J Well the problem there is that they're focused on the position of Morel without having, it would appear, any appropriate regard for the fact that Miss Bognar was speaking on behalf of Trustees Executors and she had put aipmaterial which bore on the state of mind.

O'Callahan They address Trustees Executors position at 67 and say 'the case against Trustees Executors is slightly more problematic. The claim in negligence.. they talk about the eighth cause of action and at 68 they talk about the one that we're talking about here, the ninth cause. 'The remaining cause of action against Trustees Executors based on breach of trust. For the same reasons that the trust claims against the Morels and Ms Morel should be allowed to run, we think this cause of action should also run.

Blanchard J But that's basing it on the fact that the Morels might have done something that they knew was dodgy.

O'Callahan Well inferentially it's that there's no sufficient evidence from Trustees Executors as to their state of mind either.

Blanchard J Well it seems to me that that can't stand when you look at Ms Bognar's affidavit and in particular ZB13.

O'Callahan Well the inference in this judgment in my submission is that the Court was satisfied that the facts as known could arguably give rise to a claim for equitable dishonesty.

Tipping J For myself Mr O'Callahan

O'Callahan Having got that far

Tipping J Sorry.

O'Callahan Having got that far they then say there's nothing to suggest otherwise that we can responsibly rely upon.

Tipping J I think the telling sentence in this judgment on the point of principle we're now discussing is the last one in para.62 'It may also indicate they, that's counsel, misunderstood who bore the onus of proof'. Well I'm not at all convinced Mr Taylor misunderstood who bore the onus of proof. The Court in effect is saying 'you've got the onus', sorry, that Mr Taylor's got the onus on eliminating sort of almost beyond any reasonable doubt the possibility of your, that's your clients Mr O'Callahan, relying on s.28. Well that can't be right.

O'Callahan Well my response to that Your Honour is that I think this judgment ought properly to be read such that with the assumption that the facts as known were sufficient to raise a responsible plea in respect of the, or could because I accepted the plea has not actually been made in a statement of claim, but could give rise to responsible

Tipping J You accept that you have an onus, a very low onus in traditional terms of pointing to something that allows s.28 to flow?

O'Callahan Yes I do.

Tipping J Yes. So the Court of Appeal are wrong to the extent that they thought that the onus of disproof was on Mr Taylor?

O'Callahan Well in my submission the judgment ought not to be read like that, in my submission the judgment ought to read as if they were satisfied that there had been such a threshold met by way of the

Gault J It seems to me the Court doesn't draw the distinction between the defence of the statute bar on the one hand and an exception to the defence as the further step and they seem to regard the same onus as applying to both. Now *Matai* certainly is authority that the defence of statute bar must be raised and established to a sufficient extent by the defendant but they don't seem to apply the same onus in respect of the claim exemption and that seems to me where the error arises.

Tipping J And actually they're a bit dismissive of *Humphrey and Fairweather* in that respect because the same point, although it was a trial does I think, I think Mr Jagose might have had slightly more merit in his reliance on *Humphrey and Fairweather* than he's got here. But in combination the two certainly demonstrate that if you're trying to take yourself out of the statute you have this low-level onus that we've been talking about.

O'Callahan Well in terms of the low level onus I put it in the written submissions and I stand by it and it's this that

Tipping J Well you don't need to rehearse the facts again, I'm just trying

O'Callahan No, no, no, but the onus is in fact underlyingly on the defendant to show that the proceeding is frivolous and vexatious. Now it well may

be in the appropriate case that that onus is sufficiently discharged on an initial basis by simple reference to a standard limitation period, but one mustn't get too myopic about the onus and the shifting onus in this sense that if the pleading and the circumstances as known or necessarily accepted give rise to a fair or open argument that necessarily involves s.28 applying

Tipping J So the question is simply 'have you met that onus that lies upon you'?

O'Callahan Yes that's the simple question.

Tipping J That's the simple question, yes.

O'Callahan Yes it's a simple question, it's as simple as that and I'll put it even more candidly if I may and that is if Your Honours are satisfied that there is nothing arising out of the facts as known that could give rise to a responsible plea of the equitable fraud then the defendant is satisfied, the defendant is satisfied the onus is shown as a frivolous vexatious proceeding and I can defend that by saying if Your Honours were satisfied that there was a sufficient basis on the material as known to see that the case is open, was a fair argument in respect of it. It may go either way, we don't know. Whatever explanations as offered may well be the subject of cross-examination, there may be further documentation that hasn't been disclosed that may bear on the matter. All I have to show in my submission is an open **(**inaudible) If Your Honours are satisfied with that then in the circumstances that sufficiently discharges the plaintiffs' onus. And I'll add that in some circumstances it's appropriate for there to be an exchange of affidavits but not I say in this circumstance, where having to show simply an open argument, it's enough to refer to facts that show that it's arguable even though it may turn out differently in the end. And it's clear in my submission that that's what the Court of Appeal had in mind because in my submission they unusually took the step of hinting that they would have thought I suppose by way of their postscript that they would have thought that this could be cleared up quite easily once we actually get the material and that one might expect that the defendants would be able to sufficiently explain this. The point is it hasn't been yet sufficiently explained. And it does to a degree become the question of the Court of Appeal taking a view of the facts and in my submissions Your Honours this Court must be mindful of replacing that view in the context of this appeal and the position that this Court has as a final appellate Court. Essentially I say on that there's no sufficiently large point of principle. If it's accepted that the *Royal Brunei* discussion is relevant and that the onus matters are resolved in the way, are legally to be resolved in the way that I've submitted, it's simply a question of interpreting the facts and the Court of Appeal has taken a view on that and in my submission Your Honours ought to adopt that. Unless Your Honours have any further questions on those issues that concludes my address subject only to the s.59 of the Bills of Exchange Act point. If

Your Honours wish me to attempt to address that further now I can attempt to do so or I can leave that to a later point.

Blanchard J Are you thinking that you might come back to that tomorrow or would you prefer to do it in writing?

O'Callahan I'm thinking that I might come back to that tomorrow because to be candid with Your Honours I've obtained the relevant material from the textbooks and there is some matters that I can follow up on that during the break between now and tomorrow, or at least I believe I could.

Blanchard J Yes, well if you're happy to do it in that way, and subject of course to Mr Taylor having a right of reply, the Court would be content I think to do that. It just struck me that rather than trying to rush through it overnight you might prefer to do it in writing.

O'Callahan Well look to be honest I think that's probably the proper course for my clients because I have other matters that I need to deal with overnight.

Tipping J I think that point needs some careful consideration. We may not reach it, but if we do we want to have all the help we can on what is not a straightforward issue.

O'Callahan Yes, and I'm sure I can help Your Honours on it far better if I was given that time in writing.

Blanchard J Yes well I would propose that you be given a period of a week following the hearing to do that, with Mr Taylor having a week to respond or to indicate that he doesn't want to if that's the case.

O'Callahan That would be suitable, thank you. Well unless Your Honours have any further questions that concludes my submissions on the 15 appeal.

Blanchard J Yes, thank you. Mr Taylor do you want to be heard in reply.

Taylor Very briefly. I think what the Court has proposed in terms of the s.59 issue is sensible. I've had a brief look at it over the lunch hour and frankly I've got concerns about having to read the *Thomas Cook* case again, but not because

Tipping J You may not be the only one.

Taylor Not because of the lack of erudition of it but I remember the last time I read it, it had my head spinning for some time.

Tipping J It had Privy Council's head spinning too Mr Taylor, I'm sure you were aware of that.

Taylor Yes I am Sir, yes. I apprehend I'm not really required to reply on the equitable fraud issue but I just would refer to the judgment of the Court

of Appeal on a couple of points just to reinforce that in my submission what they are saying and the basis upon which they have proceeded is that there was an onus of us to negative fraud. There's two aspects to that. At para.69 they say 'with respect however the investors were required to provide evidence only if the respondents did, and the respondents had failed to provide any evidence as to what they knew when they decided to proceed with the allotment on the 19th December and the other point that tends to reinforce that they saw the duty as to negative fraud, is that they refer to the application itself and in that case they are referring to the application filed on behalf of the Morel parties that there was no reference in that to the *Matai and Ronex* cases and of course at the time those applications were filed it certainly wasn't conceived by me that s.28 was even an issue and of course what actually happened was s.28 wasn't even – one, there was notice of opposition filed raising it and secondly, wasn't even raised until the hearing, but again it seems that the Court is really saying well you know if you'd known what the onus was and how it had to be discharged you would have referred to those cases in your application and in my submission that just reflects the misconceived nature upon which the Court of Appeal has proceeded. On the cheque issue in my submission what His Honour Justice Tipping said is correct. At the end of the day in assessing this issue the Court needs to decide having regard to the policy of the Act, the clear policy of the Act, what the minimum subscription requirements are all about, which is to ensure that there's not inadequate capital or an under-subscription of capital. Whether that means that s.37, and in particular s.37(2)(a) requires a literal precise and unmoving interpretation, or whether having regard to the policy of the Act, the Court can look at the circumstances in this case and say 'was there any reason in principle under the Act why payment could not be made, payment, or payment could not be received and accepted by the issuer and Trustees Executors on the basis tendered' and in my submission that's the fundamental issue.

Tipping J And what you're really saying I suspect Mr Taylor is that resort to the cheque if needed should not be regarded in terms of the paragraph as giving grounds for reason to suspect that it would not be paid. That's the way you'd have to mesh those two propositions wouldn't you?

Taylor Absolutely, absolutely, and in the written submission what I've said is that in my submission the Court of Appeal has mis-characterised the nature of the transaction and that's reinforced when we actually go back to the discussions at the time and I accept what the Court has said that there's a slight inconsistency between what two lay people have said or written in terms of the file note and then the cheque as it comes in, but the essence of it is unchanged, and the essence of it was yes this will be paid, this cheque will be paid one way or another whether it's by a exchange of cheques on the day or whether it's by way of a netting or setting off

Tipping J If it's needed this cheque will be met

Taylor Yes.

Tipping J If it's not needed the question falls.

Taylor Yes, exactly.

Tipping J Because the payment has necessarily been made. That really is your position as I apprehend it.

Taylor Yes, absolutely that is my submission and just in terms of my little research over the lunch hour in terms of s.59 and that is where the drawer has paid the bill that doesn't necessarily discharge the bill, but the comment in one of the texts which is, I'll certainly cover it in the written submissions on this point, is that because payment by the drawer doesn't discharge the bill, what the drawer should insist on where he's paid the bill or paid the amount of the cheque is that it be returned to avoid anybody else negotiating it or relying on it which of course is exactly what happened. Those are my submissions.

Tipping J We'll leave it for the submissions I think.

Taylor Yes, I understand that there are a few fish-hooks

Tipping J Loose ends in my mind anyway Mr Taylor but we'll leave it.

Taylor Thank you Sir. If the Court has any questions?

Blanchard J Yes thank you Mr Taylor. Well are we in a position to move to the next appeal?

O'Callahan The first cause of action in this case is a statutory debt and this arises under s.37 of the Securities Act and it arises, if the allotment is void then there's an obligation on the issuer which in this case the definitions include the Morel Interests, the company and Miss Morel personally. To refund or to pay to the subscribers there their subscription monies and that's to occur within five months of the date of prospectus. So the cause of action is essentially a sum of money recoverable under an enactment as statutory debt, so it attracts the attention of s.4, sub.1 of the Limitation Act, sub.1, sub.(d) I think it is and the only allegation in this proceeding of that provision not barring the action is by indication of a more general doctrine of reasonable discoverability. To say that their cause of action does not accrue until all the facts that have given rise to the cause of action are known by the plaintiffs or ought reasonably to have been discovered by the plaintiffs, and similarly the tenth cause of action is a cause of action based on a statutory obligation arising from misleading prospectus. The claims that the prospectus was misleading in a number of particular ways and I don't perceive it as necessary to get into the details of that just to understand the nature of the cause of action, and that as a result the

persons liable under the statute bear an obligation to the plaintiffs and once again that attracts the provisions of s.41 of the Limitation Act and once again I say that the only matter I assert as meaning it's not barred is that more general doctrine of reasonable discoverability and I essentially rely for the sixth cause of action I essentially rely on the equitable fraud provisions in respect of that

Gault J That sixth cause of action I'm not sure, if it flies it's got real problems as has been indicated. Any fiduciary duty of disclosure would be a continuing duty so why do you need a discoverability provision?

O'Callahan Well I haven't alleged that I need a general doctrine of reasonable discoverability in respect of that. I have said that, and so really the point I was really getting to Your Honour is that it doesn't form part of this particular appeal because it was reinstated by the Court of Appeal under the s.28 provisions and there's no appeal in respect of that by the Morel Interests and so I'm just really noting that that cause of action ought to survive and it's independent of the s.37 issue but I don't perceive my appeal in respect of reasonable discoverability as being necessarily relevant to that course of action. So I thought might introduce this with Your Honours' leave by a reference to the Laws of New Zealand which happened to be included in the bundles. Just to indicate what the learned authors of that book are saying about this and to understand why it is that what they say might be said, because it is an assumption by the textbook writers that the law in this country either is or will be confirmed as being developed in such a way that the doctrine of general discoverability is general. I can hand it up or I can simply read it out.

Blanchard J You're going to hand it up anyway aren't you.

O'Callahan Yes, it's not purely about the statutory debt or enactment, amount recoverable under enactment provisions. This is about contract. But just to demonstrate the way in which the textbook writers are dealing with the issue. The proposition at para.448 refers to the traditional analysis is that a cause of action accrues when every fact exists which would be necessary for the plaintiff to prove in order to support the plaintiff's right to the judgment of the Court. The plaintiff's knowledge or lack of knowledge, of the existence of the crucial material facts is considered to be totally irrelevant unless the statutory provisions relating to fraud or mistake are applicable. Applied to a claim for breach of contract a traditional analysis means that the cause of action accrues when the breach occurs. This is regardless of whether the plaintiff knows of the breach or not. The obvious injustice of allowing a claim to be time barred before a plaintiff could even reasonably know that he or she has a cause of action has prompted modern Courts to develop a principle known as the Doctrine of Reasonable Discoverability. Reasonable Discoverability was first used in the context of building cases involving negligence claims and latent defects, it being held that the six year limitation period in tort only

commenced when the plaintiff ought reasonably to have discovered the latent defect. In principle there seems no good reason why the reasonable discoverability doctrine should be confined to building cases nor indeed to tort claims. Certainly, the most recent formulations of the doctrine are of a more general nature and obviously what was current at the time has now been surpassed by a few more authorities but the reference is made to *G & S* which later become *S & G* in the Court of Appeal and to *G D Searle & Co* and which members of this Court were involved. And although there is as yet no authority dealing specifically with a claim in contract, it seems very likely that the reasonable discoverability principle will be held to extend to contractual claims as well as tortious ones. Thus, a claim for breach of contract, etc. Now it in fact has been extended to a contractual claim in the High Court by Justice Rodney Hanson in *BP Oil* which is in the materials, although Justice O'Regan in another case has soundly rejected such a proposition and there's been some debate about it by other High Court Judges mostly over comments, in fact Justice O'Regan's comments were overturned, culminating in, including this the present proceedings and culminating in the Court of Appeal's of a proposition in this case. And it said that the doctrine of reasonable discoverability, well it is said in the cases that say ought not to be recognised in relation to contract and other causes. It said that in New Zealand the doctrine of reasonable discoverability is confined to latent defects and confined in buildings and confined to cases of bodily injury, and in my submission, although that is an, apart from the High Court cases I've just referred to – Justice Rodney Hanson's decision in *BP Oil* and also Justice Harrison's decision in *Bomac Laboratories* and Hoffmann which imported that into a slightly different statutory regime within the Securities Act in terms of limitation. That's a correct statement of the kind of cases other than those High Court cases in which reasonable discoverability has been applied. But in my submission the judgment in *GD Searle & Co* against *Gunn*, is on its terms one of general application. Although the particular provision before the Court in that case was s.4 sub.7 of the Limitation Act with respect of bodily injury, the relevant phrase date in which the Court of action accrued is the same phrase that appears in s.4 sub.1 and there is nothing in my submission in that judgment of the Court of Appeal in *GD Searle & Gunn* that necessarily limits the matter to bodily injury cases and in fact the suggestions on the face of the judgment are to the contrary that is meant to set out an interpretation of the relevant phrase that is to be given consistent application. I'll take Your Honours to that judgment which is in tab 11 of the bundle that I filed. It's got the SC17 of 2006 intituling. It's got a green cover page. It's labelled bundle of authorities, volume1. Firstly in support of my proposition that the judgment on its face suggests that the interpretation of the phrase is to be given a general application rather than just confining it to the instant case. I note that the Court through pages 131 from about line 40 through until the following page around about the end of the quotation from His Honour Justice Gault's judgment in *S & G* says those are referring to matters, a number of building matters. He says

'this Court has therefore already taken what could be described as the *Hamlin* principle one step further and applied it to a personal injury claim of specific kind. Although it was submitted that *S & G* is distinguishable on the basis that it could be said that the wrongful conduct itself was the reason for the link between the abuse and the psychological and emotional damage not being recognised, there can be no logical justification for confining the principle to such a situation. It is still a question of what is meant in s.4 by the date on which the cause of action accrued. The phrase must be given a consistent meaning which is applicable to differing factual situations'.

Tipping J What are you reading from, I'm sorry

O'Callahan I'm sorry this is the *G D Searle* case which is tab 11 of that bundle.

Tipping J Yes I'm in *Searle*, I just

O'Callahan Yes, and it's page 132 and I began reading from line 27.

Tipping J Thank you.

O'Callahan I've read that paragraph and the next paragraph 'in our view the time has now come to state definitely that *Cartledge* does not represent New Zealand law. It has now been superseded in the United Kingdom by legislation and its authority as well as that of *Pirelli* has also been case into some doubt by *Hamlin*. I'm noting that throughout that *Pirelli* and *Hamlin* aren't bodily injury cases. As was pointed out in the course of some of the judgments in this Court in *Hamlin* the rationale of *Cartledge*, which depended on the effect of the equivalent of s.28 of our Act, is not convincing and we see no need for etc. We'll come to those points in a minute. And then over the page at 133 at around about lines 8 to 10 refers to Canadian cases and includes a building case which is *City of Kamloops* and then refers to *Central Trust Co and Rafuse*. In the context of saying that the doctrines is consistent with those authorities and *Central Trust Co and Rafuse* is not a building case, it's not a bodily injury case, it's a case of solicitor's negligence.

Tipping J Wouldn't there be some advantage if the legislature did it because we could have then a backstop?

O'Callahan Well

Tipping J I mean how do the Judges in this case deal with that issue of there being no effective repose?

O'Callahan Well that's what my learned friend Mr Jagose has said in his submissions.

Tipping J Well can you deal with it apropos of what was said in here? Is the point just not touched on in *Searle*?

O'Callahan I don't perceive, well

Blanchard J It is.

O'Callahan They deal with it at line 27.

Tipping J Line where?

O'Callahan Line 27.

Blanchard J On page 133.

O'Callahan 'The further question whether a 'long-stop' provision such as that contained in s.91 of the Building Act, which is a 10 year long stop, is desirable, is perhaps debatable, but must be a matter for the legislature.

Tipping J Well the legislature hasn't done it at the moment presumably because he wants it to be done as a package.

O'Callahan Well in my submission this Court as a Court of law therefore applying and administering common law doctrine ought not to anticipate what it is that the legislature wants

Tipping J But are you suggesting we should do it without it? We can't impose any backstop, can we as a matter of common law?

O'Callahan No and nor in my submission is it necessary or a necessary desirable for the court to do it and in my submission the comment in *Searle* is well founded because if the legislature, if I read the judgment correctly in *Searle*, the Court is able to satisfy that it is not a policy, a legislative policy of the limitation provisions to deprive people of their, effectively deprive people of their rights, and that in a case of the – in what I will generally term for the moment of the blameless ignorant plaintiff. That's precisely the effect and if there's a way of giving some meaning to the words 'the statute' that don't have that unnecessary and unjust result.

Henry J Mr O'Callahan could you formulate for us the proposition you wish to advance and us to adopt?

O'Callahan Yes. What I propose is that it be said that the phrase that a cause of action does not accrue to the purposes of the, as it's used in the Limitation Act and particularly in s.4, until all of the facts that are required to establish the cause of action are in existence and known by the plaintiff or ought with the exercise of reasonable diligence be discoverable by the plaintiff.

Henry J Now it will help me if you could indicate where that would leave room for s.28 to bite?

O'Callahan In terms of s.28(a) it's not entirely clear that it would leave much room for it to bite. Arguably, and it would depend on there being rather obscure facts, but arguably s.28(b) might apply insufficiently obscure facts where although the facts giving rise to the right of action may well become to be known to the plaintiff, nonetheless it's still postponed by s.28(b) because of the fact of the fraudulent concealment not being known to the

Blanchard J Fraudulent concealment of the facts?

O'Callahan Well depends how one reads s.28. On its face s.28(b) in indicates that the postponement is not until the facts are known but until the fraud is discovered, and the fraud in that context, it's a peculiar provision because it references, the second power doesn't sit easy with the (a) and (b), especially with (b), but that it may well be postponed until the fraud is discovered then the fraud is a fraudulent concealment.

Blanchard J Have you been able to come up with a factual scenario that would meet Justice Henry's point? I noticed in Christine French's article that she touched on this possibility but she didn't give any example as I recall.

O'Callahan No, look I'm

Blanchard J And I've been struggling to try and think of one.

O'Callahan I must be candid and say that I've struggled also. I can think theoretically of the possibility but I've found it difficult to formulate an adequate factual scenario which isn't answered in some other way.

Blanchard J How did the Canadians deal with the problem, or didn't they have an equivalent to s.28?

O'Callahan Well I'm not actually sure whether the Canadians had an equivalent but there's no suggestion in any of the relevant leading judgments on it that it was of any bother to them, although it's not clear whether there was such a provision. The Canadians have very much adopted a general rule of interpretation and it may be of some assistance to Your Honours to go to those Canadian formulations.

Tipping J But it would be very important to no, I can understand why someone might wish to go to such a formulation if they respectively could but unless you're proposing to completely leave s.28 I think we need to give this much closer attention vis whether the Canadians had anything that could be said to be the equivalent because I'd like to know if they had, how they got around it.

O'Callahan Well I must say I can't assist Your Honours directly and responsibly standing here at the moment as to whether

Tipping J Well this is crucial isn't it because there are other indicators in the Act but s.28 is the high water mark of the idea that you don't have to know, it will run against you, but there are certain exceptions from that, vis s.28.

O'Callahan Yes Sir. In my submission s.28 can be dealt with on this basis that the Court may see it as confirmation by the legislature that the legislature is certain that in a case of fraud a plaintiff should not have a time bar beginning to run until that fraud has been discovered or reasonably discovered. That in my submission doesn't necessarily impact on the ability to interpret the phrase cause of action accrued.

Tipping J Well there would be no point in having this fraud and mistake exception if as a general proposition accrual didn't occur until you knew or ought reasonably to know. That's the force of the point against you.

O'Callahan In his Honour Justice Gault's decision in *S & G* it was said that the phrase when cause of action accrued, it's not so much a matter of statute interpretation as a matter of legal interpretation as to when in a particular case a cause of action accrues, and it may be that given that it's for the Courts to decide when causes of action accrue that s.28 can responsibly be explained by the legislature putting it clearly and beyond doubt that in a case of fraud a limitation period is not to begin to run and leaving it free to the Courts to decide what is meant by the phrase 'cause of action accrues'.

Henry J Both *S & G* and *Searle* were cases where the Court was able to say rightly or wrongly that the particular cause of action it was considering did not arise until there was knowledge or ability to have knowledge, which is different because it doesn't involve a consideration of s.28, but you're postulating something far wider and I'm not quite sure why you're doing that, instead of concentrating on your own causes of action.

O'Callahan Well

Henry J *S & G* and *Searle* seem to be going down the path of an incremental adoption of the discoverability of rule.

O'Callahan Well it would be sufficient to say that for the purposes of ss.4 sub.1, sub.d that such a cause of action doesn't accrue until the facts giving rise to that cause of action are

Tipping J That's just piece-meal ad hocery in my view.

O'Callahan Well in my submission that's why I've ended up making a broad proposition

Tipping J Yes, well I think you're right, I think you're right. Let's put an end to this piece-meal thing, either it's there or across the board or it's not. Adding more exceptions to a general rule for a basis that's pretty obscure

O'Callahan Well that is essentially my submission

Henry J Categories of negligence.

O'Callahan Because although

Tipping J I'm not expressing a view one way or the other but what I don't like is the thought of doing it piece-meal.

O'Callahan No, well that's how I've argued it that, and the reason I've argued it that way because in my submission there is no responsible way of differentiating knowledge of the matters that give rise to the cause of action in *S & G* and in *Searle*, with the caveat of course that *S & G* might well have been explained on a different basis, and *Searle* indicates that *S & G* might well have been explained on a different basis, but

Tipping J But in *Searle* the Court said 'as was pointed out in the course of some of the judgments in *Hamlin* the rationale of *Cartledge* which depended on the effect of the equivalent of s.28 is not convincing so we really ought to be looking at that oughtn't we? I haven't re-read *Hamlin* but apparently according to this, this suggests that *Hamlin* demonstrated some reasons why s.28 is not a problem for a reasonable discoverability test, at least as far as it went there.

O'Callahan Yes.

Henry J Because damage hadn't occurred. There'd been no loss isn't that the rationale of it?

Blanchard J Yes.

Henry J Well he had a house which might have had its full value.

O'Callahan Well the Privy Council dealt with the point in *Hamlin* by saying that no matter what you might say about *Pirelli* and *Cartledge*, and especially *Pirelli* and whether that represents the law of England, it simply doesn't in New Zealand once it's understood that the loss is economic and it's a question of whether you read into that a general doubt of the points in *Cartledge* and in *Pirelli* because *Pirelli* emphatically adopted *Cartledge* as being acceptable, and whether there was inferential sort of nod that the Privy Council in *Hamlin* doubted the correctness of those decisions, the thing is it's not plain on the face of the judgment that they necessarily did

Tipping J So you're not asking us to adopt something that was said in *Hamlin* as supporting this general stance as far

O'Callahan Certainly not in terms of the Privy Council judgment because at the end of the day in my submission the fairest way of dealing with that judgment is that it confines itself to the case of where you analyse the cause of action in respect of it being economic loss and you can say that the economic loss didn't occur until a particular date and that's come to be called or known as reasonable discoverability but it's not the adoption of reasonable discoverability that *Searle* applies and it's not the adoption of reasonable discoverability that press in this appeal. The judgments in the Court of Appeal are in *Hamlin* are a little less clear on that matter

Blanchard J What standard do they have given the way in which the Privy Council approached? Surely if the Privy Council had thought that the reasoning in the Court of Appeal was correct it just would have endorsed it rather than finding its own basis for upholding the result.

O'Callahan Well the reasoning in the Court of Appeal was to some extent mixed and in my submission perfectly proper for a judicial body such as the Privy Council to have said well look whatever it is you say about these other things it's clear that we can analyse it in this way. It doesn't involve any controversy. We're very well satisfied that the law in New Zealand has developed to understand latent defects building cases in this economic loss way and that we might perhaps think that the English law's gone there or should go there but we don't really need to say. That this is a very uncontroversial way of dealing with it and it's clearly open on the facts of the case so why analyse it in any other way. Now one may have reservations about whether the economic loss argument is correct or not but that's how the Privy Council dealt with it. It would be like saying in other cases that have come before the Court of Appeal in this jurisdiction such as *Phillip Shayle George* or *Gilbert and Shanahan* to say well in those cases in any event if it had arisen we would have analysed this and we might have considered whether to analyse it in terms of reasonable discoverability is really beside the point because in those cases adoption of reasonable discoverability didn't arrive because the facts were known and unfortunately the Court of Appeal's judgment has rather misconstrued my reference to those authorities because I cited them merely as an indication that the Court of Appeal had not hitherto rejected the proposition not as positive for it because those cases are a culmination of the lines of cases where matters are analysed to see when the damage occurs and in some cases the damage occurs when like let's say a solicitor's negligence, sometimes that damage occurs at the time a document is advised by a negligent way because it undertakes obligations at that point in time and that's *Gilbert and Shanahan* the undertaking for principal obligation, but may well be different in the sense of a guarantee

Tipping J It derives in part this difficulty from the fact that we traditionally use the expressions ‘damage’ and ‘loss’

O’Callahan Yes.

Tipping J And sometimes people don’t analyse it sharply enough that either conventionally will do, damage will do even if not quantifiable as loss and so on, so if we’re going to look at this on a very high level we’re really going to need some sophisticated assistance from you as to these sort of issues because I don’t think *Hamlin* is a sufficient foundation at all.

O’Callahan No, and I haven’t

Tipping J And you’re not putting it up as so.

O’Callahan No I’m not.

Tipping J No, right.

O’Callahan For that very reason.

Tipping J Yes.

O’Callahan What I do say is that *Searle* is an emphatic decision of the Court of Appeal and it can’t be distinguished on any kind of justifiable principled way from any other type of cause of action or any other element of any other cause of action because what there was in that case is that there was a causal link. It’s just that the causal link, which is an element of cause of action, wasn’t known.

Tipping J Can I at the risk of being thought persistent Mr O’Callahan, one of the things that clearly motivated the Court in *Searle*, the Court of Appeal was the proposition that in *Hamlin* the rationale of *Cartledge* which depended on the effect of the equivalent of s.28 was not thought to be convincing, now I would like to know why certain of the judgments in *Hamlin* didn’t think that the *Cartledge/S.28* reasoning was convincing because that for me lies at the heart of this issue. I mean not necessarily now but sometime.

O’Callahan Well before I embark on that issue can I just get, I’m not sure whether, this Court breaks at 4 o’clock, is that right?

Blanchard J Yes.

Tipping J But if some members of the Court in *Hamlin* have said look *Cartledge* is really not satisfactory because the reliance on s.28 is misplaced, well the sooner we get to that in my book the better because that would be persuasive authority that s.28 is not a problem.

O'Callahan Yes, well the reference in *Hamlin* seems to be a Court of Appeal decision which is at tab 20 of the bundle. It's not a reference to the Privy Council decision

Tipping J No it's a Court of Appeal in *Hamlin*

O'Callahan Yes.

Gault J I have just been looking now at the relevant passages in President Cooke's judgment it seems to be at page 523, line 20, it seem to have been adverted to by Justice Richardson, Justice Casey dealt with it slightly more extensively at 532 commencing about line 18. I dealt with it rather in the manner that the Privy Council subsequently dealt with it at 534, line 40 and Justice McKay, whom Justice Casey agreed with, dealt with it at some length commencing at 538.

O'Callahan Well Sir Robin Cooke, President of the Court at page 523 says 'what was said on this question in *Cartledge and Jopling* and *Pirelli* need not now be disrespectfully labelled as a non-sequitor. Obviously it is a view that must be rationally open. The point is only that the same may be claimed for the Canadian and New Zealand approach. While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions go on their own paths without taking English decisions as the invariable starting point. It could not survive the independence of the United States; constitutional evolution in the Commonwealth etc, and that judgment doesn't come to a sort of concluded crisp remark about how it's to be dealt with.

Tipping J Well at 544, without wanting to jump ahead unhelpfully, Justice McKay does seem to come to a very crisp**,** he was in dissent was it, but you said Justice Casey agreed with him on this point. On the 28 point.

O'Callahan Yes.

Tipping J My brother Gault's pointed out that he was in dissent but obviously the Court wasn't unanimous on this and hadn't appreciated that.

O'Callahan No, the judgments of Justice McKay says that the *Pirelli and Cartledge* reasoning was compelling and rejects the Canadian position, saying 'nor do I see any logic in the Canadian position as to when a cause of action arises for the purposes of limitation, and as I have already said His Honour Justice Gault deals with it in the way the Privy Council eventually dealt with it, and Justice Casey agrees with Justice McKay as of page 532, line 16 and 17 also.

Tipping J Well what I'm having some difficulty understanding is how the Judges in *Searle* came to the view they expressed that I mentioned a few minutes ago about *Hamlin* and s.28 and *Cartledge*?

O'Callahan I'm just reviewing what Justice Richardson said about it.

Tipping J I understood from my brother Gault that he didn't touch on the

Gault J I just scanned it.

O'Callahan The best origin of that proposition in *Searle* appears to be a judgment of the President, Justice Cooke and that's in the passage I referred to earlier at 523 where really it seems to be responding to the voices of Justice Casey and Justice McKay. It says in that context quite strongly 'what was said on this question of *Cartledge and Jopling and Pirelli* need not now be disrespectfully labelled a non sequitur. Obviously it is a view that must be rationally open. The point is only that the same may be claimed for the Canadian and New Zealand approach.

Blanchard J What did he mean by that though?

O'Callahan Well, it's not absolutely plain that he was confining his views to adopting the approach of Justice Gault which eventually found favour with the Privy Council, being the economic loss point because if that was how it was to be read then there really wouldn't be references, especially to *Cartledge*. There may well have been some room for a reference to *Pirelli* but not necessarily to *Cartledge* and anybody saying

Tipping J Was the rationale

O'Callahan They're saying well they're both open, they're both

Tipping J Was the rationale of *Cartledge* in effect the obverse if you like of s.28?

O'Callahan Yes *Cartledge* is plainly on that. All Judges in the, the leading speech is that of Lord Reid. But Lord Pearce actually has a more lengthily review of the authorities. They all, insofar as they give their views, say this is terribly unjust. We do this with a very very heavy heart but we feel constrained to having to do this, that is interpret the statute such that the cause of action accrued when the plaintiff first suffered damage to his lungs that was more than minimal and we are constrained to do that says Lord Pearce in part because of the existing state of the authorities where there's been a number of instances where we will find that that must be the interpretation just on the phrase when cause of action accrues but if there was any doubt it s.28 puts it beyond us, or their equivalent of s.28 which is in a judgment referred to as s.27, and Lord Reid indicates that if it had been up to the common law approach to the accrual of cause of action in this context then he would have found favour with the plaintiff's contention but felt regrettably constrained by virtue of the existence of s.26, that's the fraud exception. And really despite what Justice Cooke in the Court of Appeal in the case on *Hamlin* seems to be saying is well that's an open view, but there may well be other open views and that that might be quite revealing in this sense that if it's understood that the

interpretation of cause of action accruing is open on its words does one necessarily have to constrain it because of the existence of the fraud exception? And I've already said to Your Honours that I can't responsibly think of an example where if one applies this interpretation of cause of action occurring there is much room left for s.28, but that doesn't necessarily constrain the Courts construction.

Tipping J Is there something to be taken from Justice Cooke at 522, paragraph commencing line 42, where His Honour was very anxious to make it clear that he was going on a basis that was step by step and seemed to be based a little bit on what emerged later in the Privy Council and in Justice Gault's?

O'Callahan Yes, yes he does and that's a fair interpretation of the judgment but there's also the passages that I've referred to over the page which in my submission because of a reference to *Cartledge* tend to indicate that there's an open view, a view is open, there is a responsible view to be taken that is different to *Cartledge*. Now on the incremental approach it's my submission that because it's my point in principle of distinguishing different types of cause of action, different elements of those cause of action for each other, what this Court either has to do essentially is affirm *Searle* and affirm that proposition I've just made such as it applies more generally, or if it says something different it's essentially overruling *Searle*, and in my submission there isn't really any scope in principle for taking any course other than one of those two. And so although it may be that that passage that Your Honours referred to in *Searle* that refers back to *Invercargill City and Hamlin* is to an extent overstating the, depending on how it's meant to be read, might be overstating the extent of doubt postulated in *Invercargill City and Hamlin*, but

Tipping J Well the reasoning could only have been from what you've shown us that it's extremely unjust.

O'Callahan Well it's actually

Tipping J Well it's not bad reasoning but I mean it doesn't go beyond that does it?

O'Callahan Well, but the proposition that it's unjust is not just a simplistic proposition that tugs at the heartstrings, it's a proposition that is understood in terms of how a Court in the common law jurisdictions should go about approaching a statute like this.

Tipping J But the reasoning that it's terribly unjust doesn't help us with s.28. That's where I'm concentrating on. The Court in *Searle* seems to have seen a way through s.28, which with great respect they didn't articulate to any extent, but I'm striving to see it and inviting you to give us that vision.

O'Callahan Yes.

Blanchard J You might of course look at two members of the Bench.

Henry J Opposite ends.

Gault J Doesn't Miss French quote about as high as it can be put? In her article she says that 'it is really a principle of statutory interpretation that you draw an inference that a section wouldn't conflict with or render otiose another section in the same statute. But just as that is open as an inference as to legislative intent so it can be an inference of legislative content that no serious injustice is to be created'. And that's how she put it.

O'Callahan Well I put it no higher than that because the competing principle of the most serious injustice is effectively how *Searle* was reason in my submission, that it's the principle basis on which the judgments proceeds and it says that it's not a policy of this legislation to oust people's claims. That there are a number of legislative policies and in fact I set them out in my written submissions, and lest the members of the Court are concerned about where I'm going with this I want to come back to the s.28 proposition because it may well be best seen in the light of these factors. I've summarised, if I can find my summary of the principles in *Searle*. I've taken Your Honours through this in the written submissions at para.42 of my submissions. I attempted to identify from *Searle* the particular highlights of the reasoning. The first is that the legislative purpose, that's what I've been referring to, directly quote from the judgment lines at 131, lines 31 to 39. 'The purposes of a limitation statute are said to be threefold – to give a potential defendant security against being held to account for an ancient obligation, to prevent litigation being determined on stale evidence, and to require due diligence of a plaintiff in pursuing a cause of action. In the present context it is important to keep in mind that to deprive a plaintiff of the right to bring an action is not one of the legislative purposes. Section 24 (extending periods of limitation in cases of disability) and s.28 (postponing the period in cases of fraud or mistake) expressly recognise that fulfilment of the three identified legislative purposes is not absolute'. So that is it. Security against an ancient obligation, prevention of litigation on stale evidence and requiring due diligence are not absolute legislative purposes. It's not like if a particular postulation won't satisfy one of those legislative purposes that postulation is incorrect. It may well be that there are modifications required to those principles by competing purposes, or by the competing principles of the common law and of justice. I then note that they refer to earlier Court of Appeal authority which we've discussed, and then the next point of the reasoning is that the phrase 'the date on which the cause of action accrued must be given a consistent meaning which is applicable to differing factual situations' and that statutory intervention is not necessary to achieve a result which is consonant with justice and which gives effect to the overall

intention so really that applying a law of interpretation to, as Justice Gault pointed out, it's the point that Christine French makes 'to achieve a result which is consonant with justice and which gives effect to the overall legislative intention and that in that case such results is achieved in holding that for the purposes of the s.4(7) of the Limitation Act 1950 a cause of action accrues when the bodily injury of the kind complained of was discovered and that such a result avoids any difficulty arising from classification of the injury as physical harm or economic loss, and that such a result is in accordance with the leading Canadian authorities and any question of a long stop provision is for the legislature, not the Courts and that there was no justification for a wider test that would also require the plaintiff to know or ought to have known that the act or omission was wrongful. Then I deal with my support

Gault J Is there any part of your argument that the *Searle* decision has been on the books for 10 years. The Courts have repeatedly said some legislative intervention would be desirable yet none has occurred

O'Callahan Yes well I in principle would caution against reading too much into what the legislature does or doesn't do in matters of this in response to a Court's decision or otherwise.

Blanchard J It's not just the Courts, the Law Commission had another go at it in the year 2000 and its report hasn't been taken up either.

Tipping J It could go both ways this point.

O'Callahan Yes it could, because it could be said on the one hand that the legislature is quite happy with, if you infer from a conduct of the legislature not doing anything about this the legislature's quite happy with the position of latent defects being dealt with, how they are dealt with, which we had *Hamlin* and we've also got The Building Act which deals with that.

Blanchard J The reality is of course somebody's got to draft the Bill and put it into Parliament. That's what missing.

O'Callahan Somebody has to do those things. There has to be bureaucratic and political parties willing enough to do that. What they will do in response is complete speculation. What the legislature wants to do is a matter of complete speculation and really what effectively faces the Court in this case is saying whether the Court is prepared generally to do what the Court of Appeal first did in *Searle* and that is interpret this phrase in a way that achieves what is perceived in the common law to be a just resolve, having regard to principles of statutory interpretation, because the competing principles are, in a way this is an adversarial matter between the legislature on the one hand attempting to impose a limitation period where the common law doesn't know one, because the common law other than importing from conduct waiver on inequity

larches etc doesn't know of a limitation. It's not necessarily desirable from the perspective of the common law that there be a limitation so the common law will champion the interests of justice in terms of a claim being litigated and a meritorious plaintiff being able to have a remedy, and the conflict of interest I suppose for the Court arises when the court can't just ride over what the legislature says irresponsibly. The Court has to have regard to proper principles of statutory interpretation and if the case is as those Judges in the House of Lords in *Cartledge* though that there just wasn't room for the interpretation because of the existence of the fraud provisions, then if that is the proper statutory interpretation so be it, but if it's open to interpret differently, then the Court in my submission is open to champion the interests of the plaintiff being able to have a remedy, and so the question, in my submission *Searle* is sufficient authority and good authority for the proposition that a just result is where there's a innocently, well a blamelessly ignorant plaintiff. They shouldn't have their remedy taken away from them and the question is whether *Searle* is right in respect of, or whether *Searle* can be justified in terms of the legislative interpretation.

Tipping J You say there's no intermediate ground between general discoverability in overruling *Searle*. That could be, the intermediate ground could be to say that *Searle* is just a now reasonably well entrenched exception but we're not going to build off that if you like to a general proposition.

O'Callahan Well

Tipping J However illogical or logical the exception may be perceived to be.

O'Callahan Yes well it would be an inconsistent interpretation of the language in the statute and it would be endorsing an approach of just deciding what's just in a particular instant case and abandoning all reasonable principles of statutory interpretation and simply having an ad hoc unprincipled approach to the matter.

Blanchard J Your best point may be that *Searle* looks like a general proposition and the legislature has been content to leave it at that.

O'Callahan Well they have. I still caution, as a matter of principle I caution against inferring from the legislature's conduct or inactivity in response to matter.

Tipping J I think that's very fair. I think it's difficult to infer anything from inactivity.

Gault J Well except they did respond very quickly in that case at *Hamlin* by legislating the long stop didn't they?

Tipping J That was all part and parcel of the Act, of the new Building Act though wasn't it in 1991

Gault J But when you start looking at general long stops it, all sorts of difficulties because 15 years seem to be dragged out of the air about the right period but what might be right as a long stop for some circumstances might not be nearly enough in the case for example of child abuse and incest, so that it's not that easy that long stop thing.

O'Callahan Well that's where I come back to the proposition of the common law, and in this I take my support from *Searle* in this respect in that it's not a principle or purpose of the legislation to prevent people having a remedy. There are other legislative purposes that are evident which have had in some cases the effect of people losing the remedy but hopefully in a way that consonant with justice and the common law doesn't regard peoples failure to prosecute, or failure to bring a claim, necessarily as wrongful and especially couldn't possibly regard it as reflecting on their merits or their right to have their claim litigated where they're blamelessly ignorant of the facts which give rise to it. You just simply can't bring a claim that you don't know about.

Tipping J But what about the question of disability? I mean why would you need it? If there was a general reasonable discoverability you wouldn't need to protect people under a disability would you?

O'Callahan Well that would depend on how you interpreted the reasonable discoverability doctrine and I don't necessarily say that a general doctrine of reasonable discoverability need oust the need for the disability provisions because if somebody comes to know of the facts or somebody acting on their behalf comes to know of the facts, ought reasonably to have, then nonetheless the disability provisions may still apply where they aren't able to bring the claim because they're labouring under that disability

Blanchard J There not as tricky to get around as s.28 are they?

O'Callahan No, s.28 is a

Tipping J They're not but they're part of a scheme.

O'Callahan I must say in my submission in some respect it's an ad hoc scheme because these limitation provisions have been developed over a period of time where they've incorporated, given some of the old legislation in the materials but they have been – it's not clear that the Limitation Statute as we now have it is necessarily as a cohesive statement on the matter in the sense of being a complete code. Certainly there are instances outside the Limitation Act where a remedy is time-barred other than other statutes that may include their own bars and so in that sense, but these limitation provisions seem to have arisen in a rather ad hoc way and a tortious way and we've ended up with a modern sort of

re-statement of what those are in this particular legislation and to some extent there's interlocking language, there's interlocking sections that rely on one another and refer back to one another but it's not necessarily to be interpreted as an overall scheme that necessarily must be cohesive. It's a number of principles which the legislature wants to operate and the legislature wants in the case of disability for there to be a postponement when you can't bring a claim because you're labouring under that disability and wanted to say quite plainly that a limitation period shan't begin to run until fraud is discovered. And the Judges in *Cartledge* thought that necessarily means that you must say that the general limitation provisions in s.4 must be read widely and I say it doesn't necessarily follow. You can interpret that on its own. That's the statutory interpretation point. Your Honours it's 10 past 4 I wonder

Blanchard J Yes I was about to bring play to a close. Well adjourn until 10 o'clock tomorrow morning.

4.10pm Court adjourned

22 November 2006 Continuation of hearing

10.02am

Blanchard J Yes Good Morning Mr O'Callahan.

O'Callahan Good morning Your Honours. I would like to begin today with returning to the question of the s.28 issue and why it is I say in a reasoned way that doesn't impose a real impediment to the Court in making an interpretation of the remaining statute as I contend for. Now the Bench yesterday was interested in the Canadian authorities and particular legislative context. I have been able overnight to obtain two of the British Columbia statutes that are referred to in the authorities, especially in *Kamploops* and then referred back to *Rafuse* . There's another statute that's relevant, which is the statute in issue in *Central Trust Co and Rafuse*; it's a Nova Scotia statute. I have been unable to get a copy of that but there is perhaps for at least today's purposes enough said about it in the judgment to enable the points that I'm going to make to be made. If I may hand up to the Court the two British Columbia statutes I've made, yes that's five copies there, and I'll come to those in a minute, but I'll begin at an earlier point. The earlier statutes, especially those in England, before the passing of the 1939 statute in England which introduced this fraud exception was s.26 there that was before the Court in *Cartridge*. There were no general provisions about fraud and mistake. The relevant statute is 1623 statute which I have at tab 9 of the bundle and it's from that that I made the submission yesterday that there was a number of ad hoc, things in the nature of ad hoc provisions about limitation. So the approach in the

fact of that statute was for the Chancery Courts to take a particular direction and the Chancery Courts fashioned rules of equity to say that it would be inequitable for the statute to apply in a case of fraud, at least fraudulent concealment and that subject was developed over the course of centuries and authorities and it arose as a question in the early 20th Century as to whether the common law ought to also approach the matter in a similar way in respect of fraud, and the case I have in the bundle *Lynn and Bamber*, it's at volume 2, tab 24.

Gault J Which tab?

O'Callahan 24. I don't think I need to take Your Honours through to case in detail, other than to make some observations. The very first part of the main part of the headnote is in my submission accurate in respect of the case. It notes that since the Judicature Acts the equitable principle that active and fraudulent concealment on the part of the defendant constitutes a good reply to the Statute of Limitations is applicable even to pure common law causes of action and even without the element of active concealment the statute is no answer to a claim based on fraud. And that was groundbreaking in the sense that it was a very clear decision of a Judge at first instance in common law jurisdiction that it so applied and the Judge there reviewed all the old authorities, indicated that the law was in a bit of a mess on the whole and sought to clarify it in a learned judgment. Some time later in 1939 the English statute was passed which is the one which was before the Court in *Cartledge* which is really the model for our 1950 statute and it included s.26 of that statute which is literally the same as ours, s.28 of ours, and by that means, well in respect to the other limitation periods it substantially altered the language and made it more modern, simpler and easier to understand in today's parlance. It got rid of the long lists of matters that the 1623 statute had and made them more general language of s.4 but encapsulated the same ideas and then provided in s.26, essentially codified the rule that was in *Lynn and Bamber*. Because if the state of authorities were so uncertain as Justice McCardie in *Lynn and Bamber* indicate they were, it may well have been the subject of further dispute and argument amongst the Courts and obviously the legislature made a decision to codify that principle. So what that evidence is is the law developing on this issue of when the statute of limitations applies and it developed over the course of time and culminated on that part of it with *Lynn and Bamber*. And it not only developed on that issue but throughout that course it also developed in respect of issues relating to disability and the evidence of that is to be found in *Harnett and Fisher*, although it's unfortunate that the copy I have it from the bundle are taken from the *King's Bench* reports at tab 15. It's unfortunate there's only the first instance decision. The report carried on to report the Court of Appeal decision which really is where I need to draw my reference from but unfortunately that hasn't been included in this bundle and I don't have a copy of it with me. I have referred to it in my written submission at para.25. I don't need to say much more about it other than just observe that there have been various

developments of the law interpreting, ameliorating harshness etc, principles fashioned by the Judges in relation to the application of the disability provisions, so to summarise my basic proposition to this point is that the law developed at least that far and in that context there was a codification in s.26 of that English statute which is simply adopted in our statute. And now I'll go to Canada

McGrath J The point here really Mr O'Callahan that the codification of this principle was a pretty slender basis on which to interpret what the words mean when there's no question of fraud involved?

O'Callahan Yes, yes.

McGrath J And it's really the same point as Justice Casey made in the *Hamlin* case isn't it, that there can't be a basis for necessary implication through the specific provision being included when it's not there and you're saying that that's supported when you see that this particular provision s.28 has rarely arisen from a judicial interpretation anyway?

O'Callahan Yes, yes that's my point thank you. And then that's demonstrated because it's been said from a number of sources that the basis of *Cartledge* saying you have to interpret it this way is unconvincing and it's not often said why it's unconvincing but it's my submission that it's unconvincing for that reason and the Canadians appear to have agreed with that proposition because I'll take you now to Canada. It's a little bit dense in terms of understanding the legislative context because trickled throughout this from the 1970's are statutes that do embrace in a statutory sense a more general proposition of limitation but the leading case which is said to be a leading case for the proposition of simply Judge interpretation of really the equivalent of our s.4 is beginning with *Kamploops* in the Supreme Court, and that's at tab 7. I'm going to refer Your Honours to the relevant parts of the judgment and then I'm going to use the later case of *Rafuse* to assist in charting the way through it. The relevant part of the judgment in *Kamploops* is begins around about page 40. If I could direct Your Honours attention to three to four pages before that, because the three or four pages before that go to some lengths to show that Madam Justice Wilson's understanding of *Cartledge and Pirelli* and the history of that alongside *Sarham-Souter*, but it culminates to the point where she at page 40 rejects the *Pirelli* reasoning. Now remembering that *Pirelli* wholeheartedly endorsed the *Cartledge* interpretation of s.4 and there's no real evidence in this judgment that the Court here is taking the *Hamlin* approach, the Privy Council *Hamlin* approach, so although this underlyingly is subject to the potential point that while it's a building case and we know what *Hamlin* says about that and we find that attractive, then this can be explained away. I'm just using this to demonstrate how in a judicial context of not adopting that *Hamlin* principle of economic loss and understanding that as being a consideration, it's been taken on the square basis of physical loss and the question of when it accrues and applying a reasonable

discoverability test to it. And the first point that Justice Wilson makes in terms of conclusion is at the bottom of page 40, second to last paragraph. "Applying *Sparham-Souter* of the *Municipal Act* which bars an action on the expiration of one year from the date on which the cause of action arose, the plaintiff's cause of action would not have arisen until November 1978 when his plumber called to fix a burst pipe drew the damage to his attention. Now the *Municipal Act*, that section of the *Municipal Act* which I don't have, but we have a number of references to its effect, seems to be a simple bar as explained there and there doesn't seem to be any suggestion that there is a fraud exception provision like s.28 in that legislation. Counsel in that case sought to bring the particular type of cause of action within another limitation provision, being the 1975 Act which provided at s.3 – you'll see that there on page 41 – 'the following actions shall not be brought after the expiration of two years and action for damages in respect of injury to person or property etc'. There appears to underlyingly have been some doubt as to whether that general legislative limitation provision applied or whether the cause of action was so specific to the *Municipal Act* that it was really only the *Municipal Act* provision that applied, but the important point from an advancing law perspective is that the Court squarely said that the *Municipal Act* bar didn't operate until it was reasonably discoverable, till the damage was reasonably discoverable. Because you'll see following on the general limitation that by this time in 1975 the general legislation had included that section 6 you see at page 41 which includes a more general reasonable scopability doctrine applied to specific causes of action in specific circumstances.

Tipping J So the Court may have been influenced by the fact that the legislature had already moved?

O'Callahan Well that's not the reasoning.

Tipping J No, no, I agree it's not important but if this Act had been in force at the relevant time, it being damage to property, you would have had the equivalent of a reasonable discoverability test?

O'Callahan Yes you would have, yes. But that's not the reasoning and this is why I then want to take you through what the Supreme Court said in the later case of *Central Trust Co and Rafuse*. That's at tab 6 of that bundle. *Central Trust Co and Rafuse* was on appeal from Nova Scotia and it was a professional negligence case against solicitors in respect of negligently putting together a mortgage, or relevantly securing the interests of the plaintiff, and the particular legislation is this Nova Scotia Limitation Statute that you've been unable to obtain a copy of. The reference to it is there at the bottom of the headnotes – Statute of Limitations. RSNS 1967, c.168, and for present purposes I can only derive an understanding of what that statute says by the way the Court refers to it and the relevant key passages I want everyone to refer to begin at the bottom of page 534 of the report, but once again. Actually I think I should start Your Honours on the previous page, 533, near the

top, first paragraph that begins on that page. 'It is necessary then to consider the appellant's alternative submission on the limitations issue. The question raised by this submission as I see it is whether there is any reason why the judgment of the majority in *City of Kamploops and Nielsen* which applied the discoverability rule to the limitation period in s.738(2) of the *Municipal Act*, should not be followed with respect to the appellant's cause of action in tort under s.2 of the Nova Scotia Statute of Limitations'. That next paragraph then really makes the point that I was making before that the case was based on the *Municipal Act* provisions and it notes in the following paragraph that although the limitation of actions question wasn't an issue in *Kamploops* when it was first argued before the Supreme Court, it nonetheless became an issue because of *Pirelli* and they took written submissions

Tipping J The suggestion is here in the middle of 533 that counsel for the municipality had conceded that time began to run under both sections from the date the plaintiff actually discovered or ought to have discovered the damage.

O'Callahan Yes, because counsel were agreed that *Sparham-Souter* would apply.

Tipping J Oh I see, and then they came back to it again after and that concession is withdrawn presumably?

O'Callahan And they came because

Blanchard J That was because they considered that the legislature in British Columbia had been adopting *Sparham-Souter*. I don't think it affects the argument that you're about to put up.

O'Callahan Yes, but anyway *Pirelli* came out presumably whilst the matter was under consideration and the Court sought further submissions on the point and that next paragraph refers to the way in which *Pirelli* wholeheartedly adopted *Cartledge* and its reasoning about the s.26 point.

Blanchard J Sounds as though were rather keen to dump on *Pirelli* as soon as possible.

O'Callahan Well there's been a number of sentiments expressed in that way. They certainly made sure they had the opportunity to do that and then it sets out the passages from the speeches in *Pirelli* which adopt *Cartledge* and why they do and then begins, and this is the key passage I wanted to refer you to at the very bottom of page 534 'these considerations (that is namely the s.26 fraud provisions) were obviously before the Court in *Kamploops*, yet in spite of them the majority chose to apply the discoverability rule to s.738, sub.2 of the *Municipal Act*. Now I'm trying to be fair in deconstructing his reasoning because if left at that that would in my submission not be very meaningful because there

doesn't seem to be any suggestion that that *Municipal Act* contained an equivalent of s.26 so the reasoning goes on to say 'while noting the importance attached in *Cartledge* to s.26 of the Limitation Act they did not suggest that *Cartledge and Pirelli* were distinguishable because of the particular legislative context in *Kamploops'*. Just picking up on that point it might be said that that's a weak argument because it might be said in response to what I'm saying that the Court in *Kamploops* simply decided in an unprincipled way to ignore it or that it simply didn't arise because the limitation therefore the provision wasn't there, but I suggest it's not such a weak argument when viewed in the context of what I said earlier about the Courts already having developed law that simply to the point that it had developed by 1939 in England the legislature made a decision to clarify it, at least to that degree. So the point is that there's no attempt to distinguish it therefore s.26, the 26 point might well have been thought in *Kamploops* to be unimportant, the absence of it was unimportant. Then they go on to make a further point – 'indeed it is questionable whether they were distinguishable on that basis. While s.738(2) was in force prior to its repeal and replacement by the 75 Act which I referred you to those sections 3 and 6 in the *Kamploops* decision, that 1975 Act making express provision for the discoverability rule and an outside limit. The Statute of Limitations RSBC 1948 c.191 afforded a similar basis for an argument as to legislative intent in s.38'. Now that's one of the statutes I've handed up to Your Honours. It's the one on the front page – The Revised Statutes of British Columbia 1948, volume 2 and that's the complete Statute 191 and this Statute is more evocative of the 1623 English Statute than it is of the 1939 Statute and it doesn't have a general fraud provision like the 1623 Statute didn't, but it does have s.38 which the Court is referring to and it's a fair interpretation of it in my submission and in the judgment of the Supreme Court in *Rafuse* they say that s.38 provided that the right of action for the recovery of any land or rent of which a person may have been deprived by concealed fraud shall be deemed to a first accrued at and not before the time at which such fraud all with reasonable diligence might have been first known or discovered. It would seem that the point being made there is although there isn't a general fraud provision there is a specific fraud provision relating to certain type of action and if the reasonable discoverability doctrine would render a general provision for fraud redundant, it would equally render a specific provision redundant.

Tipping J Is it fair to suggest to you Mr O'Callahan that what really influenced Madam Justice Wilson in the earlier case was her statement 'it seems to me however to be much the lesser of two evils'? She was simply saying that there are problem either way, by far the worst problem is people losing their cause of action before knowing they've got it.

O'Callahan Yes that's weighing the principles of common law which is that people should have their relief unless they are held to undue delay and the legislative purposes of the Act, which is the weighing that was done in *Searle* I don't interpret necessarily that that statement by Madam

Justice Wilson is aimed at this interpretation, potential interpretation difficulty, well the interpretation difficulty that *Cartledge* had. It's more the legislative policies which are described in *Searle* as opposed to the principle that the legislation is not to

Tipping J Well wasn't she effectively saying look we're not bound by anything, we can forge our own path and this is by far the better path to go. With great respect I don't think it was anything more subtle than that and it may be a very very good point, but there's no sophisticated discussion of the background to the 39 Act and how that was based on the common law and codification to that point shouldn't inhibit further judicial development which is your point, which is also a good point.

O'Callahan Well my primary submission is that as in *Searle* is to adopt the reasoning in *Searle* and the policy considerations in *Searle* and to urge Your Honours to accept those. What Your Honours have asked me to address is the question of whether you really can do that, given s.28 and

Tipping J Well clearly the Canadians didn't think their equivalent was a bar to that course being taken, but there's no detailed discussion in either cases there of why it wasn't a bar.

O'Callahan No there isn't.

Tipping J You've offered an explanation yourself.

O'Callahan Yes, well what this passage in *Rafuse* does is it recognises, presumably because it was argued, that you just can't do this because of the *Cartledge* reasoning and they have gone through it and said well without making the point about the legislative history and the development of the law that I've added to it, they have with full cognisance of it chosen to not accept that there is such difficulty, but as Your Honour says, they haven't actually expressed the reasoning.

Tipping J Well s.38 was in a much narrower compass than our s.28.

O'Callahan Yes

Tipping J And this is where I was looking for the help but you're doing your best I appreciate entirely, but I'm just putting to you almost thinking aloud that this doesn't really develop it much. Your observation about the legislative history with respect is the sort of thing one was looking for.

O'Callahan Yes. So that's *Central Trust Co and Rafuse* and then the other relevant authority is the later case of *Paixeiro*.

Blanchard J I take it there's been no, well where's *Paixeiro,* which jurisdiction?

O'Callahan Sorry I didn't hear the question?

Blanchard J Which jurisdiction is *Paixeiro?*

O'Callahan *Paixeiro* is in the Supreme Court but it's

Tipping J Is it still Canada?

O'Callahan Yes,

Blanchard J Where do we find that?

O'Callahan That's at tab 26.

Tipping J It might be easier to call it *Haberman.*

O'Callahan *Haberman.*

Tipping J It's probably my best contribution for the morning Mr O'Callahan.

O'Callahan I never know how to get my vowels in those words, and that's on appeal from Ontario and it's a very different statute. I would be open about that from the start. It's a particular Highway Traffic Act and it provides for a limitation period of two years from the time when the damages were sustained and there's no particular suggestion of any equivalent of s.26 or 28 and the Court talks at pages 564 and 565 of what then has become quite a body of Canadian law on the subject and simply refers to therefore this being adopting a dicta from another Canadian case from Manitoba which said in my opinion the Judge-made a discoverability rule is nothing more than a rule of construction wherever statute requires an action to be commenced within a specified time from the happening of the specific event the statutory language must be construed when time runs from the accrual of the cause of action or from some other event in which construed is occurring only when the injured party has knowledge of the injury sustained the Judge-made discoverability rule applies but when time runs from event which clearly occurs without regard to the injured party's knowledge the Judge-made discoverability rule may not extend the period the legislature has prescribed. So I'm referring to this as really quite a high development to the principle of statutory interpretation. It's a Judge-made rule adding my own gloss on to it, it is a development of judicial interpretation which is now said in Canada to be a general discoverability rule to be applied generally to interpreting statutes. And then I also note that that case also asserts over the page, 565, a slightly different point that notwithstanding *Cartledge* there is no principal reason for distinction between an action for personal injury and an action for property damage which really is evocative of my point that there's no principal main reason to distinguish *Searle* from any other type of cause of action.

Blanchard J I notice that on page 564 in para.38 Justice Major says 'the discoverability rule has been applied by this Court even Statutes of Limitation in which plain construction of the language used would appear to exclude the operation of the rule'.

O'Callahan Yes I think that is, I'm not quite sure what particular used are meant to be. Presumably it's not the phrase 'the accrual of the cause of action'.

Tipping J No, his example is date after on which the damage was sustained which is more susceptible of flexibility than the traditional view of cause of action accruing.

O'Callahan Well the date on which the damage was sustained, if one sustains the damage when one has the motor accident

Tipping J But do you sustain the damage until more than minimal damage is happened.

O'Callahan Yes well in *Cartledge* it says here you do sustain the damage once more than minimal affectation to the lungs. With respect I would say that that phrase is quite a clear phrase that is the legislature desperately trying to make it an event based bar yet the principle of interpretation in Canada is so powerful now that even that is interpreted as involving knowledge. Now I'm not suggesting that we should go that far in this case. I don't have to ask the Court to go that far. I'm asking the Court to interpret accruals cause of action, a cause of action accrues in that way, as the Court of Appeal's already done in *Searle.*

Tipping J Doesn't accrual on any normal construction mean come into existence or vest? It doesn't imply questions of knowledge or discoverability. It would have to be a somewhat imaginative construction to bring in those concepts.

O'Callahan Well that's a point that Justice Harrison made in *Bomac.* He was construing a statute that said when the cause of action arose, and he saw some distinction between arise and accrue. I'm not entirely sure that those semantics, you can go around a number of circles on those, so when does a cause of action accrue? A cause of action implies the ability to bring it and how can the ability to bring it arise when you don't know what's happened or you don't know an element of it that would allow you to bring it. The point I've made in the written submissions is not to try to say that that's the only interpretation because it's clearly in my submission open to both interpretations and the point I made in the written submissions is that the Court in *Cartledge* needn't have felt so constrained. Possibly didn't feel so constrained on the exact language if it wasn't for the s.26 point, and then I say to Your Honours that for the reasons I've gone through this morning that that is a think and unnecessary basis on which to necessarily construe s.4 in the way *Cartledge* did given the history of it developing in that way.

Tipping J When it was a kind of without prejudice clarification if you like?

O'Callahan Yes, yes, that's a rule we want to make sure that stays.

Henry J Mr O'Callahan one of the primary purposes as I understand it of a limitation provision is to prevent the litigation of stale claims which may unfairly be prejudicial against a defendant. The adoption of the general rule of discoverability must involve a balancing of that and finding against that in favour of a plaintiff who has not been able through diligence to ascertain the cause of action. I'm just wondering why one should outweigh the other. It's referred to in *Peixeiro*, if that's the right pronunciation, at page 565 but there's no rationale other than saying we prefer to give the balance in favour of the plaintiff.

O'Callahan No, well I've attempted to deal with this to some degree in my written submissions. The point I make at para.55 is really what I've developed today.

Henry J 55?

O'Callahan Yes I've developed that today and then 56 is I say 'one of the concerns that underlined the old authorities is that the whole concept of time limitation – and thereby the legislative purposes – would be in grave danger if knowledge were too easily let in as a requirement for a cause of action accruing. Now that there has been considerable debate and refinement of many of the issues that arise the Courts are in a better position than they were to confidently cure the injustices that result in the case of a blamelessly ignorant plaintiff. In practise there are unlikely to be many situations that arise where a doctrine of reasonable discoverability would avoid a limitation period. And I say of the High Court cases that I have referred to that debate the point only two of the facts in the event are proven, would actually result in a postponement of the limitation period in a way not already well understood, that is the *BP Oil and Prissomo* case. That doctrine will be quite limited and its operation is inevitable once it is accepted that the plaintiff ignorance of the legal position is irrelevant. Accordingly, it is doubtful that even *Central Trust Co and Rafuse* would be decided the same way in New Zealand if the principle in *Searle* is applied because cases like *Phillips Shayle-George* would probably deal with that.

Tipping J I'm sorry I having slightly difficulty digesting that and I don't want to interrupt my brother Henry's flow but can you just explain a little bit more sharply why *Rafuse* would be decided

O'Callahan In this country we adopt the *Howel and Young* approach which is that if the damage occurs at the time that a document is put in place or a failure to register a document say is put in place is omitted, then, well if we take the facts of *Gilbert and Shanahan* for example, there a guarantee was signed and it was arguably without proper advice

concerning it and the effect of it and the Court analysed it and said that it wasn't a true guarantee, it was a principal debtor obligation, so the loss occurred at the time the document was entered into and that all the facts that need to be known were known. The legal consequences of those may not have been known by the plaintiff and that point in *Searle*, the adoption in *Searle* the reasonable discoverability is not to apply to knowledge of the consequences

Tipping J Is this a point about potential for loss? If you know there's a potential for loss you know that you've been caused actual harm.

O'Callahan Well in *Gilbert and Shanahan* the point was that the loss had occurred, yes, because

Tipping J Well the loss hadn't occurred because there hadn't been a default on the principal security

O'Callahan Well okay, yes well it's Your Honour's point but we discussed that yesterday that there is the potential that there is the potential and so you're able to bring an action.

Tipping J Well you're able to bring an action for nominal damages but you're not going to bring your action until your loss actually occurs are you onto the reasonable discoverability?

O'Callahan No, no, the reasonable discoverability wouldn't change that point, it would only change the date, and when I say it wouldn't change the result in *Gilbert and Shanahan*, it wouldn't affect it at all because everything was known

Tipping J It's the difference between nominal damages and substantive damages wouldn't make any difference?

O'Callahan No, because the knowledge of the facts, the reason why the Court held that *Gilbert and Shanahan*, the action of *Gilbert and Shanahan* was time-barred is because they entered into a principal, the plaintiff entered into a principal debtor obligation at the time prior to the more than six years

Tipping J They bound themselves to answer to somebody's default. The loss didn't accrue until the default had occurred other than there'd been a potential for loss.

O'Callahan Which was actionable.

Tipping J Well you wouldn't get any damages would you, unless you're doing it on a loss of a chance basis, but if reasonable discoverability is to have any sort of meaning across the board surely it would cover this situation. You're sort of confessing and avoiding. You're saying you want it but it's not going to be nearly as bad as people might think.

O'Callahan Well because the *Searle* principle is that its knowledge of the facts or elements of the cause of facts giving rise to the elements of cause of action that is covered by the doctrine, so if a case like *Gilbert and Shanahan* or *Stratford and Phillips Shayle-George* is barred presently, a doctrine of reasonable discoverability will not unbar it because in those cases the facts giving rise to the cause of action were known, it's just that the plaintiffs didn't necessarily, well we assume they didn't understand that they had a right of action

Tipping J No, the problem was there was no point in suing until an actual loss had occurred but on your thesis you wouldn't be able to do that under reasonable discoverability. This is where it's, this is where it's difficult to know exactly what we're being asked to do.

O'Callahan Well what I'm not asking the Court to do is to tinker with the accepted principles now, that exist now as to classifying how particular facts give rise to an action. What I'm asking the Court to do is what the Court of Appeal did in *Searle*, which is to say if those facts aren't known then the limitation period is postponed until they are or could be reasonably discovered. I'm not asking for any general tinkering with the principles enunciated in those cases.

Blanchard J So you're saying hold the line at *Searle* applied generally?

O'Callahan Yes.

Blanchard J There's no need to go any further at this stage and the consequences of *Searle* over the ten or more years since it was decided have not been very great?

O'Callahan Correct.

Henry J Mr O'Callahan just reverting for a moment to your paras.55 to 57 in the rationale for justifying tipping the balance in favour of the plaintiff, on that approach there would be no need for any long-stop provision would there and that would be contrary to the rationale?

O'Callahan Yes, at least they would be free to do whatever they wanted and to

Henry J But as a matter of principle there's no need for a long-stop provision.

O'Callahan No.

Henry J And it would be contrary to the principle you're trying to adopt.

O'Callahan Yes it would.

Henry J It would seem to conflict with most of the thinking about the necessity for some sort of a long-stop.

O'Callahan Well in my submissions there's two ways of looking at that competition between the principles that Your Honour addressed to me and I'm not sure that 56 and 57 both adequately answer it. One is the sort of public concern of a general kind of body of law that does justice in generality and that for the great part stale claims won't be litigated but there may be instances where the parties are subjected to that and as long as the Courts aren't burdened by it and everybody conducting business is not necessarily at risk to a large degree of that, then as a sort of a general purpose the balance would fall in favour of the doctrine I'm suggesting. That may mean that in individual cases, and quite rare cases, there will be stale litigation. Presently, even without this doctrine, there can or at least theoretically be instances of stale litigation. One could hypothesise some examples. First of all actions on a deed, that's a 12-year period rather than a six year period, so naturally those cases could be older, and also when one considers the rules about contribution so that a claim could be brought, a deed could be entered into that provides for some future provision or a contract entered into that requires something to occur in the future and before there's a breach of that a number of years down the track, or an alleged breach of it, questions as to interpretation of that contract may involve, or even perhaps the existence of that contract, may involve consideration of events that had taken place many many years before. Now you could say well there's just no long-stop on that at all and you could have very very old litigation. That tends not to happen. You might have litigation that is 10, 15 20 years old in terms of the facts that are relevant to litigation and then there may well be a judgment produced on that after some years and there may be appellate judgments delaying it some more years and then there may be a claim for contribution by one party against another party in respect of that and the limitation period of that is six years following the judgment that has made one party liable and then miss the opportunity to claim contribution and perhaps also payment of the obligation that the Court ordered, so there's six years to bring that action and then that they may well litigate matters that relate back to a very old period of time. Now that is open on the present scheme on the present way these are interpreted, so there is no general provision in the law at the moment and the Courts don't really know of a, although it's undesirable it doesn't happen very often and when it has to happen so be it, that's really the approach. So this doctrine may involve the opportunity for a few more cases to be run in an age basis like that but it's certainly not in my submission going to be this flood-gate. Its going to be rare cases and that in my submission doing private justice in that case between somebody who has a right to relief is more important than giving somebody the windfall of the a long-stop or of a limitation period.

Gault J So I suppose the

O'Callahan Does that answer Your Honour's query?

Henry J Yes thank you.

Gault J I suppose the longer period that elapses during which the persons have suffered loss or damage the less the likelihood that the Courts would be persuaded that a reasonable person would not have ascertained the facts.

O'Callahan Yes, yes, because the need to ascertain when that was reasonably describable is going to be a feature of litigation that is run under such a doctrine and that itself in my submission was a natural limit on the generality at least.

Tipping J I can foresee some possible issues as to what we mean by facts giving rise to the cause of action. Do we mean for example the making of the necessary link between a physical event and a consequence?

O'Callahan Yes in *Searle* and S & G, it's the causative element of it that is the element of cause of action. Now that is an element of a cause of action and those cases are authority for that link being subject to the doctrine so I think my answer to that has to be yes.

Tipping J And the facts giving rise to the cause of action include damage don't they?

O'Callahan Will include whatever it is that sparks the cause of action, so the *Gilbert and Shanahan and Stratford Phillips-Shayle George* situations, whatever it is that sparks the right there on the state of that authority.

Tipping J But is the potential for damage a fact, giving rise to the cause of action?

O'Callahan Well if on a particular cause of action that is enough to spark it, to bring it into being, then it's that fact that must be known. I'm asking Your Honours to review the law on specific cases such as *Gilbert and Shanahan and Phillip-Shayle George*.

Tipping J Well I'm just trying to get a grip in my mind about, and you make the valid point it's not legal consequences of facts but it's facts and I'm just trying to see how widely this general reasonable discoverability is going to bite.

Gault J They're the same facts whatever time the cause of action arises.

O'Callahan Yes.

Gault J And the same facts even if it's when they exist as distinct from when they are known; same facts?

O'Callahan Yes, same facts, yes, and the only delay is if it's not known.

Gault J Yes I understand that.

Henry J Just taking the *G & S and Searle* cases for a moment, the element which was lacking there was causation as I understand it and in most cases there was initially no evidence of causation available, due diligence or not, it simply didn't exist. Like in *Hamlin* the defect wasn't known so if you brought a claim you couldn't prove anything. Is that some different approach rather than the general one, because you're saying there that the evidence, the fact necessary to establish the claim simply doesn't exist, that time doesn't run until it does exist.

O'Callahan Well evidence is different from actual happening. The lack of evidence in my submission means little more in principle than lack of knowledge. You didn't know about it. It's reasonable that you didn't know about it because the evidence just wasn't there to enable you in those cases, especially in *Searle*, the medical understanding just wasn't there, but that is in my submission just knowledge, it's not the event itself. The fact that the device in *Searle* caused damage, that is a causative link that was in existence the moment the plaintiffs in that case started suffering their injuries.

Tipping J What if you know that you've suffered a trivial harm but you have no idea that it has the potential to be really major harm down the stream?

O'Callahan I'm going to run back to my proposition that whatever the law is about a particular cause of action and about the ability to recover in respect of it, my suggestion of the doctrine of general discoverability ought not to interfere with that.

Tipping J Yes I understand that, I'm just trying to get a grasp of how it's actually going to work if we say lay down some over-arching proposition that it's when you discover the cause of action or reasonably to do so rather than when it exists.

O'Callahan Yes, although I've put this appeal at, as my learned friend has said, a determinantly high level of a general doctrine, and I don't recant from that, the point to recognise though is that Your Honours' decision in this case will be in respect of, necessarily in respect of a particular cause of action in this case and that although I would urge Your Honours' reasoning to be, because in my submission it has to be a general reasoning, to say that the doctrine generally, it doesn't necessarily interfere with those sorts of considerations.

Tipping J It might be an important point as to whether we elect to leave it to Parliament. That's where I see it as biting. If we're going to have to lay down some general proposition of considerable width in order to be consistent if you like and cover your case I just feel a slight unease about it as to where it's going to end up.

O'Callahan Well my first proposition is that it shouldn't change anything in terms of the

Tipping J Except this case.

O'Callahan Well, no, no, what I mean in terms of the approach to causes of action it shouldn't change anything other than the ability to postpone it for lack of knowledge of the event that otherwise brings the cause of action into existence. If it's thought that that in another case, and I'm finding it difficult to hypothesise easily on it, if there was another case where it was thought that that necessarily there was some nuance of it that that was relevant in another case, then that would be appropriate to decide in respect of that particular case.

Blanchard J You're really saying the Court should take the same approach as it took in the *Barristers Immunity* case, of saying well there might be some downstream problems but we're not here to solve those today, let them be worked out one by one.

O'Callahan Yes, that's the nature of that submission. But the caveat on that is that I would like to be able to say to Your Honours that it wouldn't easily have downstream problems because I'm asking Your Honours to confine it simply to the knowledge aspect.

Tipping J When in this case would you have knowledge or reasonable discoverability of the causation aspect that you will have to prove that the voidness of the allotment has caused your people some loss.

O'Callahan Well on the first cause of action, causation is not an element of the

Tipping J I'm sorry, yes, but the first cause of action is simply you acknowledge that there was voidness from which all else fails, knowledge of the facts giving rise to voidness, yes thank you, I think

Henry J If this had come to light 20 years down the track you could still pursue it?

O'Callahan It would have to be so under the doctrine I'm suggesting.

Henry J What if I *inaudible.*

O'Callahan Well I revert to the points I made earlier in response to the general proposition.

Tipping J Everything we decide according to normal principle will have retrospective effect and there will be necessarily, unless Parliament acts (a) very quickly and (b) retrospectively, there's going to be quite a window of open-ended potential liability here isn't there in just building on what brother Henry has said. You see I've an anxiety you're asking us to half of the necessary job to open the door but really

the necessary job is to put in place some sort of things that can only be there legislatively to control the flow through this open door.

O'Callahan Well I suppose before the legislature intervened in the first place the door was open, subject only to principles of laches and waver and those sorts of things. And on a very very considerably open basis and this in my submission is very narrow to cure a particular injustice that arises in the case of a blamelessly ignorant the plaintiff and although it may have the effect that Your Honour's suggesting of acting retrospectively and open the door and a window, that would be so in respect of any sort of development on this sort of subject and it's a matter of deciding what the common law approach

Tipping J Well if it has to operate retrospectively there's quite a respectable volume of precedent for saying that that is a strong indicator that it should be left to Parliament which might call potentially very far-reaching and open-ended consequences and no-one's inviting us to do this prospectively and I'm not encouraging because I don't think that would be right either so it points out very strongly the awkwardness that arises when a Court makes a major shift of direction and it applies to everything that's gone before.

Gault J I suppose there's two sides to that because in view of the position you are taking there it looks like the court should overrule *Searle* or leave *Searle* as standing for a general proposition. If *Searle* were overruled there must be numerous claims for exemplary damages for sexual abuse that would then be closed out.

O'Callahan Yes, it is in my submission an unfortunate consequence of the position we're in that whatever decision this Court makes is going to have consequences in my submission.

Tipping J We don't have to overall *Searle.* We could say that it should stand because people may have relied on it. I don't know, it's hardly reliant in this sort of situation.

O'Callahan Your Honours sit as a final appellate Court. Your Honours are to a degree free in that respect to take your own course but it's my submission that the course ought to be taken on a principle basis and it's one of my primary submissions that a principle application of the points of relevance leads to overruling or applying generally the case of *Searle,* because there's simply no basis in my submission to distinguish between the *Searle* cause of action and any other.

Henry J It's a very valid point but I don't think the Court in *Searle* saw itself as enunciating the general principle applicable to all causes of action.

O'Callahan Well I can't of course answer for the Court itself

Henry J No but you're saying in principle that's what it's done?

O'Callahan It's done and the words used in the judgment are evocative of a general principle even though the ratio is necessarily confined to that instant case.

Blanchard J And some have read it in that way, yet over the period of time since *Searle* there haven't been a great number of what might otherwise be regarded as stale claims being litigated in reliance upon it.

O'Callahan No, the body of High Court authority, look I haven't researched the question of how many cases that fall within the bodily injury matter have come before the Courts so I can't assist Your Honour today with that but what I can say is that we know from the papers that I've given the Court what the cases are in respect of other causes of action and there's only a handful and although some Judges who've heard those cases have formed a view that the Court of Appeal did in this case, other Judges have taken a different view and it's quite plain that the matter on those conflicting authorities has been open

Blanchard J I notice one of the Judges who took the wider view was actually counsel in *Searle*.

O'Callahan Yes, yes he was.

Tipping J From which side?

O'Callahan Justice Harrison Sir. So there hasn't been a floodgate. In my submission there's a fair observation that the fact of uncertainty made deter the odd plaintiff because one might end up in the situation where the plaintiff in this case of having the matter brought before this Court.

Tipping J I have to say that when *Searle* came out I think the general understanding was that this was just a bit of a 'one-off' in that field, a bit like *S & G*, and people just sort of slotted it in and said well if you're in that field you've got the advantage – I have to say I'm very dubious of the proposition that the people thought this was revolutionising the limitation law, but that's just a personal perspective Mr O'Callahan. If you've got any articled in learned journals or something which said you know watch out for *Searle*, you know, this is wonderful stuff for the plaintiff

O'Callahan We had Miss French

Blanchard J Perhaps I can counter-balance by saying I had the opposite impression. I was influenced by having taken a wider view at first instance in *S & G*, **I** got overturned of course, but

Tipping J Well perhaps all this isn't being terribly helpful. I'm sorry If I

O'Callahan I'm not sure how much I can contribute to it

Tipping J No you can't really, I mean there's no learned articles that you can refer us to that

O'Callahan Well there's Miss French's article.

Tipping J Miss French's article, yes, but that's before the event isn't it?

O'Callahan No Sir it's after *Hamlin*.

Tipping J After *Hamlin*, yes.

Gault J Just on this discoverability, just quite off the wall Mr O'Callahan, is there any relevance in the fact that these investors gave the power, or gave powers of attorney to authorise all that was necessary to put this in place and would not for the knowledge of their attorney be their knowledge?

O'Callahan Firstly it hasn't been raised by

Gault J That's why I said it was off the wall.

O'Callahan And that would need some careful consideration.

Gault J No doubt you'll give it.

O'Callahan Unless Your Honours have further questions I will, well I've run through the sort of policy matters insofar as they arise in the written submissions. I don't have anything to add to those other than what I've elucidated today. If Your Honours have any questions about that then I can answer them otherwise those are my submissions the appeal.

Blanchard J Yes, thank you Mr O'Callahan. Mr Jagose.

Jagose I really wanted to address Your Honours on only three points of three heads but before I do that I wonder if I might preface these comments by saying given what I have to say about *Searle* both what it meant, what it might not mean and whether it was correct at all, and I mean no disrespect to Justices Gault and Henry or indeed in terms

Tipping J Sounds promising Mr Jagose.

Jagose I don't mean it that way it's simply that otherwise I'll bury myself in with respects and I would rather just get on with the argument. Those really are the three heads. What did *Searle* mean at the outset, what is extension is open to be taken from *Searle* and then ought *Searle* be regarded as correct in the event anyway? We say that *Searle* is poor ground from which to grow this general principle of reasonable discoverability and I would remind Your Honours that leave here is given exactly for a general proposition to be drawn of reasonable

discoverability. First of all *Searle* is in its own terms, notwithstanding what my learned friend has to say, is quite plainly deciding a rule only for the accrual of personal injury causes of action and I wonder if I might ask Your Honours to take up *Searle* for a moment. It's at tab 11 of my learned friend's bundle. The ratio as Your Honours will know is across 132 to 133, we would therefore hold that for the purposes of s.4.ss.7 of the Act cause of action accrues when bodily injury of the kind complained of was discovered or was reasonable as having caused, been caused by the actions or omissions of the defendant. Now my learned friend says, ah but the Court itself recognises that there is a need for consistency in application of the rule and the Court says that indeed in the left-hand column of line 34 the phrase when the cause of action accrued must be given a consistent meaning which is applicable to differing factual situations, and my learned friend seeks to amplify that to mean for all purposes, for all causes of action regardless of how they arise, regardless of what context they arise in and yet if one goes over to the righthand column at line 5, the sentence at the end of line 5. 'Logically it should not be possible to argue that where a particular tortious act is compensible, different rules apply depending upon classification of the nature of the loss'. So even there this Court is saying 'if there is a rule wider than purely for personal injury it is not to be read more widely than ought to apply to tort cases, and that's the explanation of its reference to consistent meaning and being applicable in different factual situations. So the question then arises, well why personal injury causes of action? What's so special about them? Well they plainly do have some aspect inviting special treatment, that is recognised in the Limitation Act itself, ss.7 to s.4 permits leave to exceed the limitation for personal injury whether there is a delay in bringing that action attributable to any reasonable cause, so already the original two year limitation is recognised in circumstances of personal injury to warrant a gap, a recognition of delay. And then you have the concerns expressed in *Cartledge* and immediately responded to within six months by the legislature in England and critically on personal injury only. So there's the legislature responding to the difficulties that are seen and confining that response because again to them too there is some understanding that personal injury has a particular characteristic about it and what that characteristic might be is referred to in a number of ways and usually often because of the traumatic situation that the Court confronts in a sense of humanity, but when one stands back a little bit from that, one can see that there is a particular reason for dealing with personal injury differently than one might deal with other tortious causes of action or other causes of action generally and *Hamlin* in the Privy Council at page 525 cites from *Sparham-Souter* of a plaintiff subjected to harm of which he may not yet know, he can get rid of his house before any damage is suffered, not so his body, and that's quite an elegant explanation of why it is that there is something particular about personal injury that is not easily extended across various if not here on this case, all causes of action.

Henry J Really also isn't what one could call latent personal injury where the injury itself was not known as being related to the wrongful acts of the perpetrator.

Jagose I thought about that in the context of whether or not *Searle* is right and it strikes me with respect that the question of latency is, I hesitate to use the phrase, but it's a red herring, because the real issue is when has all the elements of the cause of action arisen and the fact of latency I think is a slightly different issue and I'll be coming back to that when we discuss *S & G* and when we discuss *Hamlin* too. The last thing I wanted to say about the special nature of personal injury is that it seems to me that it's possible argue for something special about a sense of personal sovereignty, about an entitlement not to have that domain interfered with and to recover from wrongful interference in that and that strikes me as quite a powerful argument.

Gault J I need some help with that. It's a policy argument it seems to me but not an interpretative argument.

Jagose No, I'm not raising it as an interpretative argument. I'm trying to explain why it is that personal injury causes of action ought to be treated differently.

Gault J Well yes, but my difficulty with that is that you are then driven to the interpretative point that the date of which the cause of action arose, or when the elements of the cause of action came into existence is to be given a different meaning for different policy reasons and that's really the struggle in this whole area isn't it?

Jagose And it might be then that *Searle* overstated the point by saying that there ought to be consistency amongst tortious causes of action.

Gault J Well I would readily be persuaded of that but doesn't it follow that the words in s.4 must be given a different meaning according to the particular claim that is being made and how do you justify that on statutory interpretation grounds?

Jagose I don't believe it can be. I think it's probably one of the base reasons for saying that *Searle* was wrong, and I think I address that in a moment when I want to talk about some of the difficulties with extending *Searle* across and that precise issue raises itself quite sharply.

Gault J Right.

Jagose It also struck me that in terms of personal injury causes of action there is an inadvertent long-stop afforded by mortality. I appreciate that it sounds abrupt but when we look at for example the Canadian long-stop, the Canadian long-stop is of 30 years or at least in the 1975 legislation that we've been provided, and that doesn't sound like too

far off, you know, three score and ten - a half life. So there is some sensibility that where personal injury gives rise to damage that there is an inevitable long-stop and given the importance of being free from personal injury a plaintiff ought to be entitled to pursue it but that doesn't hold beyond personal injury. So what I really wanted to urge the Court was to say leave *Searle* alone, let it stand for what it stands for with respect to Your Honour Justice Blanchard's sense that it might have been more widely interpreted, it seems right to confine it to personal injury causes of action alone; in part because it has been relied on to that end

Tipping J Your primary sense is to leave it alone as an exception or something like that but your secondary stance is to overrule it is that the?

Jagose It's actually my tertiary stance but I think I don't need to go so far except that when we get to the point of asking well should this be the case in which we decide to apply *Searle* more widely across the board, then there is an equal argument to say well if that's the case then there ought also be an argument to be made for saying that *Searle* is wrong entirely and it strikes me that this case is not the case to argue that *Searle* is wrong entirely. In part because it is not a personal injury case; it is not giving rise to those same considerations; and you end up in a position to say that if it's not the case in which to argue it's wrong, then it can't be the case to argue that it should cover the entire expanse of the causes of action. I really just wanted to say that I thought there was a way of rationalising *Searle*.

Tipping J So (1) is exception; (2) is avoidance and (3) is overruling?

Jagose (2) is extension I think.

Tipping J Extension?

Jagose Well what is being argued for here is an extension of *Searle*

Tipping J I thought you meant we could say well we don't have to decide it on a strike-out, well let's just wait and see what the facts are. Sorry, I didn't quite understand you.

Jagose My three points were that it is an exception. If it is not an exception then there are major difficulties in trying to extend it and in any event it might be wrong. The question of not having to decide it here is not having to decide the ultimate question whether *Searle* is right or wrong on a global universal principle basis. So to move to the second of those, the question of whether or not *Searle* might be more broadly applied, the first issue is to look back at what it relies on. What it relies on is *S & G* and *Hamlin – S & G* in the Court of Appeal – *Hamlin* in the Privy Council. What it expressly says in *Searle* is that *S & G* takes the *Hamlin* principle one step further but *S & G* was prior to the Privy Council in *Hamlin*. So in *Searle* the Court says of *S & G* and *Hamlin*

that together those cases provide the platform for determining the issue. Now if *Hamlin* is answered by an understanding of the damage element in the cause of action rather than the question of latency then there is no room for the analogy drawn in *S & G* as to latency and so therefore those two cases provide no platform with respect for *Searle*. *Searle* must stand for itself and it must be justified on its own. I understand that incremental development where *S & G* looking at the Court of Appeal in *Hamlin* says 'well this is about latency and if latency in buildings is good enough then surely latency in physical injury, bodily injury, is good enough and that analogy holds absolutely well until the Privy Council in *Hamlin* comes along and says no it's not about latency, it's about the point in time, the rising of the cause of action, the completeness of the cause of action on the arising of damage'. And at that point *S & G* doesn't appear to have its foundations well established.

Gault J I have to say I have some difficulty notwithstanding I took the view myself in *Hamlin* that it can be dealt with that easily as the Privy Council tried to side-step the previous English decisions. What happens if the house falls down before it

Jagose If the House?

Gault J Falls down, partly falls down and it's not economic loss, it's physical damage?

Jagose If the house falls down the loss is the value of the property. I mean there's no room to sue for specific performance.

Gault J Or the cost of repair, but it is there before it is sold and the loss is suffered when the wall collapses. It just seems to me artificial to constructive as always a cause of action arising only when some economic lost is suffered. I just have difficulty with it as a full explanation.

Jagose I understand the proposition but surely the question then is determined by how the cause of action sits. If one was to sue for rebuilding the house, one presumably is suing under a different basis than in damages for negligence. If one is suing for the cost of repair or the loss and value of the property, one is suing for damages and negligence.

Tipping J I don't understand the distinction I'm afraid but maybe we'll adjourn, but surely the cause of action is negligence whether you repair the house or sell it at a loss.

Blanchard J You may like to think over that over morning tea.

Jagose Thank you.

Blanchard J 15 minutes.

11.32am Court adjourned
11.50am Court resumed

Jagose Your Honour Justice Gault was saying to me prior to the break that *Hamlin* is essentially a fiction to get around the difficulties imposed then I would accept that. It's still not entirely clear to me that necessarily restores *Hamlin* as a case about latency.

Gault J I accept that.

Jagose And therefore my criticism of *S & G* remains and therefore the question of whether there is a foundation for *Searle* from those two cases continues and so the proposition must be that *Searle* has to be understood on its own.

Gault J That's a very polite way of saying you think *Searle* is wrong?

Jagose Yes, I'll be less polite later. What we are talking about here is whether or not for the purposes of s.4 the accrual of a cause of action can encompass knowledge or possibility of knowledge of its elements. And this is on the s.28 issue, can it survive. S.28 is about not accrual, it is about the deferral of the commencement period of a limitation period. To me there is a distinction between the two. If accrual is to include across the board the concept of reasonable discoverability of the elements of the Courts, then there is no room for s.28. I understand what the Judges in the Court of Appeal in *Hamlin* were saying when describing or not describing the issue of the non-sequitur but it is not a non-sequitur. In circumstances where reasonable discoverability is said to be an element for accrual across the board, there is no room then for s.28 at all.

Gault J At 28(a) there could be some room for 28(b) couldn't there? A person could know of all of the circumstances but be deceived as by undue influence for example in not recognising it as a cause of action.

Jagose Isn't that the same thing as asking whether knowledge or reasonable capability of knowing, it's the reasonable discoverability aspect by (b) isn't it. The right of action being concealed by the fraud of the person. It seems to me that that would go to the proposition of whether it was reasonably capable to be known that too can't survive is reasonable capability of being known is part of the accrual.

Blanchard J If s.28 was intended effectively to put the lid on things, in other words if you reason back from s.28, wouldn't you expect that the legislature would have specifically attended to the question of when a cause of action accrues, instead of simply using the term 'accrues' and thereby

adopting the position that the common law had got to and might still get to.

Jagose It may well.

Blanchard J I mean the law does have instances where Parliament anticipates something. It wants to put in a reform in an area where the law is moving and it puts in the reform and the law keeps moving and sometimes comes right up to the barrier and takes the whole area over. You can't have an inconsistency between the general law and the statute, but you do have instances where statutory provisions turn out to be unnecessary in the end.

Jagose Yes I can accept that in concept.

Blanchard J Well it happens, it's not just a concept. It came in under a mistake of law is one.

Tipping J I think the point about s.28 is perhaps it has force on its own but I think it's 28 in the context of the whole Act and the various other provisions in the Act which give signals that is for me at least provisionally a very significant factor. S.28 is probably the single most important provision in the Act but I don't think it would be sensible to look at it in isolation from the connotations of other aspects of the Act.

Jagose I couldn't agree more. I mean to come back to Justice Blanchard's question. I appreciate that moving up to the very edge of what is provided here, you come back to that interpretation of difficulty with asking how accrual can subsume a deferral of a commencement period. There is no deferral of the commencement period if accrual takes into account the very thing on which one may defer. S.28 does not say 'causes of action founded on fraud are accrued on knowledge'. They accrue earlier. They accrue on the existence but the limitation period is deferred.

Blanchard J But that could be said to have simply been drafted on the basis of an understanding of the law as it was at the time and the law is capable of moving on and has moved on.

Jagose Yes.

Blanchard J *Searle* being a step on the way.

Jagose Yes, and then the Courts would need to take great consideration of how the law, statutory law, had also moved and what we see is littered throughout the statutes, provisions for reasonable discoverability deferring rather than permitting accrual. We need only to think of the fair trading of the Commerce Act, of the Securities Act itself, s.37(a), which is a number of sections on from 37, but s.37(a) itself has a

reasonable discoverability provision for the commencement of proceedings seeking to avoid allotments.

Tipping J Can you give us a little bit more help on that Fair Trading Act provision, because I can remember a decision of the Court of Appeal called *Elisa Jane Murray* which took a strict view of accrual for Fair Trading Act purposes and Parliament then altered it in order to liberalise it but I think you're right in saying that the liberalisation was not dent of deferring the accrual, it was by dent of deferring the running of time. Are you able to put your finger on that?

Jagose No I can't take you beyond that point.

Tipping J Right, right.

Jagose I don't have *Elisa Jane*

Tipping J And that's quite a recent example of a Parliamentary way of adjusting something that Parliament didn't think, well the Court of Appeal's decision was changed by that Parliamentary amendment. Alright, well I'll chase it up.

Blanchard J I suppose the same question arises with how did they do it in the Building Act and I don't know the answer to that question either.

Jagose No I can't help you I'm sorry.

Tipping J You're right I think Mr Jagose that the connotations of the Act are not postponing accrual, they are postponing the commencement of time running.

Jagose Yes, and I do think that is an important distinction and that's not what the argument has been before you from my learned friend.

Tipping J No of course not but what he is saying to Your Honours is that it is open to you to do this because it is a matter of common law as to when a cause of action accrues but it's mixing up the concepts and that really leads me to the proposition that none of the cases really deal satisfactorily with the running into s.28 or its equivalence and that I would include *Rafuse* and *Kamploops*.

Blanchard J That's because the cases are driven by policy with the Courts recognising thoroughly bad law when they see it and trying to do something about it.

Jagose Yes, and it probably bears out that you know hard cases make bad law. I appreciate that the Courts

Blanchard J Or hard statutes make bad law.

Jagose Yes, yes. I appreciate that there are policy considerations but more and more it seems to me that this is a place for looking at legislative reform and if it's not forthcoming it is with respect not the Courts to say well if they're not going to do it we will. I'm a little puzzled by *Kamploops* I must say. As I read *Kamploops*, *Kamploops* is as I think Your Honour Justice Tipping said, deeply influenced by the 1975 legislation which had by the time of this case coming to fruition put in place reasonable discoverability for precisely this cause of action, the *Kamploops* cause of action. I did see in s.14 of the 1975 Act the transitional provisions which say that nothing in this Act will revive a cause of action who's time has passed. And so there is an interesting issue then as to how the Court in *Kamploops* dealt with, whether the Court in *Kamploops* properly applied the reasonable discoverability provisions in that statute. Now I know that in the *Peixeiro* case the Supreme Court says that is what we did, you know we adopted this common law principle but when you look at *Kamploops* it's a bit hard to see that directly and so it falls to cases such as *Rafuse* to interpret what *Kamploops* must have meant by referring them to the existence of that s.38 in the relevant statute. But Your Honours observed before, there is no meaningful addressing of this point and yes, the Courts being driven by policy but it is not for the Court to allow those considerations in my submission to override a clear statutory problem. And the answers that are given up, and I know again Your Honours have already addressed this but the issue around knowledge is not straightforward. There's a recent judgment of the House of Lords in *Haward and Fawcetts* which my learned friend Mr Taylor wishes to address you on but there is a case where having a wealth of statutory provisions for reasonable discoverability to get around the difficulties proposed by *Pirelli* and *Cartledge* the House of Lords gets itself into a terrible tangle trying to understand just what is the requisite knowledge and what is it not? I don't want to steal or spike my friend's guns, but there are real issues about bringing this general discoverability principle as a judicial policy rather than a very carefully explained legislative instrument and to that end Your Honours might look, and not necessarily now, but for example s.6 of the 1975 British Columbian Act where the section goes on at quite some length to explain what knowledge means. This is the end of ss.3 'and those facts within his means of knowledge is such that a reasonable man knowing those facts and having taken the appropriate advice the reasonable man would seek on those facts would regard those facts as showing that the action had reasonable prospects of success and so on'. And then ss.4 goes on to explain what appropriate advice means in relation to facts. Subsection, para.b explains what facts include and on it goes. So it's quite a piece of work to address in a judicial policy.

Tipping J I'm also having some difficulty about what actual facts you have to have knowledge of. It sounds easy the knowledge of all those facts that give you the right of action, but what about in these rather more difficult causation issues and so on. Presumably the link between the

wrong and the harm suffered would be a relevant fact would it or wouldn't it?

Jagose I've always found that difficult and *Searle* is a good example of that, where the knowledge of the IUD is complete, the knowledge of pelvic inflammation, ectopic pregnancies and other difficulties is complete, but there isn't a foundation to join the two. Is it causation, is it knowledge of the causation, or is it knowledge instead of a proposition of here scientific fact that allows that link to be drawn and maintained? I prefer the view that it is the latter so that we wouldn't be talking about knowledge of causation, which seems to put it too high, but rather that there is a foundation on which to allege causation.

Tipping J Yes.

Jagose And so it seems to me that that's probably the correct stand point . Had there been a 19, I can't remember the years now, but had there been a scientific journal article around the time that the plaintiff was suffering from various difficulties, then presumably that would inform the advice she obtained when she went to see her Doctor and thus all those things were facts in existence, including the fact of the scientific connection without the need to know of the causation which must be much more ephemeral.

Tipping J Do you have to know of the wrong in the sense of not a legal appreciation but do you have to know that the person has acted carelessly for example? I can see real interesting complexities downstream here, tentatively anyway would seem to be a bit more than the Court can bit off in one go so to speak and maybe it's an issue we just have to let things evolve as my brother Blanchard said rather like the approach, I don't see it a close analogy, but the approach of the *Barristers Immunity* case.

Jagose And there's a lot to be said for evolution, not least when one looks for example again at the Canadian legislation. You see that interstitial approach of particular causes of action having particular aspects of limitation applied to them. Some causes of action, no limitation whatsoever. Some causes of action, a specific period belted by, accompanied by reasonable discoverability, some not. And all that really goes to inform as I think Mark Hennaghan said in my first years of law school, when one read a statute a great deal one was learning in reading the statute of the issues facing the country at the time the statute was written and so when one sees, as in the Canadian legislation, land and sexual assault and injury cases having no limitation save for the long-stop, one assumes that that must have arisen in a particular context. Here to when one looks at building cases or one looks at consumer protection statutes, including the Securities Act, or one looks at the pieces of the Limitation Act itself and how it is dealt with, one must assume that those things are responses to particular social settings and to come then in and say across the board

these things apply because as a matter of inexorable logic they must, tends to bring in all the vices and allow none of the benefits of an evolutionary process. It just catches my memory but one of the other parts of the Limitation Act that I thought was interesting was that personal injury has that leave to delay beyond the original limitation period under ss.7 but so to does defamation.

Tipping J There it's two years with the power to extend up to six isn't it?

Jagose Correct, which is exactly the same as for personal injury under ss.7.

Tipping J Presumably you accrue defamation on the date of publication, not on the date when you read it.

Jagose Well but that's what seems so peculiar.

Tipping J Yes, exactly.

Jagose So presumably that is existing in the statute because there has been something that has given rise to it and I think to me it's good because on its face it seems completely anonymous.

Tipping J Well that's one of the points that I noticed when reading through the Act, that the defamation certainly seems to have a fairly sharp focus on occurrence rather than on perception if you like, albeit in that sort of field there's not likely to be much gap, but it's the point of principle that's important, not all the drafting approach.

Jagose Yes, yes.

McGrath J Mr O'Callahan really would respond to that sort of argument by saying it's a series of ad hoc propositions the Limitation Act. Have you got any comment on that?

Jagose Well if ad hoc is to say – I mean there's two meanings of ad hoc – one is pejorative and it is to say that you know ad hocery is a bad thing because it's simply knee-jerk response to something

McGrath J What I mean anyway is that there is no necessary connection. You can't necessarily learn from one provision in comparing it in what another means.

Jagose I think that's a much more powerful proposition to say these are ad hoc responses because the challenges to them have similarly been ad hoc, or the challenges that they seek to overcome have similarly been ad hoc, but I don't take a pejorative view of them, it just seems to be the way it works. One tries to address problems and cure them if at all possible and so it is important for us to look at what the legislature has done in response to the various criticisms in this area in particular. And what it has done is in a series of statutes develop where it sees

necessary reasonable discoverability as deferring the commencement period of limitation. Now all that tends to get undone rather rapidly if a Court simply says well we've got a single rule and it applies to accrual not deferral. I suppose a further point about the difficulties in extension is what Your Honour raised before about policy concerns, that they can't all run in one direction. Blamelessly their own plaintiffs are presumably balanced by blameless until proved guilty defendants and for whom no opprobrium can be levelled for the plaintiff's lack of knowledge to the extent that opprobrium is to be levelled, then it lies under s.28 and Justice McKay in *Hamlin* in the Court of Appeal makes some points around this so it is real, there is a need to have concern for the position of defendants, it is not enough to say the plaintiffs must be allowed their day in Court. That is not a ruling principle. It's not a compelling policy. There are balanced concerns that need to be weighed up and again to the extent that the argument is to say well none of those things have any real imposition here in this case because here we are talking about a breach of the securities, or an alleged breach of the Securities Act in circumstances in which at least one of the limitation periods has yet to expire the 12 years on the Deed. I mean that's scarcely an answer when what we are addressing is the global principle. That's for what leave was given, that's what the argument before the Court is about. And that extension here is far beyond anything that can be seen in any jurisdiction. It's beyond personal injury, it's beyond tort, it's beyond contract, it's beyond right up to statutory causes of action and the proposal is that this extension should apply to all.

Tipping J There are two concepts in there. There is the concept of accrual and there's the concept of deemed accrual. Now if Parliament has gone about it that way and there's the concept of extension, but I'm focusing on the difference between accrual and deemed accrual and I'm rather wondering whether if Parliament had wanted certain circumstances to lead to a deemed accrual they would have said a cause of action where it was thought appropriate shall be deemed to accrue only when knowledge ought to have known. I may be getting fixated on this but it just seems to me that the structure of the Act as a whole is really quite significant on this whole point. I'm really almost foreshadowing something I'd like Mr O'Callahan to help me with in his reply because I do think it's quite important.

Jagose At this point Your Honour I can do little more than agree with you. I had tried to get to the point what difficulties did one face if one said that accrual of a cause of action had to include, and the plaintiff knew or could reasonably have known of, is there an area then that permitted for example a strike-out saying well you couldn't have known this. There was no possibility of you having known this. This fishing expedition ought not to be permitted to continue. It would be an odd thing to get to but it's at least available in principle and that's exactly why the deferral proposition is

Tipping J Well when there's doubt about when accrual should take place, Parliament comes in with an explanatory deeming.

Jagose Yes, yes, exactly, or when it sees the need at least.

Tipping J Well when it sees the need to, probably for sharper clarification, because it could be a situation where there could be some difficulty in assessing precisely when the cause of action accrues in traditional terms. Parliament is then given help and it's also given help from the point of view if people are in circumstances that it's unjust to apply the starting point on them, they get extensions for those type of people – disability, concealment by fraud, actions for fraud, so I'm not really asking you a question I'm just flagging that I think we need a more sophisticated help, not from you, but from anyone who can offer it on the. I'm sorry that didn't come out as I meant Mr Jagose. I'll stop.

Jagose Nothing was taken from it Sir. I think I've covered really the reasons why I say an extension of *Searle* is intensely problematic on a universal basis, really not open to being dealt with satisfactorily in this context. My last point was really about whether *Searle* was right at all. I don't think I want specifically to say *Searle* is wrong, I want to say instead that this is not the case on which this Court could possibly decide that, in part for the reasons indicated that there is already reliance on *Searle* in a range of places, possibly including the legislature.

Tipping J What if as a matter of inexorable logic we were to say well accrual means as you say? How can we get out of saying that *Searle* is wrong?

Jagose I think on the basis that *Searle*, for the reasons I first elaborated, that there is a justification for *Searle* in personal injury cases and it has to do with the particular nature of personal injury.

Tipping J And therefore the concept of accrual within s.4 shifts according to whether it's a personal injury case or not a personal injury case.

Jagose Yes.

Tipping J That's got to be the case hasn't it?

Jagose Yes, absolutely.

Tipping J Within the same section?

Jagose Yes, it might not be the world's most satisfactory position but it is a position of longstanding but my real point is that if this is not the case to argue that *Searle* was wrongly decided, and I put it to the Court that it probably is not, then it similarly cannot be the case where *Searle*

should be applied across the board. That interstitial incremental evolution of limitation provisions is right.

Blanchard J Well we wouldn't want to leave *Searle* just hanging, that would be a thoroughly unsatisfactory conclusion to arrive at. I think we've got to say something conclusive about *Searle* one way or the other.

Jagose And I think the conclusive thing that can be said about *Searle* is that it is properly limited as an exception

Blanchard J I thought you might say that.

Jagose I mean there is a clear argument to say *Searle* is simply utterly wrong and there is no foundation for it whatsoever; it doesn't hold up under the Limitation Act; there is no way that one can see reasonable discoverability has an element of accrual and it should simply be thrown out and let's see what happens next. But I think that is a difficult proposition for the Court to make in this context when there is no interest to put forward from potential personal injury claimants; current personal injury claimants; a variety of people who's interest would likely be severely affected. So the best I think that the Court can do is to say we've looked closely at *Searle* to the extent that has application, it has application in its pure field.

Blanchard J Well it certainly would be startling to decide that *Searle* was wrong, but it might get Parliament's attention.

Jagose Yes it may well but that is almost as objectionable with respect as saying well let's apply it across the board because it will get Parliament's attention on the longside You can't, you know you can't have sort of half a proposition

Tipping J Well at least the first of those has some intellectual basis, but the other one arguably has no such intellectual basis. I'm saying from the point of view of your argument, if your argument's right *Searle* is a big problem whereas I don't see it as working in quite the same way

Jagose No, no, that's true but there's an issue I'd say the judicial responsibility is that there is in fact a principle of longstanding which is presumably currently being relied on

Tipping J I think it's a very worrying point because we shouldn't damnify peoples expectations and reliances. I said something along those lines in the *Barristers Immunity* case.

Jagose So much as I might like in a purely principled way to say that *Searle* to be got rid of, I suspect there's no point in saying that here because it's just not a case that Your Honours can deal. It's not a submission that Your Honours can deal with in my apprehension and I don't suppose I need to do anymore than to say *Searle* is supportable on policy grounds

and with a high wind I suppose has some intellectual coherence. Unless there's anything more I can assist Your Honours with those are our submissions.

Blanchard J Thank you Mr Jagose. Now Mr Taylor there's been an indication that you want to address us in this appeal.

Taylor Yes.

Blanchard J On what basis?

Taylor Well Sir I indicated to the Court in the previous memoranda that I'm feeling somewhat left out as not being a named party to this appeal because in fact two of the causes of action that are pleaded against Trustees Executors raise the discoverability issue and in fact with respect Trustees Executors should have been named as a party to this appeal and I have yet to understand why it was not.

Blanchard J Have you intimated to Mr O'Callahan that you'd be seeking to address us?

Taylor Yes Sir.

Blanchard J Is there any problem with that Mr O'Callahan.

O'Callahan No objection.

Blanchard J Well in that case I think we'll permit that.

Tipping J Are you confining yourself to the House of Lords or are you ranging more widely Mr Taylor.

Taylor No I won't be confining myself to that but I won't be taking up a great deal of the Court's time.

Tipping J No, no it wasn't the time, it was just the ambit which no doubt you'll just tell us where you're going.

Taylor Yes I will. What I would want to do is start with the proposition that where there is a Limitation Act there is inherently going to be injustice in the wider sense at the margins of where that Act applies and that is because the Act, or the principles which the Act or the policy behind the Act, which is legitimate, cuts across an equally legitimate principle that where a person has been wronged they should have a remedy and be able to achieve it. So unless you say there should be no Limitation Act because that policy does not warrant the injustice, you are always going to be faced at the margins with injustice one way or the other. So that's the first point. There is an inherent potential for conflict of two equally important principles and the likelihood of injustice. I then want to refer you to the House of Lords decision in *Haward and Others*

against F*awcetts* which is a decision of the House of Lords in March of this year in which

Blanchard J Do we have copies of that?

Taylor I've got one copy, although I didn't bring copies, I could certainly make those available over the lunch adjournment. I can hand up one copy, although

Blanchard J One copy's not much use.

Taylor No.

Gault J We might be able to it up if you give us some

Taylor Yes the reference is 2006 The United Kingdom House of Lords at page 9.

Blanchard J Just a moment.

Taylor *Haward* is *H a w a r d*, without the y.

Gault J Tell us when it was delivered?

Taylor Wednesday 1 March 2006.

Gault J I have it thank you.

McGrath J Sorry, the UK HL number?

Taylor 9, yes.

McGrath J Thanks.

Taylor Yes, page 9.

Tipping J I'll fly it, wing it Mr Taylor, I'm not as skilled on this. You'll tell us about it.

Taylor Yes I will. The first point to note is that this is a decision of the House of Lords which deals with the Latent Damage Act or the legislation that was passed by the United Kingdom following *Cartledge and Pirelli* in those cases and which introduced, at least in tort cases, a very detailed regime as to application of what is essentially a reasonable discoverability principle. But first I refer Your Honours to the opinion of Lord Scott appears at para.32 of the opinion of the House where he makes what in my submission is statements of principle which apply equally here and he starts by saying "it is important in my opinion to keep in mind that limitation defences are creatures of statute. The expression statute barred makes the point. And in prescribing the

conditions for the barring of an action on account of the lapse of time before it's commencement, Parliament has had to strike a balance between the interest of claimants and the interests of defendants. It is a hardship and in a sense an injustice to a claimant with a good cause of action for damages to which let it be assumed there is no defence on the merits. To be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought". It then goes on to then state what the policy behind the Limitation Act is and then goes on, and importantly in my submission to say, "each of the various Statutes of Limitation that over the years Parliament has enacted, starting with the Limitation Act 1623 and coming down to the 1980 Act, represents Parliament's attempt to strike a balance between these irreconcilable interests, both legitimate. It is the task of the judiciary to identify from the statutory language and the purpose of each amending enactment the balance that that enactment has endeavoured to strike and to apply the enactment accordingly. It is emphatically not the function of the Judges to try to strike their own balance whether as a response to the apparent merits of a particular case or otherwise", and in my submission there's a statement of principle as to how the Courts should approach the Statute of Limitations, that is the principle which should be adopted by this Court. And if we look to the House of Lords decision in *Cartledge*, what the House was saying there is that these rules about how the Court in terms of the common law decides when a cause of action has accrued are so well established

12.32pm TRANSMISSION STOPPED

Luncheon Adjournment

2.15pm Case Resumed

O'Callahan Thank you. Your Honours as far as my learned friend Mr Taylor's address with, and I perceive this to be most of his address, dealt with the difficulties that arise in his submission on applying the reasonable discoverability idea or a concept of knowledge to elements of the cause of action, Your Honours it is my submission that those points that were made by my learned friend are quite unfair to the submissions I've advanced. I say they're unfair because I have endeavoured to clearly put my case on the basis that all I ask Your Honours to do is to impose a rule that delays the existing law to the point in time where those facts that are necessary under the existing law on whatever cause of action one is dealing with are postponed until they're known. Now I would readily accept that in attempting to define when a cause of action accrues insofar as the law has had to do that to date, one encounters difficulties along the way and the difficulties associated with cases such as *Gilbert and Shanahan* and other types of cases where there's

potential liability or potential loss, trying to categorise it as a present obligation or a contingent obligation, whether that's relevant, all those sorts of considerations, I'm not suggesting that Your Honours' decision if you find for the case I argue would in anyway effect those things and those inquiries are going to have to be had anyway. What I'm suggesting to Your Honours does not affect them and in fact sometimes as my learned friend has demonstrated by the reference to the *Haward* decision, when the legislation comes in and creates an alternative scheme by legislation, that has sometimes given rise to some of these interpretative difficulties, but that depends on the precise legislation and in many instances the legislation goes much further than what I propose Your Honours should. I simply propose that Your Honours rule on a postponement of the commencement of the time running for want of knowledge, and it is in my submission knowledge of facts and those facts that establish the elements of the cause of action. It's not knowledge of the elements, because that can often imply questions of legal consequence or matters of that nature and Your Honours will note from the British Columbia Statutes that was referred to in *Kamploops*, the 1975 Statute in British Columbia actually goes so far as to specifically address knowledge of legal consequences in particular ways. And that's a legislative decision to do that.

Henry J I think I might has mis-stated your position on that Mr O'Callahan and on reflection I can see why too. The matters I was talking about there were really questions of law as to whether there had been a breach of duty and so on which the claimant is assumed to know.

O'Callahan Yes, now if someone was to say to a Court in future that those matters are worthy of address, that would be a matter for another case. It's not what I'm suggesting in this case and it's not necessary for the result I propose in this case. So unless Your Honours have any questions of me on that particular point I would like to move on to the other aspects of my reply.

Gault J I just have a query you might be able to help me with Mr O'Callahan. Mr Taylor made reference almost in passing to us to a specific Limitation provision in the Securities Act. I think he said s.37(a) and I had a quick look over the luncheon adjournment just to see if I could clarify my mind what he was talking about and there is a ss.7 I think that seems still current which appears in respect of invalid allotments to impose a delayed discovery regime. Now does that have any relevance to say your first cause of action here?

Taylor Sir I think that may have been Mr Jagose that mentioned that.

Gault J Well sorry Mr Taylor if I've accused you of something you didn't do.

O'Callahan Your Honours I'm just trying to locate the materials

Gault J As I understand it, if there is a specific provision in the statute then the Limitation Act itself doesn't apply.

O'Callahan Yes well that would be correct. I'll get the materials but my recollection is that section

Gault J Well you can come back to it, it may be totally irrelevant, but I just tried to track it down

Tipping J Subsection 7.

O'Callahan Of 37(A).

Blanchard J Capital A 7.

Gault J Now I couldn't find it on the machine, I had to go to the book.

Tipping J I've double A. I couldn't find 37 single capital A.

O'Callahan Yes, it's in this bundle that my learned friend produced in support of his appeal yesterday. There is tab 2 which contains some photocopies of the reprinted statute volume and there is 37(A) but we don't seem to have in that lot the ss.7 because it seems to have been over-copied with the

Gault J Yes but there's a hell of a lot of amendments but that subsection seems to have survived.

O'Callahan Yes, it may be that I haven't looked at that in any detail because I have treated 37(A) as not being relevant to the present cause of action because it's in respect of voidable the regular allotments rather than those in s.37 which are automatically void. So until I see it I'm not sure that I've considered it to be relevant.

Gault J Well that may be an explanation.

Tipping J The electronic goes straight from 37 to 37 double A. Keep going.

O'Callahan Right, it may be that 37(A) has been repealed and replaced as being numerous amendments but I'm not sure. Well perhaps, I don't know if we can come back to that at some stage this afternoon

Gault J But nonetheless it does perhaps indicate that in a Securities Act context discoverability has not been seen as wholly impracticable.

O'Callahan Yes, well there may be some support for my general submission to be found in that. Regrettably I haven't turned my mind to it Your Honour.

Gault J Yes thank you.

Tipping J Well here we are.

O'Callahan Does Your Honour have it?

Tipping J This is voidable irregular allotments as opposed to void irregular allotments.

O'Callahan Yes, does Your Honour have access to that?

Tipping J I've got it up on the screen now, taking Mr Jagose's very good advice to keep going almost indefinitely.

O'Callahan Alright, well I've asked Miss Smith to see if she can obtain that for me so maybe I'll come back to that. Now Your Honour Justice Tipping indicated during the address of my learned friend Mr Jagose that Your Honour was particularly interested in s.28 in the context of the whole Act. Now although I didn't go through this with Your Honours in my oral submissions, I did in my written submissions make some points about, or observations about the terminology throughout the Act and if Your Honours have my written submissions

Tipping J Yes I have read them thank you.

O'Callahan It particularly begins at para.18 on page 8 and there I note that 'some limitation periods are prescribed by the words "the date on which the right of action accrued" as opposed to when the cause of action accrued.

Tipping J You will see that there is a provision about that in the interpretation section which in effect equates them – well equates them perhaps not absolutely across the board but practically equates them. It's in s.2 of the Limitation Act right towards the end from memory.

O'Callahan I see, yes alright well that perhaps answers our point 'the right of action should include references to a cause of action and to a right to receive …'. Well that's perhaps the answer to that distinction. And I note that there is a number of sections in there and I've given the list where it appears that the language is fairly obviously occurrence based language.

Tipping J So you accept in some circumstances as you've identified that it's occurrence based?

O'Callahan Yes, yes, in terms of the language used.

Tipping J And what do you suggest is the distinction? How is the legislature signalling the difference between occurrence based and knowledge based?

O'Callahan Well that goes back to the ability semantically, well the uncertainty semantically over the term 'accrued' or other language such as arose.

Tipping J Well if 'accrued' is capable of and does in some places represent occurrence then how is one to determine when Parliament meant it to be other than occurrence?

O'Callahan Well those sections that are clearly in my submission occurrence based don't use the language of accrual or if they do it they do it with a deeming provision.

Tipping J Ah, a deeming

O'Callahan Yes, in the sense that it's stipulated what has to occur before the limitation period will begin to run.

Tipping J So it's contextual?

O'Callahan Yes, and moving on from that at para.22 of the written submissions, I note that although I've accepted that s.28 would be redundant in effect in respect, or at least (a) perhaps there might be some matters in which (b) wouldn't be redundant as has been discussed, but it would be redundant at least in respect of 28(A) on the s.4 sub.1 matters. There are certain sections of the Limitation Act to which the reasonable discoverability doctrine may not necessarily, well I'm not suggesting it apply to them, and would nonetheless be subject to the s.28 rule. Now these don't represent the great run of cases but they are some cases, some limitation periods that would still provide a role for s.28 and I listed them there in para.22 of my written submissions.

Blanchard J Are you going to take us to them?

O'Callahan I can do that.

Blanchard J I'm just getting it up on the screen.

O'Callahan The first is s.4, sub.2, which says 'that an account shall not be brought

Blanchard J Just a moment, this isn't very easy to navigate around.

O'Callahan I do have the Limitation Act in the bundle if that's of any assistance to you.

Blanchard J The whole Act?

O'Callahan The whole Act. It's at tab 23, it's in the blue bundle, tab 23.

Tipping J You're talking about 4, sub 2 are you?

O'Callahan 4, sub 2. Well I might have to

Tipping J Why would it not apply if the matter was concealed by fraud?

O'Callahan What I'm suggesting is that if the term 'a cause of action accrued' is interpreted in the way I suggest, it doesn't make s.28 redundant in respect of 4, sub 2, that's the point.

Blanchard J Would that involve giving a different meaning to 'which arose'?

O'Callahan It would and

Blanchard J Than the meaning that you gave accrue?

O'Callahan Yes it would and perhaps that particular reference fails for that reason, but there are others.

Blanchard J What's your best one?

O'Callahan Well look at 4 sub.6 if Your Honours. 'An action to have any will of which probate has been granted, letters of administration etc, shall not be brought after the expiration of 12 years from the date of the granting of the probate or letters of administration'. You see s.28 is wide in its language. It says

Tipping J What if the granting of probate was kept concealed fraudulently from the potential plaintiff?

O'Callahan Yes.

Tipping J Are you saying that wouldn't enable the plaintiff to extend the 12 years?

O'Callahan Oh yes it would, it would and so what I'm saying is that that is a section of the Limitation Act that is not affected by my contention about the interpretation of when cause of action is accrued.

Henry J But wouldn't that be a matter of public record, the date of the grant?

O'Callahan Well it may depend on the particular facts of the case as to whether the s.28 criteria is met but my point is for present purposes

Henry J I'm just trying to see how 28 would come into play if the grant was a matter of public record because the claimant would have imputed knowledge of it.

Tipping J It wouldn't be the concealment of the cause of action. The cause of action would be whatever it was was said to officiate the will.

O'Callahan Well I think on that grant to officiate the will, the will needs to have been granted and taken into probate so it's a necessary

Tipping J But you've got to have concealed the cause of action before you can get the time extended.

O'Callahan The right of action.

Tipping J Alright, the right of action.

O'Callahan Is concealed by the fraud of any such person. The period of limitation shall not begin to run. If the granting of the probate is in peculiar circumstances actually concealed from the person perhaps by somebody who has some form of influence over an other and in the peculiar circumstances of a particular case

Blanchard J But if that could apply surely it could equally be the case that you can have a situation where there wasn't deliberate concealment but the person who wants to bring the action simply didn't know that these things had happened. Maybe they were living on the other side of the world.

O'Callahan Yes. Well my contention in this case is the *Searle* doctrine of applying it to the words when the cause of action accrues in s.4. I need not for the present case say that that is a general doctrine of interpretation that must be applied to all words no matter how clear it seems to be that they are occurrence based, like the Supreme Court of Canada in *Peixeiro* said it's a general doctrine of judicial interpretation and we need to apply it, are quite keen to apply it

Tipping J Well this is a deemed accrual on the date of probate with 12 years to move in effect. They haven't worded it that way but that's the effect of it isn't it?

O'Callahan Yes, and my point is that my formulation of the reasonable discoverability doctrine as a point interpretation won't affect s.4, sub.6 and therefore it wouldn't render the s.28 redundant. And then s.7, which is the right actions to recover land, well maybe that doesn't apply.

Tipping J I would have thought that one was against you.

O'Callahan Yes, yes, it is. Yes I accept 7 and 7A, I'll strike them off my list.

Tipping J Why cross those out, I'd have them specially marked Mr O'Callahan.

O'Callahan Well I only need one I suppose

Tipping J Fair enough.

O'Callahan Perhaps I wasn't careful enough in putting them into this passage. 14 seems to be right because there's a deemed accrual which seems to

occurrence based. That's the contribution point and once again if that was (a) if there was room for **..2.39.27 ??** circumstances for s.28 to apply to it that would remain a use for s.28.

Tipping J Are you acknowledging that in the case of deemed accruals there can be no extension by dent of the reasonable discoverability doctrine?

O'Callahan Well I put it like this. To succeed on the point I wish to make I don't have to say that it applies to the deemed accrual provisions and it would not be against principle to say that it doesn't apply to the deemed

Blanchard J But the question is whether logically if it applies to one it would apply to the other, and what we're looking for, or you're looking for are sections where you don't have that sort of logical correlation.

O'Callahan Yes.

Tipping J Are you feeling unable to answer the question that I put to you in the terms in which it was asked? I'm not insisting, I'm just

Blanchard J He was busy answering my question, sorry.

Tipping J Well I want to make quite clear what your actual position is about these deemed accruals.

O'Callahan Alright, my position is that it's not necessary to resolve the present case to decide that and it's not necessarily against principle to say that on these cases of deemed accrual where the specific events are set out to say that reasonable discoverability can't apply to those.

Blanchard J Well I've got to say I don't find that a satisfactory answer. If we're looking for work for s.28 to do, merely because you say well you don't need to decide it now, but that doesn't solve that problem.

O'Callahan No it doesn't, I think Your Honour with respect is correct. If I'm to make the point that there is work to do for s.28 then I'll have to be stronger about that.

Tipping J You have to say haven't you that this s.28 can bite on deemed accrual?

O'Callahan On deemed accruals, yes. I'll come back to that on s.14 in a moment but I will observe first of all that s.4 sub.6 isn't subject to that problem because it doesn't use the language of deemed accrual, it just simply sets out when the action will arise, or when the limitation period will start to run.

Tipping J I have to suggest that I don't think you are going to get very far in my mind by showing the odd circumstance in which s.28 has some work to do. I'm looking at this on a more broad brush basis of what Parliament

was actually about in this Act when it used the expression 'accrual' or 'cause of action accruing'. The fact that you may be able to point to one or two obstruse examples for me wouldn't really deflect the point.

O'Callahan If I can return to that in just a moment. Obviously that's an important concern to address, but just on this question of my list in s.22, s.19, the action to recover rents. Curiously that's something which the British Columbian Statutes I referred you to and the Nova Scotia Statute, which I now have and I'll hand it up in a minute, that's the only type of thing in which that actually provides for a fraud exception, for a fraudulent concealment exception. In this Act there is no specific provision for that, to the extent there's a provision that's part of s.28, so

Henry J What could be the reason for not applying the discoverability proposition to 19?

O'Callahan The language is the date on which the arrears became due.

Blanchard J Legally due.

Henry J And also it covers damages. The legislature drawing a sort of distinction.

O'Callahan Well the right to levy distraint and the right to recover damages in respect of rent arise when the arrears become due. It's the assumption in the legislation.

Blanchard J Which means when they're legally due, yes. So it's a precise point. I think the damages, I'd need to look at this, but I think the damages are a surrogate for the rent.

Tipping J But the idea to put potential of concealment of fraud in that situation is almost farcical.

O'Callahan Well certainly it's not going to be ordinary, certainly not, but if there was some aspect of the case which made the arrears become legally due that in peculiar circumstances meant that it was concealed by fraud, then it might be that there was some substantial breach of the lease that made their rent due in some particular way depending on the terms of the lease and that that breach was concealed by fraud, or something of that nature. And certainly I'm not suggesting that these types of situations that might still bite for s.28 are going to often arise, the point I'm addressing is whether s.28 is rendered completely useless in the context of the Act or completely redundant in my submission it's not.

Henry J I think there's still the subsidiary question as to whether there is any logical reason for not applying the same doctrine to these causes of

action, simply because they're using different words from the time when the cause of action accrues, arose, or some other formula.

O'Callahan I accept that the language differentiated between the language of a rise and accrue is not an easy distinction to make, however it is one that in my submission can be made on a principle basis in relation to a provision such as s.19 because it's defining the event with some precision, with language that has precise meaning.

Tipping J Are we going to go and look at s.20?

O'Callahan Yes, I'm

Tipping J Because there is

O'Callahan Because I've made some mistakes through this I'm just double-checking.

Tipping J Well I have to say that s.20, sub.1 referring as it does to when the right to receive the money accrued seems to me to be a bit of a problem from your point of view, both specific and general.

O'Callahan Yes sub.1 may have been subject to that criticism.

Blanchard J It muddies the water for you on 19 because it's hard to draw a distinction isn't it?

O'Callahan Well in s.20. sub.1 that is an action to recover any principal sum of money secured by a mortgage or other charge, the right to receive rents or other subsidiary matters in respect of a lease isn't that and to recover proceeds of the sale of land now that doesn't muddy s.19.

Tipping J It's the concept of the right to receive the money accruing, that is the significant one in my view.

Blandard J Yes, that's what I meant.

O'Callahan Yes, but that language isn't used in 19.

Tipping J No, no, I'm not worried about 19.

Blanchard J No but it's a bit hard to see why there should be a distinction.

O'Callahan Well they could have said when the money was due or when the money was payable.

Blanchard J They could have but they used the term 'accrued' in a context where you wouldn't expect them to be intending any difference between the two sections.

O'Callahan Well that's probably a fair observation and that may demonstrate the submission I made about the ad hoc nature of these provisions.

Blanchard J Yes, yes.

Tipping J Well that's the only explanation because the next subsection, ss.2 talks about the right to foreclose accruing.

O'Callahan Yes.

Tipping J And the next one the proviso is it deemed accrual.

O'Callahan Or shall not be deemed to accrue.

Tipping J Not deeming, yes, so maybe the more we go on the better it gets for you as it sort of all over the place.

O'Callahan Well hence my submission about ad hoc rules. And then 'the became due' language is used in sub.4, **'**arrears of interest ', expiration of six years and the date on which the interest became due and some provisos. And I'm going to strike 22 from my list.

Tipping J You've not addressed 21.

Blanchard J Well just before you strike 22 it gives you more problems with 19 because in the one section you get accrued and then you get became due without any I think logical distinction between the two situations.

O'Callahan The right to receive the share or interest accrued yet no action to recover arrears of interest in respect of legacy should be brought after the expiration of six years and the date on which the interest became due and that's the same language used with interest in s.20.

Blanchard J Yes it is but it's hard to see that there would be a distinction intended between that language. It's just that one does tend to talk about interest becoming due in ordinary speech and I suspect the drafter's just done that. Interestingly all of these sections seem to have come into the British legislation and then into ours at the same time presumably drafted by the same hand which tends to suggest that drafter didn't see these distinctions if they're there to be made.

O'Callahan Well

Tipping J I think there is some significance and sad to say against you from 21 where you get your exceptions and then the section talks more generally about the six year period for recovering trust property and so on, not brought for six years from the date from the date on which the right of action accrued, and because of the exception

O'Callahan Well that intertwines a little bit with some of these previous sections, in those few sections prior to that about recovery of lands and recovery of property in respect of that sort of thing and they contains some exceptions in respect of trust property, like the sale of land not being proceeds of sale of trust property, that sort of thing, and so s.21 deals with the question of trust property, so on trust property there is

Tipping J But I think in relation to s.21(2) there's a decision of the Court of Appeal on which I sat called *Johns* where we construed that the concept of accruing there as being in a current state so I'd have to go back and re-read it, but be that as it may if we're just surveying the Act as a whole I don't think that one could be put into your helpful pile.

O'Callahan No I didn't suggest it could, no.

Tipping J No, for very good reason I suspect.

O'Callahan Well it just doesn't raise the point of survival of s.28 because it has its own provisions.

Tipping J Well I'm looking at this survey for two reasons - survival of 28 and general structure in conceptual arrangement.

O'Callahan Yes, so I suppose on an intellectual basis one of the statutory interpretation points is whether the legislature has been so sufficiently clear about the use of the phrase 'when the cause of action accrued' that there's no choice for the Court other than to apply the occurrence based test, because if that's the case, if it's so clear then it's my submission consistent with everything else I've said, that it would not be a principled decision to imply into that the reasonable discoverability point as I've submitted it.

Henry J Mr O'Callahan can you just come back for a moment to the general proposition you're promoting. Is it what you've got in para.1 of the submissions?

O'Callahan Yes and I should explain to Your Honour lest there be any doubt about it what is meant by 'facts necessary to found the cause of action'.

Henry J I think I understand that, it's just why you limit the proposition to s.4 as opposed to the Act in its totality where it refers to the accrual of a cause of action?

O'Callahan Well

Henry J And was it logical to draw a distinction?

O'Callahan No, it's not necessarily logical. I've put it that way because this particular appeal concerns s.4.

Henry J If we adopt that as a general proposition must it not apply to wherever the Act uses the phrase 'accrual'.

O'Callahan Well a cause of action accruing or under the interpretative provisions 'a right of action accruing', yes, yes it must as a matter of principle. Unless there's some particular feature of a particular section that provides another interpretative aid in the circumstances to show that the legislature had a clear meaning for it in a particular context. It's the caveat to that point.

Henry J Thank you.

O'Callahan And hence my significant limitation of the survey initially to the approaches to the *Searle* reasoning and the approaches to the type of causes of actions set out in s.4 sub.1 because they have their own context in the legislation.

Tipping J When s.28(b) talks of the right of action being concealed, it implies doesn't it, that the right of action already exists?

O'Callahan Well it might be interpreted that way or it might just be seen as it being very very difficult to draft the concept differently.

Tipping J Can you conceal something that doesn't exist?

O'Callahan Well if there's a natural openness in the language it may be that it has in that context a clear meaning and in that context the clear meaning might be that the things giving rise to the right are in existence yet concealed.

Tipping J But if it's not yet discoverable under your formulation can it be concealed?

O'Callahan Well yes it can because the person concealing it is concealing those facts. This difficulty in my submission arises because of the natural openness of the words 'accrual' and that concept and accrual as a cause of action in particular, and if two interpretations are open then specific context can point one way or the other or just leave it open.

Tipping J But surely the right of action referred to in 28(b) is an accrued right of action, because it's not yet accrued, you don't need an extension on account of concealment.

O'Callahan Well it may be that the drafters of that provision didn't actually turn their minds specifically to the point because as I demonstrated earlier, the development of the law had got to the point where substantially the law was saying that the bar began to operate on the occurrence based idea subject to the rules of equity fashioning exception and then a common law coming in with that as well in *Lynn and Bamber*, and then the legislature in my submission chose to codify, well to put in a statute

clearly that rule that had been developed by the law and didn't necessarily close off the idea of the law developing its responses to the concept of a cause of action accruing. And that goes back to the point of whether the law is free to develop in that area and move essentially beyond the statute or whether it can be said that this legislation is a clear line in the sand by the drafters of the legislation, and for the reasons I set out in my initial address, I'm submitting that Your Honours should feel able to develop the law as the Canadians did.

Tipping J What do you say as to the concept of postponement in the heading of s.28? 'If it had not yet accrued you would not need to postpone the limitation period or the starting of it running'.

O'Callahan Yes it goes on to say 'where in the case of any action for which a period of limitation is prescribed by this Act', so where we get to the prescription via this act is a period of limitation that might arise under s.4, sub.1, whatever that is and whatever that is or whatever any other period prescribed in the Act is, the period of limitation shall not begin to run. So the point I'm suggesting to Your Honours is that the Court is free to interpret and work out when it is that the cause of action accrues and the Court is free to develop its thinking on that. And so in the present case it simply isn't postponed because if you apply the doctrine I'm suggesting, it may be that the postponement under this is, well although the margin **..3.03.59 ??** the language of the section doesn't use the word postponement.

Tipping J No, no.

O'Callahan So it says 'shall not begin to run' so certainly pursuant to s.28, 'it shall not begin to run but it may not have begun to run anyway'.

Tipping J You see there's also the question of mistake which is hardly consistent with an overlay of reasonable discoverability, because if you're mistaken then I suppose there is some element of the reasonableness but it just doesn't seem consistent with the thought that cause of action otherwise includes the idea of discoverability.

O'Callahan Well in respect of mistake, it's simply a cause of action and if

Tipping J If you're mistaken about something you don't know the true position.

Blanchard J Well you could be in a situation of knowing the true position but not necessarily being mistaken.

Tipping J I suppose that's true. You've got to have a different view from what is the true view, yes, but that means that you're not aware, if you like, that you have a cause of action because you may be, no perhaps no, maybe not. I think I'm over-complicating this

Blanchard J I think this is the same point over and over again in different dressing.

Tipping J I think it is.

O'Callahan Now I just wanted to readdress in reply the position of my learned friend Mr Jagose talked about the defendants, where a defendant isn't to blame for the lack of knowledge. He said well if the defendant's to blame for the lack of knowledge then it would invoke s.28 and I'm accepting for present purposes that's correct in terms of if blame is meant something which would invoke the principles of actual equitable form but that leaves situations where nonetheless there is an imbalance of information and he says, my learned friend's submission on that issue was that the policy is to protect the position of a defendant against stale litigation because otherwise the stale litigation can be unjust and that there ought to be some protection of that person because they're blameless in respect to the lack of knowledge. However that assumes that it's alright in terms of that sort of policy weighing to accept the imbalance of information and essentially resolve it in favour of the party that has control of the information and although there may not be a duty at least in so far as the law presently has developed, there may not in all cases be a duty, a positive duty to disclose that information, nonetheless in terms of policy why, I pose the question, why is it unjust to the defendant to allow them to on that information from a limitation perspective?

Henry J Because that was one of the reasons for the Limitation Act.

O'Callahan Yes well the discussion of that back to *A'Court and Cross,* which I've got at page 1 of my bundle. This is the famous passage by Chief Justice Best where he says 'it is as I have heard it often called by great Judges an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of debt which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it'. All that assumes that the way of putting it like that doesn't recognise the situation of imbalance of information, otherwise if you were recognising the balance of information it would not in my submission have been possible for the Judge there to say that the legislature thought that if a demand was not attempted to be enforced for six years some good excuse for the non-payment might be presumed and took away the legal power of recovering it. And that's why the legislative policy in my submission is directed to ensuring that plaintiffs don't delay because then you can essentially effect the conscience of the plaintiff – get on with it, don't hold something like hanging over the Sword of Damocles hanging over defendants, get on with it, but where there's an imbalance of information that's just not practically possible and so making the plaintiff get on with it from the time at which the plaintiff is able to do something about it such as

having the knowledge about it is a proper response to that in a policy basis.

Henry J Yes it's just that I've never understood that to be the driving force, the only driving force behind the limitation principles, if one was to guard against stale claims and the injustice which that may cause a defendant. Even the defendant who has committed a wrong.

O'Callahan Well there's the public and the private. The private is what I've just addressed which is Sword of Damocles hanging over a defendant, the particular injustice that it might cause the defendant having stale claims etc, that's the private right and in my submission the private right can be resolved in a particular. If you take the case of the blamelessly ignorant plaintiff by reference to the counter-policy that I've just expressed which is where the imbalance of information might resolve that. On a more public basis which is more in a generality that we don't want a legal system which commits people to use it to bring stale claims. We don't want the Courts clogged up and we don't want the Courts to have the difficulty of dealing with matters that are stale and old and that we're drawing some line across the generality

Henry J It's not just to protect the Courts from difficulty, it's to protect the administration of justice for being in a situation in which it can't tell the difference between genuine and spurious claims because the evidence has deteriorated.

O'Callahan Thank you Your Honour because that's what I meant, thank you, that's exactly the point I meant to make by that reference and that more public concern is in my submission properly responded to by trying to make some assessment of the extent to which this rule that I propose will effect that overall situation and if it is to have the rather sort of narrower and more rare effect that I say it will, that's one factor in it and the other side of it is simply balancing the right of the plaintiff and throwing that into the mix as well so that's my response to His Honour Justice Henry's query. Your Honours will have appreciated that my submission that *Searle* is right remains and so I shan't respond in any detail what my learned friend said about that and to reiterate, and I haven't deterred from the proposition that's against principle to say that *Searle* can remain but not apply the doctrine more generally. Unless Your Honours have any specific queries on that arising out of my learned friend's submissions I just wish to rely on what I said in my earlier address. So unless there's any questions those are my submissions.

Blanchard J Yes, thank you Mr O'Callahan. I'm very grateful to counsel for the quality of the submissions in this case which is of some difficulty. We will take time to reserve our decision.

O'Callahan Excuse me Your Honour, thank you, I did obtain the Nova Scotia statute over lunchtime, if I could just hand that up.

Blanchard J If you could hand that out through the Registrar.

O'Callahan And it takes us no further than the British Columbia statutes.

Blanchard J Thank you.

3.15pm Court adjourned