EQUITABLE REMEDIES IN COMMERCIAL LITIGATION:

Concurrent session 1A – Constructive trust

LIMITATION PERIODS, DISHONEST ASSISTANCE, KNOWING RECEIPT AND CONSTRUCTIVE TRUSTS

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England and Wales

The decision of the Supreme Court in Williams v Central Bank of Nigeria

1. Section 21 of the Limitation Act 1980 ("**the 1980 Act**") 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; …
>
> (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 not be brought after the expiration of six years from the date on which the right of action accrued."

2. In *Williams v Central Bank of Nigeria* [2014] A.C. 1189 there were two questions before the Supreme Court:

   (1) Is a stranger to a trust who is liable to account on the grounds of knowing receipt of trust assets and/or on the grounds of dishonest assistance in a breach of trust, a "trustee" for the purposes of section 21(1)(a) of the 1980 Act?

   (2) Does an action "in respect of" any fraud or fraudulent breach of trust under section 21(1)(a) to which the trustee was a party or privy, include an action against a party which is not itself a trustee?

3. The separate nature of these questions was emphasised by Lord Neuberger:

> "Given the rather tangled way in which the law has developed in this area, through both cases and statutes, it is important to bear in mind that these are separate questions, although they are involved in resolving the same issue."[1]

[1] 1211B (at paragraph 40).

4. In *Williams* the claimant, Mr Williams, argued that no statutory limitation period governed his claims against the Central Bank of Nigeria for knowing receipt of trust funds misdirected in fraudulent breach of trust. Mr Williams argued that:

   (1) Dishonest assistants or knowing recipients, who are sometimes said to owe personal liabilities to account "as constructive trustees", were trustees within the meaning of section 21(1)(a) of the 1980 Act.

   (2) If a breach of trust was fraudulent, section 21(1)(a) disapplied the statutory limitation period both (i) to an action against the trustee who was a party to the fraud and (ii) to actions against third parties who incurred ancillary liabilities as dishonest assistants or knowing recipients.

5. These arguments were rejected.

6. The Supreme Court held that the answer to the first question was "No" (Lord Mance dissenting – he thought that a knowing recipient could be a trustee for these purposes). The majority were Lord Sumption, Lord Neuberger, Lord Hughes (who agreed with Lord Sumption and Lord Neuberger) and Lord Clarke (who also "reluctantly" agreed with Lord Sumption and Lord Neuberger).

7. The majority rejected the suggestion that dishonest assistants or knowing recipients were "trustee[s]" for the purposes of section 21(1) of the 1980 Act. This was because section 38(1) of the 1980 Act required "trust" and "trustee" to bear the same meanings as in section 68(1)(17)[2] of the Trustee Act 1925. Although this definition expressly includes "constructive trusts" and "trustees" the majority held:

   (1) that neither dishonest assistants nor knowing recipients, whilst said to be liable to account "as constructive trustees", were "true" trustees – not even constructive trustees; and

   (2) they were not "constructive trustees" within the statutory definition.

[2] This section provides that: '"Trust" does not include the duties incident to an estate conveyed by way of mortgage but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative …".

8. The Supreme Court held that the answer the second question was also "No" (Lord Mance and Lord Clarke dissenting). The Supreme Court held that section 21(1)(a) of the 1980 Act was confined to actions against a trustee who was a party to a fraudulent breach of trust. It did not cover third parties, who were implicated in the frauds, as dishonest assistants or otherwise.

9. Lord Neuberger concluded at paragraphs 118 and 119 that:

> "[118] So far as raising a limitation defence is concerned, this conclusion places dishonest assisters and knowing recipients (i) in the same position as those who are liable in common law for improper and dishonest conduct, and (ii) in a better position than defaulting trustees. The first result seems appropriate: as Millett LJ said in the *Paragon* case at p 414, "there is no case for distinguishing between an action for fraud at common law[3] and its counterpart in equity". As for the second result, it is plainly justifiable, as defaulting trustees have pre-existing fiduciary duties to claimants which dishonest assisters and knowing recipients do not.
>
> [119] Finally, it is right to mention that in some cases of dishonest assistance or knowing receipt, even though the normal six year period may have expired, a claimant may be able to invoke section 32 of the 1980 Act, which postpones the commencement of the six years, in cases "based on the fraud of the defendant", or where the defendant has "deliberately concealed" relevant facts from the claimant."

10. For completeness section 32(1) of the 1980 Act, provides (so far as material):

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) the action is based upon 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; …
>
> 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. References in this subsection to the

[3] Section 2 of the 1980 Act provides: "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

> defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

Observations

11. The decision in *Williams* provides a clear answer to the question as to what limitation period (if any) applies when trust funds have been misdirected in breach of trust, and a trust beneficiary brings proceedings to hold a third party liable for dishonest assistance or knowing receipt.

12. It is therefore a decision to be "welcomed" as it provides "clarity in a difficult area of law"[4].

13. However, some academics are less enthusiastic about the reasoning of the Supreme Court and its potential wider consequences.

14. Dr Stephen Watterson[5] has recently observed in the *Cambridge Law Journal*[6] that:

> "As a limited decision on the limitation rules applicable to dishonest assistants or knowing recipients, the majority's decision seems acceptable. However, there are aspects of the majority's reasoning that are troubling from a wider perspective. In particular, their decision that a knowing recipient is not a "trustee" for the purposes of the Limitation Act 1980 relied heavily on the wider premise that a knowing recipient is not a "trustee" – and not even a constructive trustee – *under the general law*. With respect, that is questionable."

15. Dr Watterson makes the following interesting points. First, when the courts have said that a knowing recipient is "personally liable to account as a constructive trustee", they mean exactly this. This is because:

> "the knowing recipient is fixed with custodial duties that are of the same nature of those voluntarily assumed by express trustees. Furthermore the accounting mechanisms through which the knowing recipient can be made

[4] *Limitation in Equity* LMCLQ (2014) 313-317, Paul S Davies (Associate Professor, Faculty of Law, University of Oxford).
[5] Lecturer, University of Cambridge.
[6] [2014] CLJ 253-256.

liable for performance of his duties, or their breach, are the same as those through which trust beneficiaries can take action against express trustees."[7]

16. Second, this analysis was accepted in *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30, but that decision was not cited in *Williams*. Third, the majority's reasons for concluding that a knowing recipient is not a trustee, are inadequate (and he provides a number of further reasons for this[8]). Fourth, he is concerned that there may be wider implications of downgrading the trusteeship of knowing recipients "for example the courts might miss the possibility that knowing recipients may sometimes owe other custodial duties, in addition to their core restorative duty" and "the status of knowing recipient as a "trustee" may also be important for the liabilities of third parties who subsequently participate in dealings with misdirected trust assets."

17. In the January 2015 edition[9] of the *Law Quarterly Review* James Lee[10] has pointed out that in *Williams*:

> "In the judgments, we find unhappy references to "knowing assistance", despite knowledge having been rejected as the test by Lord Nicholls of Birkenhead in *Royal Brunei Airlines v Tan* [1995] 2 A.C. 378 at 391, and "dishonest receipt" despite dishonesty being rejected as a prerequisite for liability by Nourse L.J. in *BCCI v Akindele* [2001] Ch. 437 at 448. These differences in terminology are prima facie undesirable, but they matter even more given the statutory language."

18. Dr Lee observes that the decision of the Supreme Court puts trustees (and in some cases fiduciaries) in one limitation category, and strangers to a trust in another separate category, which is caught by section 21(3) of the 1980 Act. The difficulty with this "two category" approach is that:

> "it does not necessarily follow that the *same* limitation period ought to apply to liability in both dishonest assistance and knowing receipt, for they have very different rationales".

[7] 255.
[8] Likewise, another academic, James Lee, has said "there is no meaningful consideration in *Williams* of the theoretical debate about the nature of liability in knowing receipt, for which the approach may be different [from that of liability for dishonest assistance]": LQR Vol. 131, at 41.
[9] LQR Vol. 131 39-43.
[10] King's College, University of London.

19. Indeed, the availability of a claim in dishonest assistance is potentially much wider than a claim in knowing receipt: see most recently *Novoship (UK) Limited v Yuri Nikitin* [2014] EWCA Civ 908 at [89] and [92].

20. It is Dr Lee's view that it remains to be determined whether dishonest assistance and knowing receipt fall to be treated in similar ways more generally, a point which the approach in *Williams* leaves open.

21. However, in *Novoship* the Court of Appeal recently decided that, in the light of *Williams*, there should not be any difference and held that:

> "Where limitation periods are concerned, there is no differentiation between knowing recipients and dishonest assistants: *Williams v Central Bank of Nigeria* at paras 30-31. In *Dubai Aluminium Co Ltd v Salaam*[11] Lord Millett made it clear that liability to account in equity did not depend on receipt of trust property. In our judgment, it would be equally inappropriate to differentiate between the availability in principle of remedies relating to profits made by a knowing recipient on the one hand and profits made by a dishonest assistant on the other. As Lord Westbury said in *Rolfe*[12] the "relief is founded on fraud"."[13].

Singapore

The decision of the Court of Appeal in Yong Kheng Leong v Panweld Trading Ptd Ltd

22. In Singapore the equivalent provision to section 21 of the 1980 Act, is section 22 of the Limitation Act (Cap 163, 1996 Rev Ed) 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; …
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a

[11] [2003] 2 A.C. 366 at [141].
[12] *Rolfe v Gregory* (1865) 4 De GJ & S 576
[13] [86].

period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued."

23. This section was considered most recently by the Court of Appeal in *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 at [49] to [55].

24. *Yong Kheng Leong* pre-dates the decision of the Supreme Court in *Williams.*

25. The Court of Appeal referred to Millett LJ's well known analysis in *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA at 409-410 for the rationale underlying the English equivalent of section 22(2) of the Limitation Act and held (as summarised in the headnote):

> "There are two distinct types of constructive trusts. The first category (referred to as "Class 1 constructive trusts") would potentially be denied any limitation defence, whereas those in the second category (referred to as "Class 2 constructive trusts") generally could avail themselves of any defence of limitations.
>
> If a person held property in the position of a trustee and dealt with it in breach of that trust, he would be a Class 1 constructive trustee; whereas a wrongdoer who fraudulently acquired property over which he had never previously been impressed with any trust obligations, might, by virtue of his fraudulent conduct, be regarded as a Class 2 constructive trustee by virtue of equity's reach.
>
> In the present case, the 1st director-shareholder as a director of the company had trustee-like responsibility for its assets. He was, by virtue of his directorship, lawfully able to deal with the company's assets, albeit in accordance with his fiduciary duties. When he disposed on the company's assets unlawfully, whether to his wife or to himself through his wife, he was undoubtedly a Class 1 constructive trustee because he had dealt with that property in breach of the trust and confidence that had been placed in him as a director…
>
> Only Class 1 (and not Class 2) constructive trusts fell within the ambit of s 22 of the Limitation Act. Since fraud by the 1st director-shareholder was made out on the facts, s 22(1)(a) was satisfied and the time bar prescribed in s 22 of the Limitation Act was therefore excluded."

26. In relation to the facts of *Yong Kheng Leong*, the decision corresponds with the conclusions of the Supreme Court in *Williams*. However, in the light of Supreme Court's decision in *Williams* it is no longer appropriate to refer to "Class 1 constructive trusts" and "Class 2 constructive trusts". This is because according to the Supreme Court "Class 2 constructive trusts" are not constructive trusts at all.

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