

Negligent professional advice: a once-only breach

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THE CAPITA DECISION.

1. The Court of Appeal has recently reconsidered the issue of continuing liability in the context of breach of contract. If a professional gives incorrect advice, the failure to correct it every day thereafter while his retainer remains in force does not give rise to a fresh cause of action; and the fact that the client continues to seek advice from that professional does not usually alter the position: Capita (Banstead 2011) Ltd v. RFIB Group Ltd [2015] EWCA Civ 310.

3PB'S ANALYSIS.

2. Continuing breach is an area of law that has suffered from a level of uncertainty following decisions on similar facts leading to differing judgments. Its relevance normally relates to whether a claim has been brought within time, with Claimants generally claiming that breaches caused by omission rather than commission are continuing until remedied, and Defendants claiming that the same breach is a discrete event.
3. **Previous case law.** Midland Bank Trust Co v. Hett Stubbs & Kemp [1979] Ch 384, a decision of Oliver J, related to a failure by a family solicitor to register a son's 10 year option. The judge held that the solicitor was under a continuing duty to register the option every day after the deed granting the option had been executed until the 10 years had elapsed. His judgment was based on the fact that the son continued to consult the solicitors about exercising the option, and that the solicitors' file was never closed.
4. In Bell v. Peter Browne & Co [1990] 2 QB 495, a Court of Appeal case, the solicitors of a divorcing husband failed to register his agreed one sixth interest in the matrimonial house. As a result, when the house was sold, the husband received nothing. The Court of Appeal held that the husband had a single cause of action which accrued at the time of the solicitor's failure, not a continuing cause of action that accrued every day. However, the Court of Appeal failed to expressly state that Midland Bank was wrongly decided, with Nicholls LJ (with whom Mustill LJ agreed) instead distinguishing the two on the basis that in

Bell, the solicitors had no further contact with the husband, as opposed to the son in Midland Bank Trust.

5. Later cases, including the Court of Appeal case of Nouri v. Marvi [2011] PNLR 100 and Maharaj v. Johnson [2015] UKPC 28 followed Bell rather than Midland Bank Trust.
6. **The Facts in Capita.** In the case before the Court of Appeal in October 2015, the dispute was between the purchaser (Capita) and vendor (RFIB) of shares in Capita Hartshead Benefit Consultants ('CHBC'), which, when named Robert Fleming Benefit Consultants, provided negligent pension advice and support to the Queen Elizabeth's Foundation for Disabled People ('QEF') through its employee, a Mr Le Cras.
7. In essence, the trustees, acting in consultation with Mr Le Cras, announced various amendments to its pension scheme between April 2000 and April 2004 with the objective of reducing its liabilities to its members and the cost of funding them. However, Mr Le Cras failed to implement formal amendments to the scheme, which meant that most of the amendments did not take effect. The amendments were eventually made in July 2008, and did not have retrospective effect.
8. The shares in CHBC were transferred on 30 April 2004; the share purchase agreement contained an indemnity clause whereby the vendor agreed to indemnify the purchaser for any liabilities, costs, claims, demands or expenses incurred by inter alia any services supplied or advice provided by CHBC prior to the transfer date.
9. Accordingly, the argument relating to continuing breach was whether CHBC through Mr Le Cras had been in continuing breach until the breaches were remedied in July 2008, or whether he had committed a series of discrete breaches that had all occurred prior to the transfer date.
10. **The decision at first instance.** Popplewell J. decided that because CHBC had a continuing retainer with QEF for a yearly retainer, and because Mr Le Cras remained in contact with QEF after the transfer date, his conduct fell on the 'Midland Bank side of the line', and there was a continuing breach until remedied.

11. **The Court of Appeal.** Giving the first judgment in the Court of Appeal, Longmore L.J. considered whether the distinction between Midland Bank and Bell, namely the file being kept open and further advice being sought and obtained, was a distinction of principle or incidental fact. He held it was an incidental fact:

19... The obtaining and receiving advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made.

12. He accordingly found that as there was nothing to distinguish the facts of Midland Bank from Bell, Bell was to be preferred on the basis that it was a judgment of the Court of Appeal. He therefore concluded that Popplewell J. had been wrong to find that a breach had occurred every day until the breaches were rectified in July 2008 and stated:

23... A failure to correct previous acts of negligence is not, to my mind, concurrently causative of losses caused by the original acts of negligence.

13. Henderson J. agreed:

48... CHBC was under a contractual duty to ensure that amendments were made in due time, but it failed to fulfil that duty. CHBC was therefore in breach of contract, at the latest when each of the specified dates for performance arrived and nothing effective had been done.

49. Those breaches remained unremedied, but an unremedied breach of contract is just that: a breach of contract which has not been remedied. In the normal way, it is impossible to construct a continuing contractual obligation, in the sense of one which gives rise to a fresh breach on a daily basis, from the mere failure to perform the original obligation in due time.

14. In a powerful dissenting judgment, Gloster L.J. agreed with Popplewell J. that the contract included an ongoing obligation to 'take reasonable steps to ensure that the Scheme in force adequately reflected the Trustees' decisions from time to time and that they were provided with any legal advice which CHBC had obtained and for

which they and/or QEF were obliged to pay'. She accordingly found that as a matter of construction, there was a continuing breach of contract.

15. In respect of the divide between Midland Bank and Bell, Gloster L.J. stated that it was irrelevant whether the former could be distinguished from the latter either on its facts or on a principled basis for the purposes of the appeal before her.

IMPACT OF THE DECISION

16. The Court of Appeal appears to have definitively disapproved of Midland Bank. It follows that unless a specific continuing contractual duty can be derived from the contract, it is unlikely that a breach of contract will be considered to be continuing simply because it could be put right by the party in breach.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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