Serle Court New York Conference 2017

LIMITATION & TRUSTS WORKSHOP PROBLEM QUESTION

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1. You are approached by Manuel Manjana, veteran in-house counsel for Dupe Ltd, a long-established sports car dealership based in Mayfair, London. Dupe has operated since the early 1960s. In around 1990 they hired Mr Shady, a used-car salesman from St Hellier, Jersey, as head of acquisitions. Shortly thereafter, Mr Shady was appointed to the company's board.

2. Mr Shady was an energetic and charismatic trader, who transformed the profile of Dupe. He secured a deal for Blindeye Ltd to supply Dupe with the latest models of Ferrari. The Mayfair clientele was delighted, and so were Mr Shady's fellow board members.

3. The relationship between Dupe and Blindeye continued for many years, and Dupe became the foremost Ferrari dealership in London. Then, out of the blue, on 1 December 2014, Dupe received a letter from Blindeye which said that they would no longer be supplying vehicles: the trading was at an end. Mr Manjana sought out Mr Shady to ask what had happened to derail this prized relationship, only to remember that Mr Shady had retired (and resigned from the board) one month earlier.

4. Mr Manjana consulted his files. He was alarmed to discover a large tranche of unopened correspondence addressed to him by Mr Tipoff, a junior sales executive whom had worked closely with Mr Shady for many years. Mr Tipoff had written in November 2011 in the following terms:

   (a) Mr Shady enjoyed a lifestyle far beyond the means of someone earning £50,000 per year paid to him by Dupe. Mr Tipoff therefore stayed behind in the office one night to look through Mr Shady's papers. He discovered a file titled 'Pension', which contained correspondence between Mr Shady and Blindeye dating from 1990 onwards. The earliest record was a

scrawled note on the back of a restaurant menu which said "S to get 10% on every purchase order made by D".

(b) Mr Tipoff photocopied the entire file and forwarded it to Mr Manjana. It contains bank statements showing Mr Shady in receipt of substantial annual payments from Blindeye during a 20+ year period, from November 1990 to November 2011.

(c) There was also correspondence and bank statements showing that Mr Shady had forwarded the payments he received from Blindeye into a joint bank account in Jersey, under the names of Mr and Mrs Magoo. On the face of the correspondence, Mr Shady only ever dealt with Mr Magoo, and there are letters between them exchanging bank details, payment confirmations by Mr Shady, but no evidence of Mr Shady receiving anything in return. It seems that Mr and Mrs Magoo have, over the years, received some £2 million into their account from Mr Shady. One letter from Mr Magoo notes how pleased Mrs Magoo was to receive a 3ct diamond ring for her 40th birthday – it was, apparently, 'a lovely surprise'.

5. This was a lot for Mr Manjana to take in. He decided he needed some thinking time, and embarked upon a three-year around the world cruise. He has recently returned to work and he has concluded that he needs to take advice.

6. In particular he wishes to know whether Dupe has a cause of action which can be pursued in respect of the monies and assets received by: (1) Mr Shady; (2) Mr Magoo; (3) Mrs Magoo.

7. Mr Manjana also wishes to know whether Dupe should commence any action in the courts of Jersey (where many of the potential defendants seem to be based and where the Magoos' bank account is held) or in London (where Dupe is registered and where the bank account of Mr Shady is held)?

Limitation Act 1980 (UK), section 21

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.

…

(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.

....

Trusts (Jersey) Law, Article 57

57 Limitation of actions or prescription

(1) No period of limitation or prescription shall apply to an action brought against a trustee –

(a) in respect of any fraud to which the trustee was a party or to which the trustee was privy; or

(b) to recover from the trustee trust property –
(i) in the trustee's possession,
(ii) under the trustee's control, or
(iii) previously received by the trustee and converted to the trustee's use.

(2) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is 3 years from –

(a) the date of delivery of the final accounts to the beneficiary; or

(b) the date on which the beneficiary first has knowledge of the breach of trust,
whichever is earlier.

…

(3C) Where paragraph (1) does not apply, no action founded on breach of trust may in any event be brought against a trustee by any person after the expiry of the period of 21 years following the occurrence of the breach.

…

Williams v Central Bank of Nigeria [2014] UKSC 10

Per Lord Sumption, at [7] & [9]:

7 The combined effect of the definition sections of the Limitation Act 1980 and the Trustee Act 1925 is that in section 21 of the Limitation Act a trustee includes a "constructive trustee". Unfortunately, this is not as informative as it might be, for there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees.

9 .... The problem is that in this all-embracing sense the phrase "constructive trust" refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations. In its second meaning, the phrase "constructive trustee" refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ancillary liability. The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial. The distinction between these two categories is not just a matter of the chronology of events leading to liability. It is fundamental. In the words of Millett LJ in *Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400* , 413, it is "the distinction between an institutional trust and a remedial formula—between a trust and a catch-phrase".