

Dishonest or fraudulent breaches of duty know no limits

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Limitation is a perennial concern for plaintiffs, and knowing when time starts to run is particularly troublesome where plaintiffs have been unaware of their potential claim due to either a lack of information or worse, dishonesty. In CMC Holdings Limited v Martin Henry Forster & Ors^[1] the Jersey Court indicated albeit at a preliminary stage of the proceedings, that neither a trustee of an express trust nor a fiduciary who has acted dishonestly in breach of trust or fiduciary duty can successfully plead a limitation defence.

The Claim

The Plaintiffs were Kenyan companies that imported motor vehicles into East Africa (the **Companies**). They alleged that at some time between 1977 and 2011 certain former directors of the Companies participated in unlawful arrangements to receive secret commissions in respect of that importation. The First Defendant was one of the former directors whom it was alleged acted dishonestly in breach of his fiduciary duties and should thereby be considered to be a constructive trustee in respect of the commissions. The Second and Third Defendants were fiduciary and corporate services providers alleged to have dishonestly assisted the former directors. The Plaintiffs sought an account of the commissions received.

The Plaintiffs contended that they had only begun to gain an awareness of the commissions through a conversation in May 2011 between the First Defendant and a Mr Lay, the then managing director of the Companies' group. Disclosure of documents was sought by the Plaintiffs and provided voluntarily in July 2013. Proceedings were served in June 2016.

The Defendants contended the claim was time barred as the Plaintiffs had sufficient knowledge to plead their claim more than 3 years before 2016. The Defendants applied for an order that the issue of limitation be determined as a preliminary issue.

Parties' arguments on limitation

The principle application was by the Second and Third Defendants in relation to the dishonest assistance allegations against them. It was agreed that the limitation period in Jersey for dishonest assistance claim is three years, beginning on the date of the act of dishonest assistance.[2] However, if a plaintiff is prevented from bringing its claim due to an *empêchement* (impediment) the running of time will be suspended.

The First Defendant argued that the claims against him were time barred insofar as they occurred more than 21 years before the proceedings were commenced, based upon the longstop provisions of Article 57(3C) of the Trusts (Jersey) Law 1984, as amended (the **Trusts Law**). The Second and Third Defendants argued that the Plaintiffs were not *empêché* as from May 2011 being the time when the claims were first discussed and that accordingly the 3 year limitation period ran from then. Alternatively, they argued that the claims were partly prescribed as the doctrine of *empêchement* did not apply to claims for an account, such that the Plaintiffs could only claim an account for a period of three years prior to the date of the last payment made by the Second and Third Defendants;

The Plaintiffs resisted the application on grounds that: they only had sufficient material to plead dishonest assistance following receipt of the disclosure in July 2013 such that time ran from that date; the claims against the First Defendant were not subject to any limitation period as he was liable to account as a constructive trustee on the basis that he had been a dishonest fiduciary; and the question whether the Plaintiffs had sufficient information to plead their case more than three years before the issue of proceedings should be determined at trial.

Master's Findings

As regards the First Defendant, the Master considered whether or not a dishonest trustee (as distinct from a fraudulent trustee) could invoke the 21 years long-stop limitation period found in Article 57(3C) of the Trusts Law. The Master held it was "highly likely" that claims for dishonest breach of trust against an express trustee or for dishonest breach of fiduciary duty fell within Article 57(1) of the Trusts Law (which provides that there is no limitation period for claims in fraud or to recover trust property) with the effect that the long-stop limitation period in Article 57(3C) would not apply. This is also consistent with the English Supreme Court's decision in Williams v Central Bank of Nigeria[3] where a distinction was drawn between a fraudulent or dishonest trustee and a trustee guilty of some lesser failing.

In the latter case, a long-stop limitation period can apply. In the former, it does not. The Master held that as a result, neither a trustee of an express trust nor a fiduciary who have acted in breach of trust or fiduciary duty dishonestly can successfully plead limitation. In finding this, the Master noted that it was not for him to determine the issue itself, but he was entitled to take into account the strength of the issue and allow it to inform his discretion whether to order that it

should be determined in advance of any main trial.

The arguments that the doctrine of *empêchement* did not apply to a claim for an account were rejected on the basis that the cited authorities^[4] did not support the view that a limitation period for such claims could not be suspended. Furthermore, the postponement of time running against a plaintiff by reason of lack of knowledge is well established.^[5] The Master considered it illogical to suggest that time could be suspended for a breach of duty claim but not for the remedy of an account should the breach be established. In the current case it would lead to an unjust outcome, namely that claims could be brought for the entire period from 1977 to 2011 but the recoverable sum would be limited to payments made in breach of fiduciary duty from 2008 onwards, even though the Plaintiffs had no knowledge of them until 2013.

Conclusions

As this was an application to seek the hearing a preliminary issue, the substantive effect of this judgment as a statement of Jersey law in respect of limitation is itself limited. Nevertheless, it provides an indication that no limitation period applies to claims for dishonest or fraudulent breaches of trust and duty. It is also a useful reminder of the approach the Court takes to questions of suspension of a limitation period. Whether these points will be determined following a full trial (the application for the preliminary issue having failed) will remain to be seen.

[1] [2016] JRC149

[2] Following *Nolan v Minerva Trust* [2014] (2) JLR 117

[3] [2014] AC 1189

[4] *Paragon Finance Plc v DB Thackerar & Co* [1999] 1 All ER 400

[5] In English law in *Williams v Central Bank of Nigeria* [2014] AC 1189 and Jersey customary law

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