

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

Civil Suit No. 1286 of 2016

**BETWEEN:**

**PAULINE STOUTE**

**CLAIMANT**

**AND**

**COURTNEY DACOSTA CATWELL**

**DEFENDANT**

*Before Master Deborah Holder, BSS, Master of the High Court*

**2018: February 15**

**2019: December 17**

**Appearances:**

**Mr. Patrick Phillips, Attorney-at-law for the Claimant**

**Ms. Grace McCaskie, Attorney-at-law for the Defendant**

**DECISION**

**Introduction**

- [1] At case management conference Counsel for the Defendant raised the preliminary point that the Claimant's Claim form and Statement of Claim were filed outside of the six year period of limitation stipulated by **section 6 of the Limitation of Actions Act Chapter 231**. In an application filed subsequently Counsel asked the court to strike out and dismiss the said Claim form and Statement of Claim for being filed in breach of the section and for being false and without merit.

- [2] The latter issues however raise questions of fact which must be determined at the trial stage.

**Background**

- [3] In a Claim form and Statement of Claim which were filed on 26<sup>th</sup> September 2016, the Claimant sought damages for fraudulent misrepresentation and alternatively, for the return of \$51,000.00 which the Claimant transferred to the Defendant's bank account, special damages, interest and costs.
- [4] The Claimant resides in the United States of America. The Defendant formerly resided there as well but is now residing in Barbados. According to the Claimant, in October 2008 while in the U.S.A., the Defendant offered to "secure certain investment" via a term deposit for the Claimant and her husband.
- [5] She was induced to enter a contract and pay over the money to the Defendant who falsely represented that he was employed as a Bank Manager at the Bank of Nova Scotia and that he could secure the said investment. Consequently she gave her bank instructions, on 22<sup>nd</sup> October, 2008 and 8<sup>th</sup> December, 2008, to transfer the monies to the Defendant's bank account.
- [6] She also alleged that the Defendant knew that the representation was false and that he was not a Bank Manager at the Bank of Nova Scotia or any other financial institution.
- [7] The Claimant tried unsuccessfully to have the bank restore the money to her account on 29<sup>th</sup> July, 2009. In December 2009, she orally requested the Defendant to repay the \$51,000.00. He has not done so. She has not received the term deposit and as a result has suffered loss.

- [8] In the Defence and Counterclaim which was filed on 31<sup>st</sup> October, 2016, the Defendant disputed the claim on the ground that it was a total fabrication, without merit and also that the period of limitation had expired.
- [9] He also stated that in 2009 the Claimant telephoned his sister and himself and told them that his estranged wife Joycelyn Catwell, who was the Claimant's business partner and friend, owed her money. At that time Mrs. Catwell was and still is in prison at the Lowell Correctional Institution in Florida, U.S.A. having been sentenced to serve 40 years imprisonment for fraudulent "business" transactions.
- [10] The Defendant counterclaimed for defamation and emotional distress which he suffered as a result of being falsely accused by the Claimant and the fact that he had to retain Counsel to prepare a Defence in this matter. He sought damages, legal fees, costs and interest.
- [11] The Claimant's Reply and Defence to Counterclaim was filed on 7<sup>th</sup> November, 2016. The Claimant took the opportunity to enlarge the facts of her claim. It was clear that she was not responding to the Defence.
- [12] The Claimant stated that she had no business experience with respect to investment in Barbados and the Defendant acted as her financial advisor and he held her trust and confidence. She stated that the money which was transferred to the Defendant's account "was procured by undue influence exerted by the Defendant acting in a fiduciary position."
- [13] It was also stated that the Claimant was entitled to maintain this action notwithstanding the period of limitation had expired.

[14] The Claimant denied that the statements made were defamatory of the Defendant, stated that they were true in substance and fact and that the Claimant would rely on **section 7** of the **Defamation Act**. She also pointed out that the Defendant did not identify the precise words complained of. The Claimant also denied the allegations in the counterclaim, that the Defendant suffered loss and was entitled to any of the relief being sought.

### **Defendant's Submissions**

[15] Ms. McCaskie argued that the Claimant had six years to file her claim under the **Limitations of Actions Act Chapter 231** and that the period of limitation had expired since 2014. She devoted much of her submission to the facts of the case. She contended that the Defendant had no knowledge about this matter and was being falsely accused by the Claimant whom he hardly knows and with whom he had no conversation or correspondence concerning that money.

[16] She suggested that there was a conspiracy, between the Claimant and the Defendant's estranged wife to take money out of the United States, which backfired. She further suggested that the Claimant is trying to extract money from the Defendant because the Defendant's estranged wife is now serving time in prison in the United States.

[17] Ms. McCaskie contended that the Claimant was an astute business woman and it was not likely that she would have taken so many years to take action about her investment. She said that the Defendant had referred this matter to the Fraud Squad for investigation.

[18] She asked that the matter be dismissed for being filed outside of the limitation period.

### **Claimant's Submissions**

- [19] Mr. Phillips contended that the Claimant is seeking equitable relief. She wants to have her \$51,000.00 restored to her. Consequently the time limit set out in **section 14** of the **Limitation of Actions Act Chapter 231** is not applicable. He submitted that the claim falls within the statutory exceptions to **section 58** of the said Act.
- [20] He emphasized what was stated in the Reply. He said that the Defendant acted as financial advisor to the Claimant and as such occupied a fiduciary position. He argued that she had no business experience and she consulted the Defendant. In addition to the fact that the Defendant was acting in a fiduciary position, Counsel submitted that he exerted undue influence over the Claimant.
- [21] Mr. Phillips, like Counsel for the Defendant, spent some time in discussion of an enlarged version of the facts over what was provided in the Statement of Claim. He claimed that the Defendant was introduced to the Claimant under the name Courtney Brewster and she did not know that he was married to Joycelyn Catwell who was also known by other names, until the latter was arrested by the F.B.I.
- [22] He said that the Claimant would testify that she transferred the money to the Defendant's account by reason of his professional acumen and financial expertise as a financial advisor. He identified himself as a Bank Manager and she acted on this. He concluded that the Defendant as the Claimant's financial advisor was acting in a fiduciary relationship.
- [23] He referred to the following definition of "fiduciary".
- "A relationship is termed fiduciary if one party owes a duty to act with care and good faith in the interests of the other party. Looking at it the other way, a relationship is

fiduciary if, aside from and legal duties arising out of contract or tort, the latter party relies on the former. A fiduciary duty can only exist in relation to: (a) the subject of the relationship; or (b) undue influence. The relationship of trustee and beneficiary, for example, is fiduciary. The trustee owes the beneficiary a duty to act in a fiduciary manner (i.e., carefully and in good faith in the interests of the beneficiary, of all the beneficiaries if there are several) in respect of the trust, and must not exercise undue influence over the beneficiary, but owes no universal duty. If the beneficiary is a solicitor employed by the trustee in the trustee's personal affairs, the fiduciary duty is in the opposite direction in respect of the professional relationship. Some relationships are, by their nature, always fiduciary; some relationships, such as banker and customer, are not normally fiduciary but may be so in particular circumstances. Banker and customer are usually related only as debtor and creditor, or the other way round, but a Banker may undertake more for a customer than keeping his account.”

[24] Having concluded that the relationship was termed fiduciary Mr. Phillips argued that the Defendant was liable to account. He quoted Halsbury's Laws of England, 5<sup>th</sup> edition, Volume 68, paragraph 1151 in support.

He cited *North American Land Co. v. Watkins* [1904] 1 Ch 242.

[25] Mr. Phillips submitted that the “legal import” of **section 58** of the **Limitation of Actions Act Chapter 231** is a “replica” of **section 21** of **Limitation Act 1980 UK** because both provided specific statutory exceptions to the six year rule, the former with respect to equitable relief and the latter a breach of trust.

[26] He further contended that the Defendant was a constructive trustee because he procured the money transfer to his bank account by false representation.

- [27] He stated that where a person holds property in circumstances in which equity and good conscience require that it should be held or enjoyed by another, he will be compelled to hold the property in trust for that other. He also cited *Hussey v. Palmer* (1972) 1 WLR 1286.
- [28] He argued that once it was established that the claim fell within the statutory exceptions there was no maximum period beyond which equitable relief could be granted but a twenty year period might be taken as a convenient guide. He cited *Weld v. Petre* (1929) 1 Ch 33.
- [29] Mr. Phillips asked that the Defendant's application be dismissed with costs.

### **Response**

- [30] Ms. McCaskie stressed that the matter was a total fabrication. She submitted that the cases cited were not applicable and could be distinguished. She stated that in *North America Land Co. v. Watson* (supra) there was a tangible relationship; a real agent took money and defaulted in carrying out the contract. She also stated that in *Hussey v. Palmer* (supra) there was a tangible agreement.
- [31] She contended that a person who was not a doctor could not be held to the same standard as a doctor and likewise a person who was not a banker could not be held to the standard of the banker.

### **Law**

- [32] **Limitation of Actions Act Chapter 231**

**Section 14.** Subject to section 15, no action founded on simple contract may be brought after the expiration of 6 years from the date on which the cause of action accrued.

**58.** The following time limits do not apply to any claim for specific performance of a contract, for an injunction or for other equitable relief

- (a) the time limit under section 6 for actions founded on tort;
- (b) the time limit under section 14 for actions founded on simple contract;
- (c) ....

### **Issue**

[33] The court has to determine whether **section 58** of the **Limitation of Actions Act Cap 231** is applicable to this claim.

### **Discussion**

[34] The tangled web of allegations and counter allegations made by both Counsel in their written and oral submissions, make this matter rather intriguing. It seems that there is more to this matter than meets the eye. However, I will focus on the core facts as pleaded in an effort to determine whether the conclusions reached by Mr. Phillips can be sustained.

### **Facts**

[35] The Defendant totally denied any knowledge of this matter but according to the Claimant he is essentially a fraudster. He deceived the Claimant. He never worked in a bank and he had no expertise in banking. He offered to procure the term deposit for the Claimant and she accepted. She transferred \$51,000.00 to the Defendant's bank account because of his deceit. She believed that he possessed "financial acumen and expertise as a financial advisor" but he did not. The Defendant also exercised undue influence over her.

[36] The monies were transferred to the Defendant's account in two instalments. The reason stated for the transfer in the letter dated

22<sup>nd</sup> October, 2008 from the Claimant to her Banker is noted with some interest.

[37] The letter is as follows:

“To Whom it Concern:

Due to an emergency in Barbados, I Pauline Stoute is requesting from our account #57476237 with Royal Bank of Canada a transfer in the amount of \$20,000.00 make payable to Courtney Catwell account number 33108 at Scotia Bank. We are requesting that all fees for the transfer be taken from our account.”

[38] No reason was stated for the second transfer of funds in the letter dated 8<sup>th</sup> December, 2008. By letter dated 10<sup>th</sup> August, 2009 the Bank of Nova Scotia acknowledged receipt of the Claimant’s letter received by fax on 29<sup>th</sup> July, 2009, but told her that they could not act on her instructions to return the funds to her bank account without the written consent of the account holder, Mr. Courtney Catwell.

[39] In December 2009 the Claimant orally asked the Defendant to repay her money and he refused. The Claim was filed on 26<sup>th</sup> September, 2016.

**(a) *Undue Influence***

At paragraph 4 of the Claimant’s Reply it was stated that the transfer of the money to the Defendant’s account was “procured by the undue influence exerted by the Defendant acting in a fiduciary position”. No particulars with respect to “undue influence” were provided in the Reply. The failure to introduce “undue influence” in the Claimant’s Statement of Case was a significant omission. The Defendant should have been informed of all the allegations against him and therefore the case he had to meet. In any event having only raised it in the Reply the Defendant was deprived of an opportunity to respond.

[40] Mr. Phillips referred the court to the following passage where the nature of undue influence was discussed. It read:

“It is something more than mere advice, although advice, strongly pressed and often repeated may be construed as undue influence in the light of the relationship of the parties. Much turns upon that point, for every case of undue influence is founded upon the assumption that one party is in a stronger position, or has greater intellectual power or knowledge of affairs than the other, and that other, in consequence, places reliance upon the guidance of the stronger.” Equity. 3<sup>rd</sup> edition by Keeton and Sheridan.

### **Relationship**

[41] Given the allegation above, the nature of the relationship between the parties is an important consideration. On the facts it is not unreasonable to infer that there was no meeting of minds between the parties. The Claimant may have intended to enter legal relations but the Defendant apparently did not. He was not capable, competent or perhaps qualified to provide her with the service she required.

[42] Counsel for the Claimant submits that there was a fiduciary relationship.

#### ***(b) Fiduciary Relationship***

[43] The definition of a fiduciary relationship at paragraph 23 above is instructive. As stated by Ms. McCaskie the examples provided are of persons involved in bona fide relationships. It is also noteworthy that the relationship of banker and customer is not normally fiduciary unless the banker undertakes to do more than keeping the account.

[44] In *Bristol and West Building Society v. Mothew* [1998] Ch 1 at 18, **Millet LJ** used the following definition:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The 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. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.”

- [45] A bank manager would have been able to provide the Claimant with the service she required, that is, a term deposit. In fact any customer would have been able to secure the same service by paying a visit to the bank to get the relevant advice from a staff member there. This service is no major undertaking, it is still no more than keeping the account. In other words it is the usual debtor/creditor relationship.
- [46] If the relationship of a banker and customer is not normally fiduciary, the question that arises is whether this term should be extended to include the “relationship” between fraudsters, conmen, tricksters and persons of that ilk and their prey. Do they owe a duty of care to persons whom they deceive? Do they have an obligation to be loyal?
- [47] No reason has been advanced for including these kinds of “relationships”.
- [48] Traditionally four relationships have always been classified as fiduciary. There are trustee and beneficiary, agent and principal, director and company and partner and co-partner. In the case of

solicitor and client, the fiduciary will generally last as long as his retainer. The relationship between accountant and client, broker and client, promoter and company and guardian and ward have also been held in certain circumstances and with respect to specific transactions to be fiduciary.

- [49] A.J. Oakley<sup>1</sup> says that for the purposes of recovery of illicit profits, the courts take a particularly broad view of what constitutes a fiduciary relationship. For example the principle was applied where a police officer had been bribed not to report brothel keepers. (*Attorney General v. Goddard* [1929] LJ(K.B) 743); and it was also applied to an ex-R.A.M.C. Sergeant who had obtained large sums from smugglers for riding in his uniform through Cairo in lorries in which smuggled goods were being transported, thus enabling the lorries to pass the civil police without search. (*Reading v. Attorney General* [1951] AC 507).
- [50] The learned author however questioned whether it was really appropriate for relationships of this kind to be classified as fiduciary.
- [51] Useful discussion can be found in *re Goldcorp Exchange Ltd. (In Receivership)* [1995] 1 AC 74 at page 98 with respect to fiduciary relationship. **Lord Mustill**, in the Privy Council, said:

“To describe some one as a fiduciary, without more is meaningless. As Frankfurter J said in *S.E.C. v. Chenery Corporation* (1943) 318 U.S. 80, 885-86, cited in *Goff and Jones, The Law of Restitution*, 4<sup>th</sup> ed. (1993), p.644:

“To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as fiduciary? In what respect has he failed to discharge these obligations?”

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<sup>1</sup> Parker and Mellows: The Modern Law of Trusts 9<sup>th</sup> edition paragraph 10-074

And what are the consequences of his deviation from duty?”

[52] He also made the point that “the fact that one person is placed in a particular position vis-à-vis another through the medium of a contract does not necessarily mean that he does not owe fiduciary duties to that other by virtue of being in that position. **But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself.**” (My emphasis).

[53] In that case it was argued that because the company held out itself as willing to vest bullion in the customer and to hold it in safe custody on his behalf in circumstances where he trusted and depended on the company, then the company was fiduciary. This was not accepted.

[54] Although the courts have, in particular circumstances extended the categories of relationships to be termed fiduciary, the persons were involved in bona fide relationships. To my mind the authorities do not justify treating a complete fraudster in the same way.

(c) *Liability to Account*

[55] Mr. Phillips submitted that the Defendant was acting as a fiduciary and therefore was liable to account.

[56] The following passage was used in support:

**“1151. Liability to account of persons in fiduciary capacity.** Ordinarily a claim for an account is barred after the expiration of any time limit applicable to the claim which is the basis of the duty to account. However, where any person as agent or guardian, or in any other fiduciary capacity is in possession of money for which it is his duty to account or has received and converted to his own use such money, then so long as the relation of confidence exists between the parties (and

during the continuance of the fiduciary relationship), no lapse of time can bar the right to an account from the beginning of the transactions, nor will time begin to run when the relation is terminated. If a guardian of a minor is in receipt of rents of land during the minority and he retains those rents or converts them to his own use and never accounts for the rents received, a claim for an account may be maintained more than six years after the ward's coming of age. A person who receive rents as bailiff for minors...

Where money has been received by a person in the position of a confidence receiver or agent and has been wilfully misapplied for his own benefit, no lapse of time will protect that person or his personal representatives from the liability to account; but the relation of banker and customer is simply that of debtor and creditor.”  
Halsbury's Laws of England. 5<sup>th</sup> edition. Volume 68.

- [57] The examples provided in the passage are of persons in the traditional relationships and once again it is pointed out that the relationship of banker and customer is not of a fiduciary nature.
- [58] Seeking an account is a remedy which is available to a principal for breach of fiduciary duty. Where a principal is seeking to recover assets which have passed through the hands of the fiduciary who has breached his duty, but the specific property cannot be identified this remedy will be sought. However an account is a personal remedy even though it is sought against a fiduciary. A fiduciary is liable to account for assets actually received by him or by a company wholly owned or controlled by him but he is not liable to account for a benefit received by someone else. The fiduciary will be required to render an account of what he has done with said property. Any compensation will be equitable compensation (Nocton v. Lord Ashburton [1914])

AC 932.). The award will give no priority over the fiduciary's general creditors. (Parker and Mellows. Ibid 10-065.)

[59] The case of *North American Land and Timber Co. Ltd. v. Watkins* [1904] 1 Ch 242, was cited by Counsel in the discussion on liability to account. The facts are as follows:

[60] In 1901 the Plaintiff's company brought action to recover certain monies from the Defendant which he received in 1883 as agent for the company and had not accounted for. The Defendant was sent to buy timber lands for the company but charged the company more than he had paid for the lands and kept the rest of the money. The Plaintiff only discovered what he had done in 1901. The court held that the Defendant was an express trustee and that the Statute of Limitations was not a bar to the action.

[61] Apart from the fact that the agent was held liable to account for the hidden profits and the fact that the Statute of Limitations was not applied, the usefulness of this case in advancing the Claimant's submissions has not been demonstrated.

***(d) Constructive Trust***

[62] A constructive trust arises by operation of law and in a variety of circumstances, but there are differences between the constructive trust and others. It has been said that the constructive trust is the most significant remedy for breach of fiduciary duty and it is also the remedy which is most favourable to the principal. With the imposition of such a trust proprietary rights are affected.

[63] Mr. Phillips submitted that the Defendant procured the transfer of money by false representation and is therefore a constructive trustee. He also stated that no express words are necessary for the assumption

of such duties. He cited Hussey v. Palmer [1972] 1 WLR 1286 where an elderly lady paid for the construction of a bedroom at her son-in-law's house, after she was invited to live there. **Lord Denning, MR** at page 1289 said:

“By whatever name it is described, it is a trust imposed by law wherever justice and good conscience requires it. It is a liberal process, founded upon large principles of equity, to be applied in cases, where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”

[64] The stated principle notwithstanding, there are no useful factual similarities between Hussey v. Palmer (supra) and this present matter.

[65] In discussing constructive trusts AJ Oakley's Parker and Mellows: The Modern Law of Trusts, 9<sup>th</sup> edition says that in the years immediately before and after 1970 there were a number of cases emanating from the Court of Appeal (UK) which took the approach of **Lord Denning, MR** to constructive trust, but it is suggested that these were attempts to introduce the remedial constructive trusts into English Law. The approach has since been rejected.

[66] He continues at page 352 paragraph 10-035:

“However, subsequent decisions rejected the approach manifested in this series of cases and English law therefore reverted, at least for the moment, to the traditional attitude towards constructive trusts which has already been described, an attitude which has perhaps been more accurately described by the statement that in England “the constructive trust continues to be seen as an

institutional obligation attaching to property in certain specified circumstances.”

[67] In the text reference is also made to the Court of Appeal case *Halifax Building Society v. Thomas* [1996] Ch 217 as an illustration of present law. The facts are as follows:

“The defendant obtained a mortgage advance from the plaintiff by fraudulently misrepresenting his identity and earnings. The plaintiff, having satisfied all sums due to it under the mortgage out of the proceeds of sale, sought to retain the surplus on the basis, *inter alia*, that it was beneficially entitled under a constructive trust imposed on the defendant in accordance with *The American Restatement of Restitution* to prevent what would otherwise be his unjust enrichment. The Court of Appeal specifically held that “English law has not followed other jurisdictions where the constructive trust has become a remedy for unjust enrichment” and declined “to extend the law of constructive trusts in order to prevent a fraudster benefitting from his wrong”. (paragraph 10-034).

[68] A distinction has been made between two categories of constructive trust claim by Millett LJ in *Paragon Finance plc v. D.B. Thakerar and Co.* [1999] 1 All ER 400.

[69] There are:

“(a) Where the constructive trustee, although not expressly appointed as a trustee, has assumed the duties of a trustee before the events which are alleged to constitute the breach of trust. In this category the defendant is a real trustee, and the provisions of LA 1980, s. 21(1), may apply if the other conditions of the subsection are satisfied, with the result that there may be an unlimited period for bringing proceedings. An example is *James v. Williams* [2000] Ch 1.

(b) Where the constructive trust is merely the creation of the court as a remedy to meet the alleged wrong doing. It includes claims alleging knowing and dishonest assistance in the fraudulent breach of trust of another (*Cattley v. Pollard* [2006] EWHC 3130 (Ch), [2007] Ch 353). In this category there is no real trust, and usually no prospect of a proprietary remedy. The defendant is merely said to be liable to account as a constructive trustee. In this category the other provisions of LA 1980 apply, with the result that the period will usually be six years from accrual. An example is *Halton International Inc. v. Guernroy Ltd.* [2006] EWCA Civ 801, LTL 27/6/2006....” (Blackstone’s Civil Procedure 2011 Chapter 10.6)

[70] The learned authors of Blackstone state that when considering the boundary between cases where the Defendant is a true trustee under an express or constructive trust, and those where he is not, the key factor is whether there is trust property (*Clarke v. Marlborough Fine Art (London) Ltd.* (2001) *The Times*, 5 July 2001).” (Blackstone Ibid).

***Is there trust property?***

[71] Any property whatever can form the subject matter of a trust but the property which is the subject of the trust must be capable of being identified. The property must be segregated from other assets. A liability cannot be the subject matter of a trust. Failure to segregate means that property cannot be identified and there is no remedy.

[72] The two payments in the sum of \$51,000.00 were transferred to the Defendant’s bank account. Clearly it was not segregated from other monies in the account. In the absence of a separate bank account for the trust, identification would be an issue.

[73] The Claimant does not place reliance on **section 42** of the **Limitations of Actions Act Chapter 231, (LA 1980 UK section 21)** but rather on **section 58**. Claims involving trust property are dealt with under **section 42** where an action by a beneficiary to recover trust property or in respect of breach of trust is subject to a six year limitation period. No period of limitation is applicable where there is fraud or fraudulent breach of trust involving the trustee or to recover trust property from a trustee or proceeds of property in the possession of the trustee or received by the trustee and converted to his own use. The following case provides an illustration.

[74] In *Gwembe Valley Development Co. Ltd. V. Koshy (No. 3)* [2003] EWCA Civ 1478 a claim for an account of profits against a director who deliberately did not disclose an interest was held to be a fraudulent breach of trust within **section 21(1)(a)** of **LA 1980 UK (section 42(1)(a) of Limitation of Actions Act Chapter 231)** consequently there was no period of limitation.

[75] I am satisfied that the Defendant cannot be classified as a “true trustee under an express trust or constructive trust,” therefore the second category, described above, becomes relevant, but the period of limitation is six years.

[76] It seems that the Claimant is seeking a remedial constructive trust as a means of doing justices *inter partes* and as a remedy against unjust enrichment.

[77] Oakley’s commentary is instructive:

“The proprietary nature of the liabilities which arise as a result of the imposition of a constructive trust affects the existing property rights both of the constructive trustee and, in the event of his bankruptcy, of his general

creditors. As a matter of principle, such alterations of existing property rights should not be able to ensue merely from the desire of a court to do justice in the instant case. It has never been the practice of English courts to alter existing property rights merely in order to do justice *inter partes*. The House of Lords has repeatedly stated that rights of property are not to be determined according to what is reasonable and fair or just, in all the circumstances, [Pettitt v. Pettitt [1970] AC 777; Gissing v. Gissing [1971] AC 886; Lloyds Bank v. Rosset [1991] 1 AC 107] a principle which is crucial for the maintenance of that certainty which should be the hallmark of every system of law. The imposition of a constructive trust in the way that the Court of Appeal did immediately before and immediately after 1970 in order to resolve a dispute in a manner which appears to be just and equitable is inevitably contrary to such a principle. The consequences of the imposition of a constructive trust constitute powerful arguments against the use of the constructive trust as a means of doing justice *inter partes*.” (paragraph 10-041).

[78] My assessment is that the Claimant put her trust in the Defendant only to be let down by him, but that does not make him a trustee in the equitable sense. I refer again to the words of **Lord Mustill** in *re Goldcorp Exchange Ltd.* (supra).

“It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.

[79] In my opinion the facts pleaded do not give rise to any category of constructive trust.

(e) *Equitable Relief: Section 58 Limitation of Actions Act Chapter 231.*

- [80] Mr. Phillips' position is that the Claimant is seeking equitable relief therefore the six year limitation period is not applicable.
- [81] The remedy of equitable compensation/damages is available to a principal for breach of fiduciary duty. It is available as an alternative and not in addition to the remedies of seeking an account and constructive trust. (*Personal Representatives of Tang Man Sit v. Capacious Investments Ltd.* [1996] 1AC (Privy Council)). This remedy is restorative of the principal's position prior to the breach but he is not required to choose or elect between the remedies before judgment is given in his favour.
- [82] There has been no meaningful discussion on **section 58** (LA 1980 UK section 36) although the Claimant relies on it. The reasoning seems to be that once the other remedies were raised an entitlement to relief under the section would follow. There is also no basis for the erroneous statement that **section 58** is a "replica" of LA 1980 UK **section 21**.
- [83] In *Cia de Seguros Imperio v. Heath (REBX) Ltd. and Others* [2001] 1 WLR 112, the claim was concerned with alleged breaches of fiduciary duty by the Defendant. The appeal turned on the correct application of **section 36(1)** of the **Limitation Act 1980**.
- [84] **Waller LJ** referred to a named text which dealt with fiduciary duties of agents and found that there was no mention of equitable compensation or equitable damages for breach of fiduciary duties. He also took note of the distinction that was drawn between proprietary and personal remedies and some of the advantages of a proprietary remedy. He pointed out that illustrations of circumstances where the statutes of limitation had been held not to apply were limited to

circumstances where a proprietary remedy was established. He commented at 118C:

“If the position was that for breach of fiduciary duty a remedy in equitable compensation or equitable damages was available to which the statute of limitations would not apply, that would certainly have been a matter of great relevance, and one would have expected it to be mentioned. Furthermore, it would be somewhat surprising that if it was right it was not a point which had been established by some authority or another.”

[85] The court held that a claim for “equitable damages” or “equitable compensation” was a claim for equitable relief to which **section 36** of the **Limitation Act 1980** applied. The six year limitation period in **sections 2 and 5 (sections 6 and 14 Limitation of Actions Act)** were applied to the claim by analogy for breach of fiduciary duty so as to treat the Claimant’s causes of action as time-barred. The facts upon which the dishonest breach was founded were identical with those which founded the time-barred claims in tort and contract.

[86] At page 120 C.D.E. **Waller LJ** referred to the House of Lords decision in ***Knox v. Gye*** (1872) LR 5 HL 656, 674 where Lord Westbury said:

“For where a remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit by the statute of limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a court of equity acts by analogy to the statute of limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the statute, a court of equity adopts the enactment of the statute as its own rule of procedure. But if any proceedings in equity be included within the words

of the statute, there a court of equity, like a court of law, acts in obedience to the statute.”

[87] A passage from Spry’s Equitable Remedies 5<sup>th</sup> ed (1997) at pp 419 - 420 also quoted at page 120 F and G in the judgment of **Waller LJ** and partially reproduced here easily explains the process.

“Hence it must be seen first whether there is a special statutory provision that affects directly whether expressly or by implication, the particular equitable right that is in question. But if there is no such provision, the court may decide that the material equitable right is so similar to legal right to which a limitation period is applicable that the limitation period should be applied to it also.”

[88] My final quotation on this aspect of the case is taken from the judgement of **Millet LJ** in *Paragon Finance plc v. DR Thakerar & Co.* (supra) at 415-6. Its usefulness lies in the fact that it demonstrates the importance of the trustee relationship in preventing the claim from being statute barred. There must be an “equitable element”.

[89] It reads:

“The law on this subject has been settled for more than a hundred years. An action for an account brought by a principal against his agent is barred by the statutes of limitation unless the agent is more than a mere agent but is a trustee of money which he received: see *Burdick v Garrick* (1875) LR 5 Ch App 233, *Knox v Gye* (1872) LR 5 HL 656 and *In re Sharpe, In re Bennett; Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154. A claim for account in equity, absent any trust, has no equitable element; it is based on legal, not equitable rights: see *How v Earl Winterton* [1896] 2 Ch 626, 639 per Lindley LJ. Where the agents liability to account was contractual equity acted in obedience to the statute: see *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607, 631 per Lord Redesdale. Where, as in *Knox v Gye*, there was no contractual relationship between the parties, so that

liability was exclusively equitable, the court acted by analogy with the statute. Its power to do so is implicitly preserved by section 36 of the Act of 1980....”

- [90] The distinction between the remedy at law and the remedy in equity has not been made. The factual allegations are essentially the same for the oral contract as for breach of fiduciary duty even with the additional allegations of trust, confidence, undue influence introduced by the Claimant in the Reply.
- [91] As pointed out in *Cia* (supra) whether for breach of contract or breach of fiduciary duty, there will be no difference in a claim for assessment of damages.
- [92] The remedy in equity being “correspondent to” the remedy at law, the latter being subject to **section 6** of the **Limitation of Actions Act**, this matter should easily be resolved by analogy. However I note that the words in **section 36** of the UK Act which implicitly preserved the power to act by analogy are not included in **section 58** of the **Limitation of Actions Act**.
- [93] A discussion on whether or not this means that a court of equity is totally prohibited from acting by analogy in this jurisdiction is not warranted given the findings which I previously made.
- [94] I accept that a claim for equitable damages is a claim to equitable relief to which **section 58** applies. The claim is for damages for fraudulent misrepresentation or restitution. The argument is that the Defendant who was a constructive trustee breached his fiduciary duty. Based on the position previously articulated there is no “equitable element.” There is no equitable right.

## **Delay**

- [95] This issue of delay has not been dealt with appropriately. **Section 4** of the **Limitation of Actions Act** (LA 1980 UK section 36.2) preserves the equitable doctrine of laches under which delay can bar a claim to equitable relief where it would be unjust to give the remedy. The length of the delay, the nature of the acts done during the interval which might affect either party, are relevant considerations. (***Fisher v. Brooker*** [2009] 1 WLR 1764 (HL)).
- [96] In ***Cia, Waller LJ*** also noted that an advantage of a proprietary remedy was that the doctrine of laches would apply rather than the provisions of Limitations Acts. (Page 118B)
- [97] The suggestion that the period of twenty years is a convenient guide is erroneous because this is not a rule of general application. The twenty year period was said to be a convenient guide in the case of actions to redeem mortgages. Therefore the case of ***Weld v. Petre*** (supra) cannot advance the Claimant's position. In this case shares in a limited company were deposited with a mortgagee to secure a loan which was repayable with interest. Twenty-six years later a claim was made on behalf of a mortgagor to redeem the shares. The twelve year limitation period was not applied. It was held that the 12 year rule by analogy to the **Statute of Limitations** was not applicable to proceedings for the redemption of a mortgage of personalty.

## **Defendant's Counterclaim: Defamation**

- [98] The counterclaim was not the focus of the submissions before the court. I mention it momentarily because Mr. McCaskie did ask that judgment be entered for the Defendant. Apart from the fact that publication was not even mentioned, Mr. Phillips' view that the words

complained about were not identified is valid. (See paragraph 14 above). The cause of action was not established. The counterclaim is not viable.

### **Limitation**

[99] Limitation is a procedural defence. Expiry of a limitation period is not specifically listed as a ground for striking out under the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)** but a claim may be struck out under **Rule 26.3.3(a)** as an abuse of the court's process. (Blackstone, Chapter 33.13). This ground however was not argued by the Defendant.

“Normally, the only consequence of the expiry of limitation period is that the Defendant acquires a technical defence to the claim. The Claimant still has a cause of action but one that cannot be enforced.” (Ibid. Chapter 10.1)

### **Conclusion**

[100] I have given due consideration to the submissions that were made. I wish to say that not only has this matter been poorly pleaded but the submissions by both parties were inadequate.

[101] Having admitted that the claim was filed outside of the six year period of limitation, the Claimant sought to restate the claim in the Reply apparently to “find a way out”. **Rule 8.5(1)** of the **CPR** requires the Claimant to include in the Claim form or in the Statement of Claim a short statement of all the facts on which he relies. **Rule 8.5.(3)** also states that the Claimant may not rely on any allegation or factual argument which is not set out in the Statement of Claim, “but which could have been set out there, unless the court gives permission.

[102] The Reply did not deal with fresh evidence that was raised in the Defence, but rather it essentially moved away from the original claim.

[103] The learned authors of Blackstone advise that:

“[A] reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in a particular claim and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of the claim, but which require a response once they have been raised in the defence... Once, however, a defence has been raised which requires a response, so that the issues between the parties can be defined, a reply is necessary for the purpose of setting out the claimant’s case on that point. The reply is, however, [not] an opportunity to restate the claim, .... (Chapter 27.2.)

[104] I have come to the following conclusions:

- (1) There is no mileage to be had from “undue influence”.
- (2) No reason, compelling or otherwise, has been advanced for extending the categories of fiduciary relationships. On the facts there was no fiduciary relationship.
- (3) A duty to account is a personal claim. The six year period of limitation is applicable to the personal liability to account.
- (4) The facts of this case do not give rise to a constructive trust.
- (5) The Claimant failed to establish that there was a breach of fiduciary duty therefore the remedy for such a breach is no longer in issue. In these circumstances equitable relief under **section 58** of the **Limitation of Actions Act** is not applicable.

### Disposal

- [105] (1) The Claimant has no equitable remedy. Her Claim is time barred having been filed outside the six

year period of limitation in the **Limitation of Actions Act**. The Claimant is therefore prohibited from pursuing this matter.

- (2) The Claimant to pay the Defendant's costs to be assessed, if not agreed.

**Ms. Deborah Holder, BSS**  
**Master of the High Court**