Bagus Inv Ltd v Kastening

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	05 August 2010
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Text

[2010] JRC 144

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff., **sitting alone.**

Between
Bagus Investments Limited
Appellant
and
Wilfred Kastening
Respondent

Advocate O. A. Blakeley **for the Appellant.**

Advocate P. D. James **for the Respondent.**

Authorities

Re Esteem [2002] JLR 53 .

Goode v Martin [2001] 3 All ER562 .

Trusts (Jersey) Law 1984.

Limitation Act 1980.

Paragon Finance plc v D B Thackerar & Co [1999] 1 All ER 400 .

Taylor v Davies [1920] AC 636 .

English Trustee Act 1988.

Limitation Act 1939

Halton International Inc v Guernroy Limited [2006] EWCA Civ 801 .

Peconic Industrial Development Limited v Lau Kwuk Fai 11 ITELR 844 .

Dubai Aluminium Company Limited v Salaam [2003] 2 AC 366 .

Statek Corporation v Alford [2008] EWHC 32 (Ch) .

UCC v Bender [2006] JLR 242 .

BCCI v Akindele [2001] Ch 437 .

Charter PLC v City Index Limited [2008] Ch 313 .

Bank of Credit and Commerce International (Overseas) Limited v Akindele [2001] Ch 437 .

Bailiff

THE

1 This is an appeal against a decision of the Master refusing leave for the plaintiff to re-amend its Order of Justice so as to include a claim for knowing receipt.

2 The application to re-amend is opposed by the defendant on three grounds:-

(i) the claim in knowing receipt is prescribed;

(ii) the draft re-amended Order of Justice does not plead the facts necessary to support a claim for knowing receipt; and

(iii) the Court should in any event exercise its discretion against the amendment because of the way in which the plaintiff has conducted the litigation to date.

3 The first issue raises interesting questions as to what (if any) prescriptive period applies under the law of Jersey to a claim of knowing receipt.

The factual background

4 The essential factual background can be shortly stated. During the 1990's a Jersey fiduciary services provider known as Lavy Hancox Group ("the LH Group") was the forum for fraudulent activities by its founder and beneficial owner Mr Raymond Bellows ("Bellows"). In little over 4 years Bellows fraudulently converted a total of £5.1 million of clients' funds.

5 The plaintiff is a BVI company which was a client of the LH Group and was administered by them. Bellows was a director of the plaintiff. According to the Order of Justice, on 9th September, 1996, the LH Group, through Bellows, unlawfully and without authority transferred US$480,000 (equivalent at the time to £306,611) from the plaintiff's bank account with Midland Bank in Jersey to an account in the name of Lavy Hancox Management Limited also at Midland Bank in Jersey ("the Midland account").

6 The defendant was also the recipient of fiduciary services from the LH Group. According to the Answer, during the 1990's, while resident in the UK as a foreign domiciliary, he carried on business in relation to property investment and financial services. He caused certain of his assets outside the UK to be settled on a Guernsey trust called the Beaufort Settlement ("the Trust"). Lavy Hancox Trustees Limited was the trustee of the Trust. The defendant was told by Bellows in 1992 that he was a beneficiary of the Trust but in fact he was not appointed as such until February 1998.

7 The Trust owned a company called Beaufort Properties Limited ("Beaufort"), also administered by the LH Group. The defendant provided services as a consultant/agent to this company in respect of property and financial matters. Bellows was a director of Beaufort.

8 According to the Answer, by late 1996 Beaufort was in a position to begin lending funds of its own on a commercial basis and in September 1996 it made a secured loan of $1.5 million to Mr Carl-Heinz Rehkopf. Mr Rehkopf was the owner of one of Germany's leading home furnishing groups and was an independent third party. According to the defendant, he assumed that the sum was taken from Beaufort's bank account which contained more than $1.5 million at the time. However, according to the plaintiff, the sum of $1.5 million was in

fact paid out of the Midland account and was made up in part from the converted funds of $480,000.

9 In 1997 Bellows' fraud was exposed and the companies of the LH Group (including the trustee of the Trust) were put into liquidation. At about the same time, the loan to Mr Rehkopf became repayable. According to the defendant, he was concerned that the monies from the loan repayment would somehow be mistakenly swallowed up in the LH Group liquidation.

10 As a result he travelled to Germany in March 1997 and collected a bearer cheque for US$1,513,520.55 (“the cheque”) from the office of Mr Rehkopf's company. He then travelled to Liechtenstein and paid the cheque into the bank account of a Liechtenstein Anstalt, the Lesara Anstalt, a separate legal entity beneficially owned by the defendant. From there the majority of the funds were subsequently transferred to another Anstalt owned by the defendant, known as the Taurus Finanz Anstalt in April 1997. Thereafter the monies were distributed by Taurus to the defendant in various tranches and were received by him in Switzerland and England.

11 On 16th December, 1997, Standard Bank Offshore Trust Company (Jersey) Limited (“Standard”) was appointed trustee of the Trust in place of the LH Group. The defendant disclosed to Standard at a meeting in London on 13th January, 1998, that he had paid the money representing repayment of the loan to himself (technically, it had been paid to the Lesara Anstalt owned by him). Standard indicated that it could ratify this payment. Shortly thereafter in February 1998 Standard made the defendant a beneficiary of the Trust after which the Trust was wound up with the defendant receiving the benefit of the repaid loan.

12 The plaintiff claims essentially that it was beneficially entitled to the converted funds of $480,000 and now seeks their return together with any profit or interest earned thereon.

History of the proceedings

13 Mr James has placed considerable reliance on the history of the proceedings and the dilatory manner, as he submits, in which the plaintiff has pursued them. I do not think it necessary to recount the history in detail. Put shortly, the plaintiff did not file its original Order of Justice until July 2006, some 10 years after the events in question and approximately 9 years after the LH Group was placed *en désastre*. The claim at that stage was two-fold. First there was a restitutionary claim in accordance with the decision in *Re Esteem* [2002] JLR 53 at 113 and secondly there was a claim in knowing receipt on the basis that the defendant knew that the monies represented by the cheque did not belong to Beaufort. The claim was brought against the defendant as first defendant and Beaufort as second defendant. The defendant requested further particulars of the claim in knowing receipt and after some delay the plaintiff eventually indicated in November 2006 that it would be dropping the claim in knowing receipt and abandoning the claims against

Beaufort. Advocate Blakeley sent a draft amended Order of Justice to that effect. There were then considerable further exchanges about the terms of the draft amended Order of Justice together with various applications by the defendant, including summonses seeking unless orders against the plaintiff.

14 On the basis that the claim was now simply one in restitution and that the proper law of a receipt based claim is the place of receipt, the defendant obtained advice from foreign law experts in relation to Swiss law, English law and Liechtenstein law. The effect of these was that there could be no valid claim under any of those systems of law. The contents of this advice and a notice to admit were sent to the plaintiff's advocates and the defendant re-amended his answer to plead the relevant facts and the relevant Swiss, English and Liechtenstein law. He then applied for trial of certain preliminary issues, namely where the monies were received, whether the laws of Switzerland and England governed the claims and whether therefore the plaintiff's claims were doomed to failure. On 22nd January, 2008, the Master made an order in those terms. During the hearing before the Master, the plaintiff indicated that it might be seeking leave to re-amend its Order of Justice to include an action for knowing receipt once again but nothing further was done. According to the defendant, the plaintiff was not responding to its various efforts to move forward on the preliminary issues and it subsequently obtained an order for security for costs. Eventually on 23rd December, 2008, the plaintiff issued a summons seeking leave to re-amend the Order of Justice in order to plead once again a claim in knowing receipt. When this came before the Master, he held that he had no jurisdiction because the plaintiff was in effect seeking a reversal of his decision to order the trial of preliminary issues. The plaintiff therefore appealed the decision of the Master to order the trial of preliminary issues. This came before the Royal Court on 2nd April, 2009, with Commissioner Hamon presiding. The Court ordered that the matter be remitted to the Master but that the plaintiff should pay the costs of the hearing before the Royal Court. It was in those circumstances that the application to re-amend came back before the Master and led to his refusal to grant leave to re-amend on 20 th July, 2009.

15 I should add that Advocate Blakeley submitted that the plaintiff had been forced to agree to drop the original allegation of knowing receipt because at that stage it did not have the necessary evidence as to the defendant's state of knowledge when he procured the payment of the cheque to Lesara Anstalt. Since then, on 20th August, 2007, the defendant had sworn an affidavit in which he had said that he had paid the cheque to Lesara Anstalt because he was worried that if the funds were returned to Beaufort, they might somehow mistakenly be swallowed up in the liquidation of the LH Group. Mr James replied that Mr Blakeley's argument that new information had become available to the plaintiff was simply untenable. The plaintiff had, from before the launch of the proceedings, been in possession of a file note of Standard dated 13th January, 1998, in which the writer of the note had recorded the defendant as saying " *he arranged for it to be paid directly to himself as it was due for payment after Lavy Hancox was declared en désastre and therefore did not want to mix any additional funds with those currently frozen.* He was worried that any potential creditors of Beaufort Properties Limited or those who may have a claim*against funds misappropriated in favour of those companies could approach him with regard to the repayment of these sums."* The affidavit had therefore, submitted Mr James, given the

plaintiff no new information at all in relation to the claim of knowing receipt and the defendant's state of mind.

Prescription

16 With that introduction, I turn to consider the application for leave to re-amend the Order of Justice so as to re-introduce a claim of knowing receipt. The parties are agreed on the relevant test, namely that the Court will not permit amendments to introduce a new cause of action which is arguably prescribed at the date of amendment, unless the claim arises from the same or substantially the same facts as the claim already pleaded, see *Goode v Martin* [2001] 3 All ER562. A claim in knowing receipt (with its requirement for knowledge that renders it unconscionable to retain the money in question) clearly does not arise from the same or substantially the same facts as a simple claim in restitution and Advocate Blakeley did not suggest otherwise. The reason for the rule is that, if leave to amend is given, the amendment dates back to the date of the original Order of Justice and the defendant will therefore be precluded from raising the prescription argument if, as in this case, the claim was not prescribed at the date of the original Order of Justice. A plaintiff seeking leave to introduce a new cause of action in such circumstances has to surmount the high hurdle of establishing at the hearing of the application for leave to amend that the defendant has no reasonable prospect of success on the prescription argument. If leave to amend is refused, a plaintiff's alternative course is then to institute a separate fresh action in which a defendant would of course be free to argue the prescription point on its merits.

17 I turn therefore to consider whether it is reasonably arguable that the knowing receipt claim is prescribed at the present date. If it is reasonably arguable, leave to re-amend must be refused.

18 The key statutory provision is Article 57 of the Trusts (Jersey) Law 1984 (“the 1984 Law”) which provides as follows:-

> ***“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) Save a provided in paragraph (1), the period in which an action founded on breach of trust may be brought against a trustee by a beneficiary or an enforcer is:-

(a) 3 years from the delivery of the final accounts of the trust to the beneficiary or the enforcer; or

(b) 3 years from the date on which the beneficiary or the enforcer first has knowledge of the occurrence of a breach of trust,

whichever period shall first begin to run.

(3) …

(3A) Save as provided in paragraph (1), the period in which an action founded on breach of trust may be brought against a former trustee by a current trustee is 3 years from the date on which the former trustee ceased to be a trustee of the trust. …"

19 Although it may seem unusual, the way in which the case has been argued means that I must first consider the position in relation to the equivalent English provision, namely Section 21 of the Limitation Act 1980. The relevant provisions are as follows:-

"21 (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) …

(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. …"

By virtue of s38 of the Act, the expressions "trust" and "trustees" in s21 extend to constructive trusts.

20 Mr James argued that, under English law, it is clear that section 21(1) does not apply to claims for knowing receipt. Underlying this assertion is the fact that, in English law, the

expression “constructive trustee” covers two completely different types of situation. The first is where the defendant acquired the property as a trustee or other fiduciary in an unimpeached arrangement before the conduct complained of when he abused the trust and confidence that reposed in him; the second is where the wrongful conduct of the defendant in asserting his interests leads to an equitable obligation being placed upon him. This distinction has been touched upon in a number of cases but has perhaps been most clearly articulated by Millett LJ in the case of *Paragon Finance plc v D B Thackerar & Co* [1999] 1 All ER 400 at 408–414. I would refer in particular to the following passage of his judgment beginning at 408:-

> ***“The explanation for the rule [that a claim against an express trustee was never barred by lapse of time] was that the possession of an express trustee is never in virtue of any right of his own but is taken from the first for and on behalf of the beneficiaries.*** His possession was consequently treated as the possession of the beneficiaries, with the result that time did not run in his favour against them: see the classic judgment of Lord Redesdale in *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607 ***at 633–634*** .
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> ***The rule did not depend upon the nature of the trustee's appointment, and it was applied to trustees de son tort and to directors and other fiduciaries who, though not strictly trustees, were in an analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves.*** Such persons are properly described as constructive trustees.
>
> ***Regrettably, however, the expressions ‘constructive trust’ and ‘constructive trustee’ have been used by equity lawyers to describe two entirely different situations.*** The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> ***A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.*** In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v Grogan* [1869] LR 4 HL 82 ***(a case of a secret trust) and*** *Rochefoucald v Boustead* [1897] 1 Ch 196 ***(where the defendant agreed to buy the property for the plaintiff but the trust was imperfectly recorded)*** .

> *Pallant v Morgan* [1952] 2 All ER 951, [1953] Ch 43***(where the defendant sought to keep for himself the property which the plaintiff trusted him to buy for both parties) is another.*** In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.
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> ***The second class of case is different.*** It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the ***trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff.*** In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd v Cradock (no 3)* [1968] 2 All ER 1073 ***at 1097*** , [1968] 1 WLR 1555***at 1582 per Ungoed-Thomas J."***

21 In a number of cases the first type of constructive trustee has been referred to as a class 1 constructive trustee and the second as a class 2 constructive trustee. I shall do likewise where appropriate.

22 Mr James argues that it is clear that, under English law, a class 2 constructive trustee does not fall within the meaning of "trustee" for the purposes of the Limitation Acts. A person who is guilty of knowing receipt is clearly a class 2 constructive trustee and therefore the provision that there is no limitation period to recover trust property from a trustee does not apply to a person guilty of knowing receipt. His starting point is the decision of the Judicial Committee of the Privy Council in *Taylor v Davies* [1920] AC 636. Section 47 of the relevant Canadian Act (which corresponded with Section 8 of the English Trustee Act 1988) contained at paragraph (1) the provision that the expression "trustee" included a constructive trustee and at paragraph (2) went on to say:-

> ***"In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply…"***

23 The Privy Council held that that provision did not apply to a class 2 constructive trustee. Viscount Cave said this at 652:-

> ***"It does not appear to their Lordships that the section has this affect.*** The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction."

24 In the case of *Paragon* (referred to earlier) Millett LJ agreed that the position of class 2 constructive trustees had been established in *Taylor* but went on to consider whether the slightly different language of the Limitation Act 1939 (repeated in the Limitation Act 1980 which replaced it) as compared with the earlier statutes meant that class 2 constructive trustees now fell within Section 21(1) of the 1980 Act, so that they could no longer rely on any limitation period. The Court of Appeal did not need to decide the matter because, like me, it was simply considering an application to amend. The Court had only to consider whether the plaintiffs could show that the defendants had no reasonably arguable limitation defence. It held that there was such an arguable defence and therefore refused leave to amend. However, in passing at pages 412 – 414, Millett LJ set out 10 arguments, which he described as "formidable", in favour of the proposition that the 1939 Act and 1980 Act had not had the effect of abrogating the former distinction between the two kinds of constructive trust for the purposes of limitation, so that a class 2 constructive trustee was not caught by s21(1).

25 In *Halton International Inc v Guernroy Limited* [2006] EWCA Civ 801, the English Court of Appeal applied the dicta of Millett LJ in *Paragon* and said that only a class 1 constructive trust was to be treated as a "trust" for the purposes of the Section 21(1) exception to the ordinary limitation rules.

26 Next, Mr James referred to a decision of the Court of Final Appeal in Hong Kong in the case of *Peconic Industrial Development Limited v Lau Kwuk Fai* 11 ITELR 844. In that case there was a claim against the defendant for dishonest assistance. The defendant argued that the claim was time barred on the basis of Section 20(1) of the Limitation Ordinance of Hong Kong which was in identical terms to s21(1) of the English statute. The plaintiffs argued that a dishonest assister was a constructive trustee and accordingly fell within Section 20(1). This was unanimously rejected by the Court of Final Appeal and the headnote reads:-

> ***"An allegedly dishonest assister was not a fiduciary and was entitled to plead the Limitation Ordinance.*** The principle of the Ordinance was that limitations were denied to fiduciaries; strangers to a trust who made themselves liable through dishonest interference were only described as constructive trustees as a formula for liability for equitable relief.
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> ***(2) The words "in respect of any fraud… to which the trustee was a party or privy" in S20(1)(a) referred to an action in which a beneficiary was suing a trustee for a breach of trust and did not include claims against dishonest***

assisters and other non-fiduciaries."

27 I would refer in particular to the observations of Lord Hoffmann NPJ at paras 19–23:-

> ***"19. The language of s20, like most of the Ordinance, is taken word for word from the UK Limitation Act 1939. It was obviously intended to have the same meaning. One therefore has to ask whether Danny Lau would have been a constructive trustee within the meaning of the corresponding section of the 1939 Act (s19). On a literal reading he would, because a stranger to a trust who dishonestly assists in its breach is traditionally described as a constructive trustee. For the purposes of limitation, however, there are two kinds of constructive trustees. …First, there are persons who, without any express trust, have assumed fiduciary obligations in relation to the trust property; for example as purchaser on behalf of another, trustee de son tort, company director or agent holding the property for a trustee. I shall call them fiduciaries. They are treated in the same way as express trustees and no limitation period applies to their fraudulent breaches of trust. Then there are strangers to the trust who have not assumed any prior fiduciary liability but make themselves liable by dishonest acts of interference. I shall call them non-fiduciaries. They are also called constructive trustees but this … is a fiction; "nothing more than a formula for equitable relief". They are not constructive trustees within the meaning of the law of limitation.***
>
> ***…***
>
> ***22. This*** [the decision in *Taylor v Davies*] ***was an authoritative statement on the construction of the 1888 Act and although the 1939 Act amended as well as consolidated the previous law, it is hard to believe that the slight changes of language in s19 were intended to introduce a fundamental change. In****Paragon****… Millett LJ offered what he called "formidable arguments" against such a construction which I find entirely convincing.***
>
> ***23. In my opinion, therefore, non-fiduciaries do not come within the definition of trustees in s19 of the 1939 Act or s20 of the Ordinance. …"***

28 Finally Mr James referred to paragraph 141 of the speech of Lord Millett in *Dubai Aluminium Company Limited v Salaam* [2003] 2 AC 366 where, when referring to a dishonest assister, Lord Millett said this:-

> ***"In such a case he is traditionally (and I have suggested unfortunately) described as a "constructive trustee" and is said to be "liable to account as a constructive trustee".*** But he is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or ***handling the trust property.*** If he receives the trust property at all, he receives it adversely to the claimant and by an unlawful transaction which is impugned

by the claimant. He is not a fiduciary or subject to fiduciary obligations and he could plead the Limitation Acts as a defence in the claim."

29 Advocate Blakeley refers to the case of *Statek Corporation v Alford* [2008] EWHC 32 (Ch) where, in an obiter passage, Evans-Lombe J concluded that section 21(1) of the Limitation Act 1980 should be construed as applying to dishonest assisters with the result that no period of limitation was applicable to claims against them. Advocate Blakeley therefore argued that the position under English law was not clear cut.

30 I accept that the cases have not invariably spoken with one voice but in light of the authorities referred to above, I consider that the overwhelming likelihood is that English law considers that class 2 constructive trustees, which include dishonest assisters and those guilty of knowing receipt, are not trustees for the purposes of section 21 (1) of the Limitation Act 1980 and that accordingly claims against them are subject to the ordinary limitation provisions and become prescribed after the appropriate period.

31 Advocate James argues that Article 57(1) is clearly based on section 21(1) of the 1980 Act. He submits that the law of Jersey in relation to constructive trusts generally (and dishonest assistance and knowing receipt in particular) is similar to English law. It follows, he says, that Article 57(1) should be interpreted in the same manner as the English courts have interpreted section 21(1) with the consequence that category 2 constructive trustees – such as those guilty of knowing receipt – do not fall within Article 57(1). He submits that they either fall within Article 57(2) or within the more general period of 10 years from when the cause of action arose. In the former case, he contends that the plaintiff has been aware of all material facts since it saw the Standard file note in 2005; in the latter case, over 10 years have elapsed since the defendant received the property in 1997. The claim in knowing receipt is therefore prescribed on the facts, he submits.

32 Advocate Blakeley argues that there are a number of reasons for concluding that Article 57(1) should not be interpreted in the same manner as section 21(1) and that an action for knowing receipt falls within Article 57(1) and is therefore imprescribable.

33 He points out that the wording of the two provisions is not identical. Thus Article 57(1) specifically refers to actions against trustees whereas s21(1) is not so limited. Secondly Article 57(1) refers to "any fraud" whereas s21(1) includes this as an additional alternative to "a fraudulent breach of trust". I have to say that I do not see that these two minor changes assist his argument.

34 He emphasises that s21(1) refers to actions "by a beneficiary" whereas Art 57(1) does not. He points out that in *Paragon*, Millett LJ mentioned this as one of his 10 "formidable" arguments, on the basis that such wording was *prima facie* applicable only to those whose trusteeship preceded the occurrence which was the subject of the claim against them and not those whose trusteeship arose only by reason of that occurrence.

35 Next, he referred to Article 2 of the 1984 Law which provides as follows:-

> ***"A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the persons own right):-***
>
> ***(a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence…"***

He submitted that this wording was wide enough to include a class 2 constructive trustee and that accordingly the expression "trustee" in Article 57(1) included a class 2 constructive trustee.

36 As an alternative to that argument, he referred to Article 33 of the 1984 Law which is in the following terms:-

> ***"(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain or advantage.***
>
> ***(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust.***
>
> ***(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.***
>
> ***(4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."***

He submitted that this wording was clearly wide enough to include a class 2 constructive trustee and that paragraph (1) deemed such a person to be a trustee. That person should therefore be treated as a trustee for the purposes of Article 57(1). Although Advocate Blakeley did not refer me to the case but simply included it in the substantial bundle of authorities, I have noted in my reading for the purposes of preparing this judgment that the case of *UCC v Bender* [2006] JLR 242 might be said to offer some support for his arguments, although the point at issue in this case was not before the Court of Appeal in that case.

37 He further argues that the English position is unsatisfactory. The test for knowing receipt is as set out in *BCCI v Akindele* [2001] Ch 437 and the plaintiff must show first, a disposal of his assets in breach of fiduciary duty; secondly the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly such knowledge on the part of the defendant that the assets he received are traceable to a

breach of fiduciary duty as to make it unconscionable for him to retain the benefit of the receipt. Although this is a lesser standard than dishonesty, it is nevertheless such that it would be unjust to allow a limitation period to defeat such a claim by the true beneficiary of the property.

38 In short, Advocate Blakeley's primary submission is that Article 57(1) applies to class 2 constructive trustees. Because a claim of knowing receipt will not always fall within paragraph (a) (there may have been no fraud) Advocate Blakeley must be relying also upon paragraph (b)(iii).

39 As an alternative argument on the facts of this case, Advocate Blakeley argues that the defendant is in fact a class 1 constructive trustee. He argues that the defendant was the duly appointed agent of Beaufort and was entrusted by Beaufort to deal with its assets. He was therefore a fiduciary. He therefore became a class 1 constructive trustee when he wrongfully converted the property to his own use by paying it to Lesara Anstalt.

40 As a second alternative, he submits that, even if the limitation period is three years by virtue of Article 57(2), the claim is not prescribed because the plaintiff only had knowledge of the occurrence of the breach of the trust when he received the defendant's affidavit of 19th November, 2007, rather than when he saw the file note.

41 I can deal briefly with these two alternative arguments. As to the first, Advocate James argues that the relevant breach of trust is the wrongful conversion of the plaintiff's assets when they were paid out of the Midland account for the benefit of Beaufort. In relation to that breach, the defendant is undoubtedly a class 2 constructive trustee as he had not been entrusted with any property at that time. It seems to me that this must be an arguable point and it would not be right to deprive the defendant of the ability to take the point by allowing the amendment at this stage.

42 The same argument applies in relation to whether, if Article 57(2) is applicable, the claim is prescribed on the facts. That would depend upon the evidence and the defendant must be allowed to produce such evidence as he wishes and argue the matter fully. It would be wrong to deprive the defendant of the opportunity of pursuing an arguable prescriptive defence on the facts by allowing the amendment at this stage.

43 I return therefore to the main argument. I do not propose to summarise Advocate James's arguments in response to those of Advocate Blakeley but I have taken them into account in coming to my conclusion.

44 In my judgment, the defendant clearly has an arguable case that a claim in knowing receipt does not fall within Article 57(1) and is not therefore imprescribable. It would be wrong therefore to deprive him of the opportunity of raising the defence, which would be the consequence of allowing the amendment at this stage. Advocate Blakeley says that, as it is

simply a question of law, I should decide it one way or the other at this stage. But that is not the test for granting leave to amend. Indeed, in *Paragon* itself, the English Court of Appeal refused leave to amend on the ground that the limitation defence was arguable even though it was entirely a matter of law.

45 In brief summary, my reasons for considering that the defence of prescription by the defendant is arguable are as follows:-

(i) Jersey law is similar to English law in relation to constructive trusts and would undoubtedly recognise the two different types or classes of constructive trustee described in the English cases and by Lord Hoffmann in *Peconic*.

(ii) I accept that the wording of Article 57(1) is not identical to s21(1) but it is very similar. The Jersey provision was clearly based upon the English provision and I do not consider that the minor differences in wording necessarily lead to the conclusion for which Advocate Blakeley contends.

(iii) These two aspects provide a strong basis for considering that the reasoning of the English courts in relation to the interpretation of s21(1) may be equally applicable to Art 57(1).

(iv) Advocate Blakeley placed some reliance upon the fact that, unlike s21(1), Article 57(1) does not refer to claims by a “beneficiary”. As he mentioned, this was one of the grounds specifically referred to by Millett LJ in *Paragon*. However, the provision which was the subject of the decision of the Privy Council in *Taylor v Davis* did not refer to claims by a “beneficiary” and yet the Privy Council held that the provision did not apply to class 2 constructive trustees. That is quite a strong argument against Mr Blakeley's point. Furthermore, Article 57(2) does refer to claims by a beneficiary and also refers back to Article 57(1), thus implying that paragraph (1) is dealing with the same type of claim as paragraph (2).

(v) The construction contended for by Advocate Blakeley would lead to surprising results. Many breaches of trust are not fraudulent. A claim in knowing receipt can arise following a breach of trust carried out by the original trustee which was not fraudulent. In those circumstances the claim against the original trustee who actually committed the breach would be time barred after three years in accordance with Article 57(2), whereas the claim against the person who had received the property from the original trustee with knowledge of the breach of trust would not be prescribed. A claim in knowing receipt is a personal claim and there is no defence of change of position. Accordingly the knowing receiver would be liable even if he had paid the money away. It seems illogical that a secondary party in this way should face a claim unlimited in time whereas the original trustee who committed the breach would have the protection of a limitation period.

(vi) The wording of Article 33 of the 1984 Law is arguably wide enough to cover an entirely innocent volunteer recipient. If the plaintiff's arguments are correct, such a person would never have any right to a limitation defence whereas the original trustee

who had committed the breach would if the breach was not fraudulent.

46 In the same way as Advocate Blakeley sought to persuade me that I could decide the matter finally at this stage, Advocate James also submitted that the only correct legal answer was that which he was putting forward. However, I accept that there are arguments the other way as put forward by Advocate Blakeley and summarised above. The test which I must apply is whether the defendant has an arguable defence on prescription and, for the reasons set out above, I have no doubt that he has. It would therefore be wrong to grant leave to amend and thereby deprive the defendant of the opportunity of arguing the matter fully both on the law and on the facts. I therefore refuse leave to re-amend the Order of Justice on this ground.

No properly pleaded claim of knowing receipt

47 In view of my decision on the prescription point, I propose to deal fairly briefly with the second and third grounds relied upon by the defendant when opposing the amendment.

48 The relevant allegations in the proposed re-amended Order of Justice are as follows:-

(i) At paragraph 10 the plaintiff pleads that the sums represented by the cheque included sums due to the plaintiff and as a result the plaintiff had beneficial/equitable title to the cheque.

(ii) In paragraph 11F, the plaintiff refers to the meeting on 13th January, 1998, between the defendant and representatives of Standard and pleads that the defendant said that his rationale for paying the money to Lesara Anstalt rather than to Beaufort on 25th March, 1997, was "…to avoid this money being added to money frozen following the désastres. He further explained that he was concerned that persons who may have had funds misappropriated in favour of Beaufort may pursue him for repayment."

(iii) Paragraph 15 pleads that the defendant knew or had grounds to believe that when he received the cheque and subsequently arranged for it to be deposited to the account of Lesara Anstalt he was not beneficially entitled thereto and that the value of the cheque was for the benefit of either or both Beaufort and other entities which, prior to the *désastre*, were managed by the companies. The plaintiff then goes on to plead that the defendant's knowledge was based on the following matters:-

> *"b(5) He knew or had reasonable grounds to believe that the beneficial interest in the Cheque belonging to entities managed by the companies."*

(iv) At paragraph 16 it is pleaded that the acts of the defendant detailed above and his acts in:-

> *"(a) converting the Cheque to his own benefit;*

(b) not making enquires as to the beneficial ownership of the Cheque or sums made up by it when he was concerned as the beneficial ownership;

(c) …

(d) …

made his knowledge such that it would be unconscionable for him to be allowed to retain the benefit of the Cheque and / or its proceeds and that he should be held personally liable to account to the Plaintiff for the Converted Funds and all profit and / or interest thereon."

49 Advocate James argues that there is not a sufficiently pleaded case of knowing receipt. In order to consider the validity of this submission I must remind myself of the elements of a claim in knowing receipt. I agree with Advocate James that a convenient summary of the position is to be found in two cases. In *Charter PLC v City Index Limited* [2008] Ch 313, Carnwath LJ approved the following passage of the judgment of Sir Andrew Morritt C sitting in first instance in that case:-

> ***"9 The relevant cause of action is now commonly called 'knowing receipt'.*** The essential elements of such a cause of action were elaborated by Hoffmann LJ in *El Ajou v Dollar Land Holdings PLC* [1994] 2 All ER 685, 700 ***in these terms:-***
>
> **'For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.**'"

50 Having referred to the decision of the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Limited v Akindele* [2001] Ch 437, (which established that 'unconscionability' was the test in relation to the degree of knowledgeable required) Carnwath LJ summarised the position as follows in paragraph 8 of his judgment:-

> ***"Accordingly, liability for "knowing receipt" depends on the defendant having sufficient knowledge of the circumstances of the payment to make it "unconscionable" for him to retain the benefit or pay it away for his own purposes."***

51 The headnote of *Ackindele* records the decision of the Court of Appeal as follows:-

> ***"that, although a knowing recipient would often be found to have acted dishonestly, dishonesty was not a pre-requisite to liability under the knowing receipt head; that in order to be liable for knowing receipt the recipient had to have knowledge that the assets received were traceable to***

a breach of trust or of fiduciary duty, the single test for which was whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt;…"

52 A dispute arose between Advocate James and Advocate Blakeley as to whether the "payment" referred to by Carnwath LJ in the passage referred to at para 53 above is, in the context of this case, the original payment by Bellows from the plaintiff's account to the Midland account (as contended by Advocate James) or whether it is the payment by the defendant of the cheque intended for Beaufort into the account of Lesara Anstalt (as contended by Advocate Blakeley).

53 In my judgment, the knowledge which a defendant must have in order to be liable for knowing receipt is knowledge of the breach of trust or fiduciary duty which underlies and gives rise to the claim. Thus in the passage from the judgement of Hoffmann LJ in *El Ajou* referred to above, he refers first to the need for there to be a disposal of the plaintiff's assets in breach of fiduciary duty and later for there to be knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty. In context this must be a reference to the same breach of fiduciary duty i.e. the breach of fiduciary duty as a result of which the assets were wrongly disposed of. Similarly in *Akindele* the decision refers to knowledge that the assets received were traceable to a breach of trust or a fiduciary duty.

54 In this case, the underlying breach of fiduciary duty relied upon was that committed by Bellows when he wrongly transferred the plaintiff's money from its own bank account to the Midland account. Without that breach of fiduciary duty, the plaintiff would have no claim. It is therefore that breach of fiduciary duty of which the defendant must have such knowledge as to make it unconscionable for him to retain the traceable monies he has received.

55 I therefore consider that a proper pleading of a claim in knowing receipt must set out all facts and matters relied upon in support of the assertion that the knowledge of the defendant of this original breach of fiduciary duty is such as to render it unconscionable for him to retain the monies which ultimately found their way to Lesara Anstalt.

56 I do not think that the proposed re-amended Order of Justice meets the necessary standard in this regard. It is somewhat confusing because it mixes up references to the original payment and the subsequent payment to Lesara Anstalt. However I would not have thought it right to dismiss the application on this basis. Had this remained a live issue I would have adjourned the application in order to give the plaintiff an opportunity to present a further version of the draft re-amended Order of Justice so as to spell out with precision exactly what knowledge of the original payment in breach of fiduciary duty the defendant is alleged to have had, what facts and matters are relied upon in support of that assertion of knowledge and why such knowledge would render it unconscionable for him to retain the relevant monies. Once presented with a pleading which set out the matter fully in this way, I would have considered again whether the pleading contained sufficient to withstand a

strikeout application so that leave to amend should be given.

Discretion

57 I have considerable sympathy with Advocate James' submission concerning the dilatory and unsatisfactory way in which the plaintiff has progressed this litigation. I can understand why the Master refused leave to amend on this ground as well. The plaintiff waited nearly 10 years before issuing proceedings and has proceeded slowly since then. The claim of knowing receipt is not new. It was included in the original Order of Justice. It was dropped, only now to be resuscitated. The defendant has incurred costs in obtaining legal opinions following the dropping of the original claim in knowing receipt and in anticipation of the trial of the preliminary issues referred to earlier.

58 Nevertheless, the general principle is that the Court should allow all such amendments as are necessary to enable it to determine the real issues in dispute provided that no party to the action will thereby be unavoidably prejudiced. Furthermore this is not a case of a late application to amend shortly before a trial which is likely to mean the loss of a trial date. It seems to me that any prejudice to the defendant can be compensated by an award to costs. Accordingly I would not myself have refused leave to amend on this ground had I been satisfied on the other two grounds.

Conclusion

59 In summary, I dismiss this appeal against the decision of the Master on the basis that there is an arguable defence to a claim of knowing receipt on the issue of prescription.