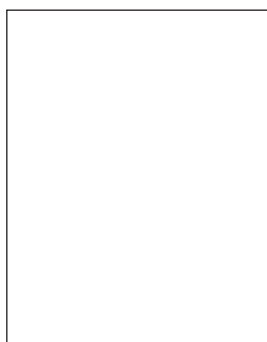


Trust me

Shantanu Majumdar reviews the law relating to fiduciary duties and limitation



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It is a striking (and unsatisfactory) fact that the word 'fiduciary' is mentioned nowhere in the Limitation Act 1980 and the applicable law must be extrapolated, where possible, principally from the following sections of the Act:

- Section 21 – trust property.
- Section 36 – equitable jurisdiction (and remedies).
- Section 23 – actions for an account.

And, where relevant, s2 (tort) and s5 (contract).

Common to all fiduciary relationships is an undertaking to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence. A distinction must be drawn between:

- breaches of *fiduciary* duty by fiduciaries. These are peculiar to fiduciaries and

attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory (*per* Millett LJ in *Bristol and West Building Society v Mothew* [1998]).

Later in this now classic exposition, Millett LJ said that:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a

position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. [page 18]

- breaches of other duties by fiduciaries.

Most duties (fiduciary or otherwise) which are owed by fiduciaries will be subject to a six-year limitation period but the route by which this conclusion is reached depends upon the duty in question.

Statutory limitation periods applied directly or by analogy

The simplest case is of a fiduciary that is sued in tort and/or contract: ss2 and 5 respectively apply directly.

These sections will also apply where the breach in question is pleaded as a breach of fiduciary duty, eg as breach of a duty of care that arises in equity or to account to a principal. This is because s36 provides that various provisions of the Act including ss2 and 5 do not apply:

to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

The application of this somewhat convoluted historical test will sometimes require a trawl through the pre-1940 authorities and in *P&O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2007] it was said that:

'The distinct trend is to take a fairly generous approach to applying the limitation act by analogy but, nonetheless, the Court of Appeal in the *P&O* case decided that no statutory limitation period applies to a claim for specific performance.'

... if a statutory limitation provision, properly interpreted, applies to the claim under consideration, equity will apply it in obedience to the statute, as indeed it must. However, even if the limitation period does not apply because the claim is for an exclusively equitable remedy, the court will nonetheless apply it by analogy if the remedy in equity is 'correspondent to the remedy at law'. In other words, where the suit in equity corresponds with an action at law a court of equity adopts the statutory rule as its own rule of procedure. (Per Moore-Bick LJ [at para 38])

This question of correspondence has been examined in a number of other modern cases. In particular, in *Coulthard v Disco Mix Club Ltd* [1999] the claimant sought to rely on s36 in order to defeat a limitation defence by claiming damages for alleged breaches of fiduciary duty in respect of under-accounting but it was held that no distinction so far as limitation was concerned could be made between an action for damages for fraud at common law and its counterpart in equity on the same facts.

This decision was applied in *Cia de Seguros Imperio v Heath (REBX) Ltd* [1999] where common law claims for breaches of contract and duty were held to be based on precisely the same factual allegations as a concurrent claim for dishonest breach of fiduciary duty even though the

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Breaches of trust – s21

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engaged. Section 38 of the Act provides that the words 'trust' and 'trustee' have the same meaning as under the Trustee Act 1925. They therefore include implied and constructive trust(ee)s.

In *Paragon Finance plc v DB Thakerar & Co* [1999], CA Millett LJ identified two types of 'constructive' trustee (and therefore trust):



- the first, 'Class 1' (sometimes called 'institutional') includes those who, though not expressly appointed as trustees, have assumed the duties of a trustee as a consequence of a lawful transaction that is independent of, and took place *prior* to the breach of trust, and which is not itself impugned by the claimant.
- the second, 'Class 2' (sometimes called 'remedial') constructive trust arises directly from the unlawful

and those whose liability in equity was occasioned by the acts of which complaint was made. (*Per Millett LJ in Paragon.*)

Section 21(3) provides that:

- (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall

Section 21(3) is qualified by s21(1), which provides that:

- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; *or* [emphasis added]
 - (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

Where the breach of fiduciary duty also constitutes a breach of trust then s21 (Time limit for actions in respect of trust property) is engaged.

transaction which is impugned by the claimant.

The difference is thus between pre-existing status and subsequent remedial response: a Class 1 trustee is a true trustee whereas a Class 2 trustee is not.

A similar distinction is drawn between:

those whose fiduciary obligations preceded the acts complained of

not be brought after the expiration of six years from the date on which the right of action accrued.

This is the default six-year rule applicable to breaches of Class 2 trusts so that Class 2 trustees (or their equivalents) can plead a limitation defence (see *Dubai Aluminium Co Ltd v Salaam* [2003]). Section 21(3) may apply directly or by analogy to fiduciaries depending on the particular facts of the situation.

The Gwembe Valley decision

Quite what these apply to is not as clear as it should be. At paras 90-91 of the 165 paragraph judgment of the Court of Appeal in *Gwembe Valley Development Company Ltd & anor v Koshiy & ors* [2003], Lord Justice Mummery said:

90. For limitation purposes the two classes of trust and/or fiduciary duty are treated differently. The first class of case arising from the breach of a pre-existing duty is, or is treated by analogy as, an action by a beneficiary for breach of trust failing within section 21(1) of the 1980 Act. This means that there is no limitation period for the cases failing within section 21(1)(a) or (b); but that there is a six year limitation period for cases failing within s21(3).

91. In the second class of case s 21 would not apply, but a limitation defence to a claim might be available by analogy with common law claims, such as tort (for example, deceit) or breach of contract, even though the liability is exclusively equitable, as may be the case with breaches of fiduciary duty in the absence of a contract.

A director has responsibilities akin to those of a trustee in the management of the property of the company and applying it on behalf of the company in its interests and those of all of its members (see for example *JJ Harrison v Harrison* [2002]). A claim for an account against a director for the breach of such duties will therefore be subject to s21.

Summary points

- Despite the silence of the Limitation Act, a reasonably coherent limitation regime for fiduciaries has been constructed in the cases.
- Its application requires an analysis of:
 - the nature of the duty breached (fiduciary or non-fiduciary);
 - in some cases the nature of the fiduciary; and
 - the applicability of the sections of the Limitation Act either directly or by correspondence.
- This will almost always yield a six-year limitation period even in most of the cases where the breach amounts to a breach of trust under s21 unless the fiduciary falls within s21(1)(a) or (b).
- Where there is a statutory limitation period then laches or acquiescence may still defeat the claim.
- Where there is a statutory limitation period then this may be suspended in cases of fraud, deliberate concealment or mistake.

In the *Gwembe Valley* case the claim against the defendant director was based upon his having made unauthorised profits rather than that he had disposed of, or received, company property in breach of trust. For this reason the Court of Appeal held that this gave rise to a personal liability to account within (or akin to) a Class 2 trust. On the face of it the claim therefore fell within s21(3) and was therefore subject to a six-year limitation period. However, the judge had found that the defendant had acted dishonestly and the Court of Appeal held that this brought the case within s21(1)(a) (fraud/fraudulent breach of trust) so that no statutory limitation period applied.

The court summarised its conclusions on limitation as follows:

Fiduciary duties and limitation
– summary

111. In the light of those cases, in our view, it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries. The starting assumption should be that a six-year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case-law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act ss 2, 5; see *Seguros*)... By contrast, claims for breach of fiduciary duty, in the special sense explained in *Mothew*, will normally be covered by s 21. The six-year time limit under s 21(3), will apply, directly or by analogy, unless excluded by s 21(1)(a) (fraud) or (b) (class 1 trust).

The lingering question is whether this is quite consistent. At paras 90-1, Mummery LJ had said that s21 does not apply to Class 2 trusts/fiduciary duties. By this he would seem to have meant s21(1) but, even so, if that is correct then the finding that the defendant was a Class 2 trustee would therefore exclude him from 21(1)(a) since dishonesty is, on this view, an additional not alternative requirement for its application.

Laches and acquiescence

In any event, even where no statutory limitation period applies a claim falling under s21 may be defeated by the equitable defences of laches and acquiescence. It has been said that:

... it is important to note the different senses in which the word 'laches' is used. Sometimes it is used as a synonym for 'delay'... Sometimes it is used to describe the lapse of a sufficient period of time to draw the inference that the plaintiff had previously approved of the status quo which, by

his suit, he wishes to disturb... More often, it is used not only in the second sense just mentioned but also to comprehend that degree of delay which when coupled with prejudice to the defendant or third parties, will operate as a defence in equity. (See Meagher, Gummow and Lehane's *Equity, Doctrines and Remedies*, 4th edn (2002) at para 36-50.)

P&O Nedlloyd referred to this passage and expressed the view that, despite the evident lack of consistency in the use of the laches, delay is an essential feature in the relevant decided cases. It should also be noted that in many of these decisions laches has been held to bar the claim in question after the passage of a period of time that is significantly less than the length of most statutory limitation periods but the existence and extent of any prejudice either to the defendant or third parties is a crucial factor.

Fraud, deliberate concealment and mistake

Finally, for the sake of completeness it should be noted that even where a statutory limitation period would otherwise apply there are three situations where it will not. Section 32 of the Limitation Act provides that where:

- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or

could with reasonable diligence have discovered it.

Fraud has to be an essential ingredient of the claim for s32(1)(a) to apply. Deliberate concealment under s32(1)(b) includes 'deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time' (see s32(2)) and mistake under s32(1)(c) includes mistakes of law as well as fact. ■

Bristol and West Building Society v Mothew [1998] Ch 1
Cia de Seguros Imperio v Heath (REBX) Ltd [2001] 1 WLR 112
Coulthard v Disco Mix Club Ltd [1999] 2 All ER 457
Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366
Gwembe Valley Development Company Ltd & anor v Koshiy & ors [2003] EWCA Civ 1048, [2004] 1 BCLC 131
JJ Harrison v. Harrison [2002] BCLC 162
Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400
P&O Nedlloyd BV v Arab Metals Co (The UB Tiger) [2007] 2 All ER (Comm) 401

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