

Limitation and Loss:

Issues for Personal Representatives and Trustees

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Introduction:

X died in 1990 and was survived by his two adult children: A and B. A was appointed executor and trustee in 1990, obtained a grant in December 1991 and assented assets, including a valuable commercial yard ("the Yard") to himself in June 1992. Between 1991 and 1996, A misappropriated £300,000 for the benefit of his wife (W) and himself. In August 2000, B discovered A had transferred the Yard to his son (S) in August 1999 for no consideration. A summons was issued by B in the Family Division in 2001 for an inventory and account. C was appointed as additional administrator (by consent with A) in January 2004 and issued proceedings in January 2005 (1) against A to remove him and for compensation for breach of trust, (2) against W seeking an indemnity on the basis that she had dishonestly assisted her husband in the fraudulent breaches of trust, and (3) against S to recover the Yard on the basis of knowing assistance.

Legal overview:

1. Limitation, in relation to claims against personal representatives and trustees, is governed by sections 21, 22 and 36 of the Limitation Act 1980, sections which are less easy to construe and in relation to which authority is sparse. The relevant sections of LA 1980 are appended to this handout for ease of reference.
2. Section 21 is concerned with "*an action by a beneficiary under a trust*". It has recently been held in the case of *Cattley v Pollard* [2006] EWHC 3130 (Ch) that "*a beneficiary*" for these purposes includes trustees if they are acting on behalf of the beneficiary. This section provides that "*no period of limitation*" prescribed by LA

1980 will apply to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee is party or privy: s.21(1)(a). Section 21(1)(b) applies the same regime to the recovery of trust property or its proceeds from the trustee where they are still in his possession or were previously received and converted to his use. Section 21(2), after the expiration of 6 years, protects a non-fraudulent trustee who is also a beneficiary from a claim by other beneficiaries in respect of trust assets except to the extent of the property in excess of his own proper share.

3. Section 21(3) covers all other actions by beneficiaries to recover trust property or in respect of any breach of trust which do not fall within s.21(1). In such circumstances, an action cannot be brought once 6 years have elapsed from the date on which the right of action accrued.
4. Section 22 concerns claims to the personal estate of a deceased or any share or interest in such an estate whether under a will or intestacy. It is made expressly subject to sections 21(1) and (2), a phrase which was recently considered by the Court of Appeal in *Green v Gaul* [2007] 1 WLR 591. These claims cannot be brought after the expiration of 12 years from the date on which the “*right to receive the share or interest*” accrued.
5. Lastly, it is important to bear in mind section 36(2) which preserves the equitable jurisdiction to refuse relief on grounds of “*acquiescence or otherwise*”.

The Claim against A:

Removal of the personal representative

6. A was appointed executor by the Will which ‘speaks’ from death, i.e. 1990. The Court has jurisdiction to appoint a judicial trustee in place of a personal representative under section 1 of the Judicial Trustees Act 1896 and to appoint a substitute personal representative under section 50 of the Administration of Justice Act 1985. There are no reported authorities on the approach adopted upon an

application for removal under s.50 AJA 1985 but *Perrotti v Watson* [2001] EWCA Civ 116 (CA) makes clear that it is a matter for the discretion of the Court, and that it is reasonable for the Court to take a pragmatic approach, to consider the views of the beneficiaries and the interests of the estate as a whole. It is generally likely to remove a personal representative where that person has been unduly slow in administering an estate or been guilty of *devastavit* or does not co-operate with the other personal representatives and there is no need for full or supervised administration by the Court.

7. By analogy, the authorities concerning the removal of trustees under the Court's inherent jurisdiction indicate that serious misconduct is a ground for removal but that friction or hostility between beneficiaries and trustees is also sufficient to justify the removal of the trustee where it threatens the well-being of the trust fund: *Letterstedt v Broers* (1884) 9 App Cas 371 with the oft-cited passage at 385-6:

“...in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity. ...It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.”

8. Up until 2006, there was no reported authority on a personal representative arguing that a claim to remove him under s.50 AJA 1985 was time barred. In the unusual case of *Green v Gaul* [2007] 1 WLR 591, which was an intestate estate, the administrator did not specifically plead or argue at first instance that the claim to remove her was time barred, whether by statute or otherwise. Instead, she said that, by assenting assets from herself as administrator to herself in her personal capacity, she ceased to be a personal representative so that there was nothing from which she could be removed. She argued that the beneficiaries' claims therefore were time barred by s.22(a) of the Limitation Act 1980 and/or *laches*.

9. On appeal, Lord Justice Chadwick did not find it “*self-evident*” that the claim to remove the administrator were claims to which s.22 applied because that claim did not fall within the descriptive words “*action in respect of any claim to the personal estate of a deceased person*”. The origins of s.22 are to be found in statutes predating the Judicial Trustees Act 1896 and the Administration of Justice Act 1985. As these statutes conferred, for the first time, jurisdiction on the court to appoint a judicial trustee and to remove and substitute a personal representative respectively, it follows that s.22 could never have applied to a claim to remove a personal representative. Accordingly, the claims to recover a legacy and the personal estate of a deceased person did not include a claim to remove a personal representative. The Administration of Estates Act 1925, s.33 (definition of ‘residuary estate’) continues to draw a distinction between real and personal estate in the hands of the personal representative. The true position must be that it was not contemplated by the legislature that s.22(a) would apply to claims against a personal representative of an intestate in respect of real or personal estate at a time when the estate remains unadministered. It was not suggested that, if the claim to remove the administrator did not fall within s.22 LA 1980, there was any other applicable statutory limitation period.
10. It remains arguable that the equitable defences may be pleaded by a personal representative to a claim to remove him or her.
11. Although it was unnecessary for the CA in *Green v Gaul* to decide whether time did run against the beneficiaries under s.22 LA 1980, Lord Justice Chadwick did express the ‘*better view*’ that such time as might run in favour of a personal representative (presumably under whichever section may apply whether expressly or by analogy) in relation to a claim to remove him or her could not, in an intestate estate, begin until the administrator is first in a position to distribute the residuary estate. This would apply by analogy to testate estates and should helpfully remove the vexed questions that have previously arisen as to the distinction between

executors and administrators and, in particular, whether the effect of these distinct offices impacts on the date of accrual of a cause of action for limitation purposes.

Actions for breach of trust

12. The second step is to recover compensation from A arising from A's various breaches of trust. In an action for compensation for breach of trusts, the trustee's liability is essentially to restore the trust property as it was before the breach. If specific restitution of the trust property is impossible, the liability is to pay sufficient money compensation instead. In this regard, it must be remembered that s.38 LA 1980 provides that "*trust*" and "*trustee*" shall have the same meanings respectively as in the Trustee Act 1925 and s.68(17) TA 1925 provides that "*trust*" and "*trustee*" extend to implied and constructive trusts, to cases where the trustee has a beneficial interest in trust property and, where the context admits, shall include a personal representative.
13. It is necessary to identify the basis upon which compensation is claimed as there may be a variety of different causes of action, each of which may give rise to a different loss and to which a different limitation defence may be pleaded. It is well established that limitation must be specifically pleaded by a defendant and that the Court will not consider limitation of its own initiative. It is important that trustees specifically plead and particularise any limitation or equitable defence.
14. Let us consider A's case. He argues that:
 - (i) he became a trustee on his assent of assets to himself in 1992 and the limitation period of 6 years expired in 1998 under s.21(3);
 - (ii) if he remained a personal representative, s.22(a) applies and the 12 year limitation period expired in 2002, 12 years from the **death** of the Deceased and before the Chancery Division proceedings commenced in 2005;
 - (iii) alternatively, if no period of limitation applies, the claims are barred by *laches*.

15. Neither LA 1980 nor the authorities were, until *Green v Gaul*, particularly clear on the limitation periods applicable to an action by a beneficiary for an account. LA 1980, s.23 is headed "*Time limit in respect of actions for an account*" and appears therefore to expressly exclude s.21(3) from applying. However, in *AG v Cocke* [1988] Ch 414, the Court held that an action for an account is not based on allegations of breach of trust. It arises from the fiduciary relationship of the trustee and the beneficiary: "*It follows that no limitation applies and section 23 has nothing to do with the case because there is no basis of the duty which is otherwise dealt with in the Limitation Act 1980 itself*" per Harman J (as he then was) at 421C.
16. In *Green v Gaul*, Lord Justice Chadwick considered s.23 LA 1980 and held that there is no doubt that the claims against the administrator to an account and payment are claims in respect of property, real and personal, which came into her hands as administrator. This extended to each and every claim of breach because the remedy sought for each breach was an account and payment. Accordingly, they were claims within s.21(1)(b) LA 1980, either directly or indirectly, by reason of s.23 which requires identification of the basis of the duty to account. This means the claims against A will, on their face, fall within s.21(1)(b). What does this mean for him in terms of possible defences?
17. Where s.21 applies, s.22 is expressly disapplied by the statute so A cannot rely on a 12-year limitation period, even assuming he could correctly identify the date of accrual. Instead, the opening words to s.21 are that "*No period of limitation prescribed by the Act shall apply*" and A needs to consider whether this makes him indefinitely vulnerable on a strict liability basis or not.
18. Section 36(2) LA 1980 expressly preserves the equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise. *In re Pauling's Settlement Trusts* [1964] Ch 303 is authority for the proposition that, where LA 1980 provides an express period of limitation, a claimant is not to be denied the benefit of that period by the operation of the defence of *laches*. It does not follow that the opening words

of s.21 amount to an express period of limitation so that, once a claim can be shown to fall within s.21(1), a personal representative or trustee is indefinitely vulnerable and can never plead the equitable defences on the facts. So it is open to A to plead the equitable defences if they are available to him on the facts.

19. Delay alone is not enough to disentitle a beneficiary to relief for breach of trust as can be seen where delays of 3 years (*Hanchett v Briscoe* (1856) 22 Beav. 496), 10 years (*Re Cross* (1882) 20 Ch D 109 (CA)) and 12 years (*Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA)) alone were insufficient defence for the trustees. If a statutory limitation period applies, mere delay in suing for less than that period is entirely inoperative: *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 115, approved [1964] Ch 303 at 353, CA. Where no statutory period applies, mere delay may disentitle a beneficiary to discretionary relief (e.g. injunction, setting aside of transactions, etc) but to disentitle him from compensation for breach, something more than mere delay is required (e.g. a change of position, actual waiver or acquiescence, etc).
20. The length of time between grant and proceedings strongly suggests that A should plead one or more of these defences, in which case the modern test must be considered. The CA in *Green v Gaul* affirmed the modern approach to the defences of *laches*, acquiescence and estoppel in *Frawley v Neill*, *The Times*, 5 April 1999, namely the broad test of unconscionability:

"the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

21. It is important for A to also remember that, where he believes he acted honestly and reasonably, he may seek relief under s.61 of the Trustee Act 1925 from personal liability for any particular breach or omission. This should be specifically pleaded.

22. Another matter for trustees (although not available to A in this case as sole personal representative) to consider is the right of contribution between trustees. This may be ordered under the general principle of equity or under the Civil Liability (Contribution) Act 1978 (applicable only where both trustees became trustees after 1978 although the trust may have existed before that date). There is a special two year time limit for claiming contributions under the 1978 Act and, where the Act applies, it excludes the court's inherent equitable jurisdiction to order a contribution, but not any right to an indemnity: s.7(3). Where a claim is made under the previous non-statutory rules, it is doubtful whether any limitation period applies because LA 1980 confines itself to claims under the 1978 Act. In *Robinson v Harkin* [1896] 2 Ch. 415, a claim under the court's inherent jurisdiction for a contribution was held to be subject to the limitation periods imposed by s.8 of the Trustee Act 1888 – which has no counterpart in LA 1980. It is unlikely that this period would now apply but, if any period is relevant, time will not run until the beneficiaries have established their claim against the defendant trustee. If LA 1980 does not apply at all, the equitable defences such as *laches* may apply.

The Claim against W:

23. W is A's wife and has received the direct benefit of the bulk of the misappropriated monies which were transferred directly to her bank account. C argues that W dishonestly assisted the various fraudulent breaches of trust by A and seeks an indemnity from her. W asserts that the dishonest assistance claims were barred six years after each alleged theft under s.21(3) LA 1980, i.e. by 2002 at the very latest as that is when the last transfer was made into her name. Alternatively, she relies on *laches*.

24. These issues were recently considered in *Cattley & ors v Pollard & ors* [2006] EWHC 3130 (Ch) which deserves careful reading. As far as W and C are concerned, the relevant ratio is that the references in s.21(1)(a) to a "*breach of trust*" and "*trustee*" do not apply to those cases where the trust obligation arose as a direct consequence of the occurrence of the fraudulent transaction. That section only applies to claims against express trustees (such as A) and those who had assumed the duties of a trustee by a lawful transaction that was independent of and preceded the breach of trust.
25. In general, fraud claims are subject to a primary limitation period of six years. The exception in s.21(1)(a) has no application to the dishonest assistance claims against W and, subject to consideration of the remaining issues, those claims are subject to a primary limitation period of six years from the date the cause of action accrued (applying *Paragon Finance plc v Thakerar & Co.* (1999) 1 All ER 400).
26. Further, s.21(3) applies in this case. C, as trustee, has no personal interest in the outcome: the real litigant is B: the beneficiary. *Cattley v Pollard* held that, when s.21(3) refers to an action by beneficiaries, it includes, at least by analogy, actions brought exclusively on their behalf by trustees who have no personal interest in the outcome. It follows that the last subparagraph of s.21(3) applies to the claim against W.
27. A further point on which C relies is that C could not, with reasonable diligence have discovered facts that were key to proving A's fraud before his appointment in 2004. As the case against W is dependent on A's frauds, the same applies to W's frauds. Accordingly, as at January 2004, the fraud of W had not been discovered by the trustees or the beneficiaries nor could they with reasonable diligence have discovered it. Section 32 therefore applies to postpone the running of the primary period of limitation until after 2004 with the consequence that the proceedings against W are not time barred.

28. Whether or not W will succeed in her defence of *laches* will, of course, depend on all the circumstances and the test of unconscionability.

The Claim against S:

29. For claims by personal representatives against third parties, no allowance is made for the intervening death (i.e. the period of time between death and grant). In S's case, the Yard was transferred by A in breach of trust just over six years before C issued the claim to recover it. The Yard is no longer in A's hands. If B wishes to assert his beneficial interest in the Yard, it is necessary to *follow* it: *Foskett v McKeown* [2000] 2 WLR 1299. This gives the beneficiary a proprietary remedy against S.
30. Following may be a fruitless exercise if the Yard has passed from S into the hands of an unidentifiable person or someone against whom an effective remedy cannot be obtained or into the hands of a *bona fide* purchaser for value without notice. The fact that a trust asset can no longer be effectively followed does not mean to say the beneficiary has no proprietary remedy: it may be represented by another asset, in which case the beneficiary can *trace* or assert his beneficial interest in the substituted asset.
31. As C is concerned with land and a tracing remedy, it is necessary to have regard to ss.15 and 18 LA 1980. By virtue of these sections, C's tracing claim is not time barred because the relevant period is 12 years. As previously stated, where the LA 1980 provides an express period of limitation, C is not to be denied the benefit of that period by the operation of the defence of *laches*: *In re Pauling's Settlement Trusts*.

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APPENDIX 1

Relevant sections of the Limitation Act 1980

15 Time limit for actions to recover land

- (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
- (2) Subject to the following provisions of this section, where –
 - (a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and the right of action to recover the land accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest; and
 - (b) the person entitled to the preceding estate or interest (not being a term of years absolute) was not in possession of the land on that date;
no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of twelve years from the date on which the right of action accrued to the person entitled to the preceding estate or interest or six years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.
- (3) Subsection (2) above shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.
- (4) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

- (5) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.
- (6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.
- (7) Part II of that Schedule contains provisions modifying the provisions of this section in their application to actions brought by, or by a person claiming through, the Crown or any spiritual or eleemosynary corporation sole.

18 Settled land and land held on trust

- (1) Subject to section 21(1) and (2) of this Act, the provisions of this Act shall apply to equitable interests in land, *including interests in the proceeds of the sale of land held upon trust for sale*, as they apply to legal estates. Accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal estate in the land (and any relevant provision of Part I of Schedule 1 to this Act shall apply in any such case accordingly).
- (2) Where the period prescribed by this Act has expired for the bringing of an action to recover land by a tenant for life or a statutory owner of settled land –
 - (a) his legal estate shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land either has not accrued or has not been barred by this Act; and
 - (b) the legal estate shall accordingly remain vested in the tenant for life or statutory owner and shall devolve in accordance with the Settled Land Act 1925;

but if and when every such right of action has been barred by this Act, his legal estate shall be extinguished.

- (3) Where any land is held upon trust (*including a trust for sale*) and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land *or in the proceeds of sale* either has not accrued or has not been barred by this Act; but if and when every such right of action has been so barred the estate of the trustees shall be extinguished.

- (4) Where –
- (a) any settled land is vested in a statutory owner; or
 - (b) any land is held upon trust (*including a trust for sale*);
- an action to recover the land may be brought by the statutory owner or trustees on behalf of any person entitled to a beneficial interest in possession in the land *or in the proceeds of sale* whose right of action has not been barred by this Act, notwithstanding that the right of action of the statutory owner or trustees would apart from this provision have been barred by this Act.

21 Time limit for actions in respect of trust property

- (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
 - (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.
- (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation

prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

- (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. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
- (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

22 Time limit for actions claiming personal estate of a deceased person

Subject to section 21(1) and (2) of this Act—

- (a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; and
- (b) no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

23 Time limit in respect of actions for an account

An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.

36 Equitable jurisdiction and remedies

.....

- (2) Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.