CMC Holdings Ltd v Martin Henry Forster

Jurisdiction:	Jersey
Judge:	Matthew John Thompson, Master Thompson
Judgment Date:	26 August 2016
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Text

[2016] JRC 149

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court

Between
CMC Holdings Limited
First Plaintiff
CMC Motors Group Limited
Second Plaintiff
and
Martin Henry Forster
First Defendant
RBC Trust Company (International) Limited
Second Defendant

The Regent Trust Company Limited
Third Defendant

Advocate W. A. F. Redgrave **for the First and Second Plaintiffs**

Advocate D. V. Blackmore **for the First Defendant**.

Advocate J. P. Speck **for the Second and Third Defendants**.

Authorities

MacDoel Investments & Ors v Federal Republic of Brazil [2007] JLR 201.

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

Trusts (Jersey) Law 1984, as amended.

Stock v Pantrust [2015] JRC 268.

X Children v Minister for Health and Social Services [2011] JLR 772.

Bagus Investments Limited v Kastening [2010] JLR 355.

Williams v Central Bank of Nigeria [2014] AC 1189.

Peconic Industrial Development Limited v Lau Kwokfai 11 ITELR 844.

MacFirbhisigh v CI Executors [2015] JRC 233.

West v Lazards Bros & Co (Jersey) Ltd & Ors [1993] JLR 165.

Midland Bank and Day v Federated Pension Services [1994] JLR 276.

Royal Brunei Airlines v Tan [1995] 2 AC 389.

Cunningham v Cunningham [2009] JLR 227.

Three Rivers D.C. v Bank of England (No.3) [2003] 2 AC 1.

Public Services Committee v Maynard [1996] JLR 343.

In the matter of II [2016] JRC 116.

Paragon Finance Plc v DB Thakerar & Co [1999] 1 All ER 400.

Kilbey v Grafters Limited & Ors [2015] (1) JLR 1.

Unilever Plc v Proctor & Gamble Co [2001] I All E.R. 783.

Companies — civil procedure — reasons for refusing to order preliminary issue regarding litigation.

CONTENTS OF JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons for refusing to order a preliminary issue on the question of whether or not the plaintiffs' claims are out of time. The application was advanced by the second and third defendants but was also supported by the first defendant.

2 The proceedings concern claims brought by the plaintiffs, who are Kenyan companies and whose business is the importation of motor vehicles into East Africa. The plaintiffs allege that between sometime in 1977 and 2011 some of the past directors of the companies, including the first defendant, participated in certain arrangements to receive secret commissions. The claim is summarised at paragraphs 1 to 6 of the Order of Justice as follows:-

> *"1 The Plaintiffs are long-established Kenyan companies.* They import vehicles from overseas vehicle manufacturers and supply them to the East African market. The Second Plaintiff is a wholly owned subsidiary of the First Plaintiff.
>
> *2 The Plaintiffs seek relief in respect of the Defendants' participation in a secret scheme ("the Scheme") which operated from 1977 to 2011.* Under the Scheme, funds properly due to the Plaintiffs were diverted at the instruction of certain directors of the Plaintiffs, in breach of fiduciary duty and in breach of trust. The directors responsible included the First Defendant.
>
> *3 Those directors were dishonestly assisted by the Second and Third Defendants, who were at all material times fiduciary and corporate services providers in Jersey.* In the alternative, the Second and Third Defendants are vicariously liable for the dishonest assistance rendered by their employees and agents in the directors' breaches of duty.

4 The Scheme was funded by secret commissions paid by vehicle manufacturers that supplied vehicles to the Second Plaintiff. They were paid directly to bank accounts in Jersey operated by entities unconnected with either of the Plaintiffs and without the knowledge or authorisation of the Plaintiffs. Funds paid into the Scheme were transferred between those entities, invested, and over time substantially distributed to a small group of people, including the First Defendant and other of the Plaintiffs' directors who were privy to the Scheme.

5 The secret commissions paid into the Scheme and their proceeds were the result of breaches of fiduciary duty and breaches of trust by directors of the Plaintiffs, including the First Defendant. The Plaintiffs seek orders that the First Defendant account to the Plaintiffs for all sums that were paid into the Scheme as a consequence of his breaches of fiduciary duty and breaches of trust. The Plaintiffs also seek an order that he account to the Plaintiffs for his profit from the Scheme still in his hands.

6 The Plaintiffs also seek orders that the Second and Third Defendants account to the Plaintiffs for all sums paid into the Scheme on the ground of their dishonest assistance in these breaches of fiduciary duty and/or breaches of trust, or in the alternative on the basis that they are vicariously liable for the dishonest assistance provided by their agents and employees."

3 The Scheme was described as operating in two parts as set out at paragraphs 26 to 34 of the Order of Justice which plead as follows:-

"26 The Scheme received income from payments made to a number of companies incorporated in offshore jurisdictions, and a Jersey law trust. The companies and the Trust were outside the Cooper Motor Corporation group of companies of which CMCH is the holding company. The existence of the companies and the Trust was deliberately kept secret from the Plaintiffs, as were the payments. The companies and the Trust all had bank accounts in Jersey and held the secret commissions in pounds sterling.

27 The Scheme received payments in two phases. Phase one of the Scheme received payments from 1977 to the late 1990s, though the proceeds of those payments continued to be held in bank accounts in Jersey and distributed to individuals including Core Defaulting Directors and Non-Core Defaulting Directors of the Plaintiffs until 2011. Phase two of the Scheme received payments from the late 1990s and ceased to do so in 2007.

28 Phase one was established in 1977 by Jack Benzimra and thereafter operated principally under his direction until around 1996. Jack Benzimra was assisted from the outset by Richard Pirouet (of TBM and TBM's successor firms, and later RBC) and later by Richard Schindler and Alan Nutbrown of RBC. Jack Benzimra was also assisted from 18 December 1989 by Regent and its agents and employees, who included Richard Pirouet, Richard Schindler and Alan

Nutbrown as is further particularised below.

29 It is to be inferred that Forster was aware of the Scheme and involved in its operation from at least 1978, by reason of the following facts:

(1) Forster was sales director of CMCH from 1978;

(2) Forster was Managing Director of CMCM from 1979; and

(3) Forster received payments from the Scheme from 1978 onwards.

30 Phase one involved a number of a number of companies incorporated by TBM in offshore jurisdictions. Services were provided to these companies by TBM and its successors including RBC. From 1989 the Trust was part of the Scheme and Regent provided its services as trustee. These entities are described below, in the order in which they were created:

(1) Corival Overseas Investments Inc. ("COI Panama") — (1977–1984), a limited company with company number 12227 registered in Panama;

(2) Corival Overseas Investments Inc. ("COI Liberia") — (1984–1998), a limited company registered in Liberia, replacing COI Panama in the Scheme from 1984;

(3) Fair Valley Investments Inc. ("FVI") — (1981–1999), a limited company registered in Liberia; and

(4) The Fairvalley Trust ("the Trust") — (1989–present), a discretionary trust governed by Jersey law.

31 In respect of phase one, relief is sought against all three defendants (as is more fully particularised below):

(1) against Forster, for breach of fiduciary duty and breach of trust; and

(2) against RBC and Regent, for their dishonest assistance in those breaches.

32 Phase two, which began in or around 1996, involved the use of two new companies to receive commission payments and make payments out to beneficiaries. Those companies were:

(1) Corival 1996 Limited ("C96") — a Jersey limited company with company registration number 66771, incorporated on 12 November 1996 and dissolved in 16 June 2007;

(2) CMC Group Limited ("CMCG") — a British Virgin Islands limited company with registration number 357826, incorporated on 22 December 1999 and dissolved in 2007.

33 C96 and CMCG were unconnected to the Plaintiffs and their existence was

kept a secret from the Plaintiffs. The directors of C96 and CMCG were Forster, Kiereini, Jani and Njonjo. Forster held the senior position of authority.

34 In respect of phase two, relief is only sought against Forster, for his breaches of fiduciary duty and breaches of trust (as is more fully particularised below). Neither RBC nor Regent provided services to C96 or CMCG. No relief is sought against RBC or Regent in respect of commissions which were paid to C96 and CMCG and were not received by the Scheme in phase one."

4 According to the plaintiffs, what led to them starting to become aware of the Scheme was a conversation between a Mr William Lay ("Mr Lay") and the first defendant. In an affidavit sworn by Mr Lay in support of an intended application for Norwich Pharmacal disclosure based on *MacDoel Investments & Ors v Federal Republic of Brazil* [2007] JLR 201 dated 22 nd August, 2012, Mr Lay stated that he became Group Managing Director of the CMC Group on 1 st May, 2011. In his affidavit at paragraphs 10 to 12, Mr Lay deposed that in May 2011 he discovered material about the Scheme and was provided with certain information emanating from the first defendant about payments made to certain employees under the Scheme.

5 On 12 th July, 2013, voluntary disclosure of 29 files of documentation relating to the Scheme was provided to Baker and Partners, advocates for the plaintiffs, by the second and third defendants. No application for production of any documents was therefore pursued.

6 The Order of Justice was served on 1 st June, 2016, i.e. within 3 years of the provision of information by the second and third defendants but more than 3 years after the first conversation between Mr Lay and the first defendant.

7 The principal argument advanced by the second and third defendants supported by the first defendant was based on the fact that the applicable time limit to bring a dishonest assistance claim is three years from the date of the act of dishonest assistance (see *Nolan v Minerva Trust* [2014] (2) JLR 117 at paragraph 501). Assuming that the doctrine of *empêchement* applied to such claims, any suspension of time ceased once the plaintiffs became aware of the Scheme in May 2011 or shortly thereafter following the conversations between Mr Lay and the first defendant referred to in Mr Lay's affidavit. Accordingly, the claims became time barred at some point in 2014 long before proceedings were commenced by the plaintiffs.

8 The plaintiffs by contrast contended that they only had sufficient material to plead dishonest assistance following receipt of the 29 files from the second and third defendants in July 2013 and accordingly the claims against the second and third defendants were not prescribed. It was the plaintiffs' position that the claims against the first defendant were imprescriptible as a matter of Jersey law as is set out in more detail below.

9 The defendants argued that the issue of whether the plaintiffs had sufficient information to plead their case more than 3 years before issue of proceedings should be determined by way of a preliminary issue; the plaintiffs argued it was a matter for trial.

10 The first defendant also suggested in a letter from Advocate Blackmore dated 24 th July, 2016, that a preliminary issue should be ordered as to whether the claims advanced by the plaintiffs against the first defendant were time barred insofar as they occurred more than 21 years earlier, because of the effect of Article 57(3C) of the Trusts (Jersey) Law 1984, as amended. This was a discrete question of law suitable for determination as a preliminary issue. She did not advance any oral submissions in respect of this issue. However the issue was explored in submissions made by Advocate Speck as explained later in this judgment. It is therefore appropriate to deal with it.

11 What underpinned the first defendant's letter is that at paragraph 121 of the Order of Justice the plaintiffs allege that the first defendant and other past directors in breach were “trustees of such of the plaintiffs' property as was in their possession, or under their control and in relation to that property owed the plaintiffs the following fiduciary duties”.

12 At paragraph 137 the first defendant is said to be liable to account the plaintiffs *“as a constructive trustee”*. Paragraph 5, 138 and paragraphs 1 and 2 of the prayer against the first defendant in the Order of Justice also refer to the first defendant acting in breach of trust.

13 The second and third defendants also argued that the claim was partly prescribed because even if the claims were not prescribed as a whole, and therefore the plaintiffs could claim an account from the date of the last payment made by the second and third defendants in June 2011, an account could only be claimed for the three year period prior to the last payment made by the second and third defendants. In other words the doctrine of empêchement did not apply to the claim for an account. This was also a discrete question of law suitable for determination as a preliminary issue.

The legal principles

14 There was no disagreement between the parties on the applicable legal principles as to when a preliminary issue should be ordered.

15 I explored these principles in *Stock v Pantrust* [2015] JRC 268 at paragraphs 13 and 14 as follows:-

> “ ***13. I was also reminded of the words of Southwell J.A. in*** *Public Services Committee v Maynard* [1996] JLR 343 ***at page 360 lines 11 to 19 as follows:-***

"However, in our judgment, the Royal Court should consider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues ."

14. He also referred me to a decision of the English Court of Appeal reported at *McLoughlin v Grovers* [2001] EWCA Civ 1743. ***In setting aside a first instance judgment where a preliminary issue had been ordered and had taken place, the English Court of Appeal were critical of a trial on the issue of foreseeability of damage only.*** Mr Justice David Steel at paragraph 65 of the decision stated:-

"No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability. It was wholly impracticable for there to have a full trial of the factual issues pertinent to foreseeability. It was an issue that should have presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately .

In my judgment, the right approach to preliminary issues should be as follows:-

a. Only issues which are decisive or potentially decisive should be identified;

b. The questions should usually be questions of law;

c. They should be decided on the basis of a schedule of agreed or assumed facts;

d. They should be triable without significant delay, making full allowance for the implications of a possible appeal;

e. Any order should be made by the court following a case management conference.""

16 While Advocate Speck warned me against treating the decision in McLoughlin as creating some form of code or binding legal principle, he did not dispute that the factors listed were useful guidance as to whether or not a preliminary issue should be ordered. I took these factors into account as set out below in reaching my decision.

17 Prior to the hearing I had also referred the parties to *X Children v Minister for Health and Social Services* [2011] JLR 772. Paragraphs 10 to 12 are pertinent and state as follows:-

" ***10 The possibility of taking a discrete issue which might determine the whole case, thus avoiding the costs which the parties would incur in taking the matter further, is attractive at first blush.*** An appeal against the decision to the Court of Appeal and potentially to the Privy Council, however, can without exaggeration add years to the process. A number of English and Jersey cases have warned against the practice. In the case of *Southwark L.B. v. O'Sullivan* ***(6), a case in which the construction of a statute was taken as a preliminary issue, Lewison, J. said this*** ([2006] EWCA Civ 124, ***at para. 14):-***

"As Lord Scarman observed in *Tilling v. Whiteman* [1980] A.C. 1, ***preliminary points of law are too often treacherous shortcuts, their price can be, as here, delay, anxiety and expense.*** As so often, the decision to try preliminary issues on assumed facts has lead [sic] to an over-complication of the case and puts the court into a position of having to decide questions, without a full picture of the factual background on which the case depends. In this case, as in many others, the decision to have a trial of preliminary issues has turned out to be a false economy. I have therefore reached the conclusion that this court should not embark upon a consideration of the questions of construction in advance of the fact-finding exercise."

11 In *Public Servs.* Cttee. v. Maynard ***(5), our Court of Appeal (Southwell, J.A. presiding) gave a similar warning in the context of a personal injuries case*** (1996 JLR at 360):

"It appears from the order of the Judicial Greffier of September 30th, 1994 that the issue he ordered to be heard as a preliminary issue, 'whether the plaintiff's right of action is prescribed,' was an issue of both fact and law. In the event, it was argued before the Lieutenant Bailiff and before this court simply as involving points of law. To choose points of law such as these for initial decision seems to us to be within the current practice of the Royal Court of Jersey. However, in our judgment, the Royal Court should reconsider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues together."

12 In addition to the delays and costs that can be incurred through the appeal process, there is a further danger, in my view, in taking a preliminary point in a factual vacuum, particularly where, as here, Convention rights must be taken into account ."

18 The court's reasoning in *X Children* in refusing to order a preliminary issue is found in paragraph 15 as follows:-

> " ***15. Taking into account the warnings given in particular by our Court of Appeal in Maynard that in personal injuries cases all issues should be tried together; the risk of substantial delays and costs being incurred through the appeal process; my concern about the court dealing with this issue in advance of the fact-finding exercise; and the relative merits of the arguments that would be presented to the court, I decline to order the trial of this preliminary issue***."

19 I also took this guidance into account in reaching my decision.

The applicable limitation periods

20 There was no disagreement between the parties that the applicable limitation period for a claim in dishonest assistance is three years from the date of the act of dishonest assistance by reference to *Nolan v Minerva Trust and Ors* [2014] 2 JLR 117 following *Bagus Investments Limited v Kastening* [2010] JLR 355 and consistent with the Supreme Court decision of *Williams v Central Bank of Nigeria* [2014] AC 1189.

21 The preliminary issue suggested by Advocate Blackmore in relation to the first defendant, although she made no oral submissions on it, was explored in the course of Advocate Speck's submissions. The context of his submissions about whether or not a dishonest trustee (as distinct from a fraudulent trustee) could invoke the long-stop limitation period found in Article 57(3C) of the Trust (Jersey) Law 1984 was because he sought to argue that the second and third defendants must be in a better position than a non-fraudulent trustee which could invoke the 21 year longstop date in Article 57(3C) citing paragraph 118 of *Williams v Central Bank of Nigeria*.

22 Advocate Redgrave made it clear that the claim against the first defendant was as a constructive trustee for breach of fiduciary duty whereas the claim against the second and third defendants was against them as dishonest assisters only. He argued that the limitation period of 21 years contained in Article 57(3C) was of no relevance, but in any event did not apply to dishonest trustees pursued as such. There was also no statutory longstop date applicable to a dishonest assister.

23 It is convenient to address this issue in this part of the judgment. As far as the first defendant is concerned, the possible confusion that may have arisen in this case is because of the allegation in paragraph 121 of the Order of Justice that the first defendant was trustee of the plaintiffs' property and the consequent assertions at paragraphs 5, 137 and 138 that the first defendant acted in breach of trust. However, Advocate Redgrave was clear notwithstanding his pleaded case that he was not claiming against the first defendant as express trustee, but rather his claim was one of constructive trusteeship. Given the possibility for confusion, the plaintiffs' pleadings should be clarified either by amendment or in reply to make it clear that the plaintiffs' claim against the first defendant was on the basis

that company directors are ***"type 1"*** constructive trustees *vis a vis* company property under their control (see paragraph 27 of *Bagus*) and it is on this basis that the first defendant is said to have acted in breach of trust.

24 The confusion that can be caused by references to constructive trusteeship and breach of trust was discussed at paragraph 490 of *Nolan* considering *Peconic Industrial Development Limited v Lau Kwokfai* 11 ITELR 844 cited in *Bagus*. In *Peconic* Lord Hoffman made it clear that persons who had assumed fiduciary obligations but without any express trust "are treated in the same way as express trustees and no limitation period applies to their fraudulent breaches of trust." The first defendant was clearly a director of the plaintiffs. Accordingly the plaintiffs' case is that he is liable to account as constructive trustee because he is a dishonest fiduciary. Therefore under Jersey law no limitation period applies. The competing arguments under Jersey law are that the relevant limitation period is either 10 years because a claim is brought against the first defendant as a director (see *Northwind Yachts*) or 3 years if the analysis in *MacFirbhisigh v CI Executors* [2015] JRC 233 at paragraphs 334–338 is applied. While Advocate Redgrave, in reviewing an earlier draft of this judgment reminded me that it might be said that the claim was time barred under Kenyan law, no such argument was raised by any of the defendants in suggesting a preliminary issue. Any such contention, if raised in the future, is therefore a matter for another day.

25 The starting point in respect of whether the long stop limitation period in Article 57(3C) applies to a dishonest fiduciary is Articles 57(1) and 57(3C) of the Trust (Jersey) Law 1984, as amended, which provide as follows:-

> ***"(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*** .
>
> ***(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*** ."

26 It is clear from these Articles that a claim against a trustee for fraudulent breach of trust falls within Article 57(1), and that such a claim is not subject to any limitation period. By reference to the reasoning in *Peconic* referred to above, a claim against a fiduciary who

commits a fraudulent breach of fiduciary duty is also imprescriptible.

27 Claims against an express trustee for breach of trust or against a fiduciary for breach of fiduciary duty which do not fall within Article 57(1) are therefore subject to the long-stop limitation period in Article 57(3C).

28 It was also agreed between the parties that claims against dishonest assisters, whether or not they are express trustees of a trust and provided assistance inter alia in that capacity, are subject to a 3 year limitation period, subject only to any question of *empêchement*.

29 The issue is therefore whether a claim for breach of trust against a dishonest trustee acting as an express trustee or a claim for breach of fiduciary duty against a dishonest fiduciary falls within Article 57(1) in which case the long-stop limitation period in Article 57(3C) does not apply. In my judgment it is highly likely that such a claim does fall within Article 57(1). I say this for the following reasons.

30 Firstly, there are two first instance decisions of the Royal Court namely *West v Lazards Bros & Co (Jersey) Ltd & Ors* [1993] JLR 165 and *Midland Bank and Day v Federated Pension Services* [1994] JLR 276, which suggest that fraud for the purpose of Article 57(1) is wider than common law fraud. While *Federated Pension Services* was overturned on appeal on different grounds, both cases held that fraud in the context of the predecessor to Article 57(1) did not just mean common law fraud but extended to equitable fraud and *dol*. In my judgment there is force to the argument that dishonesty (as defined in *Royal Brunei Airlines v Tan* [1995] 2 AC 389 and *Cunningham v Cunningham* [2009] JLR 227) would also fall within the definition of equitable fraud as considered in *West v Lazards and Federated Pension Services*.

31 Secondly the obligation to plead fraud or dishonesty found in paragraphs 184 to 186 of *Three Rivers D.C. v Bank of England (No.3)* [2003] 2 AC 1 set out in *In the matter of Il* [2016] JRC 116 is the same and no distinction is drawn between the duties owed when pleading fraud or dishonesty. This lack of a distinction points towards acts of dishonesty falling within Article 57(1).

32 Thirdly, insofar as the Supreme Court in *Williams v Central Bank of Nigeria* explored this issue in the context of what was meant by the words ***"which the trustee was party or privy"*** appearing in English equivalent of Article 57(1), Lord Sumption at paragraph 34 stated as follows:-

> ***"These words are there to relieve trustees who acted in good faith, including the honest co-trustees of a dishonest trustee*** ."

33 It is implicit this quotation that a dishonest trustee otherwise falls within the English equivalent of Article 57(1).

34 Lord Neuberger at paragraph 94 to like effect stated:-

> " ***…the context of section 21(1)(a) suggests that a claim against an innocently negligent co-trustee or professional adviser of the fraudulent trustee is not "an action … in respect of …fraud or fraudulent breach of trust" Rather it should be characterised as an action "in respect of [their] negligence"***."

35 Both these extracts appear to point to a distinction being drawn between a fraudulent or dishonest trustee and a trustee who was guilty of some lesser failing. In the latter case a long-stop limitation period can apply. In the former it does not.

36 The above observations lead to the conclusion that a claim against either an express trustee or a fiduciary who has acted in breach of fiduciary duty fraudulently or dishonestly can never be time barred as a matter of Jersey law. In relation to the first defendant, while he is being sued as constructive trustee, this claim arises because he is a fiduciary and has acted in breach of fiduciary duty. In my judgment neither a trustee of an express trust nor a fiduciary who have acted in breach of trust or fiduciary duty dishonestly can successfully plead limitation. This represents the position of the first defendant as a director owing fiduciary duties if the plaintiffs' allegations are proved.

37 Insofar as an issue was identified that a claim against the first defendant as a fiduciary acting in breach of fiduciary duty dishonestly is subject to a long stop limitation period of 21 years, for the reasons set out above, I regard such an argument as unpersuasive because I consider that the Royal Court would conclude that such claims fall within Article 57(1) and are not prescribed. While on an application to order a preliminary issue it is clearly not for me to determine the issue itself, I consider I am entitled to take into account the strength of the issue and take it into account it as a matter of discretion whether to order that it should be determined in advance of any main trial. It is clear from paragraph 15 of *X Children* set out above that Commissioner Clyde-Smith took into account the relative merits of the arguments that would be presented in refusing a preliminary issue. I have taken the same approach. To take an extreme for example, if a legal argument was hopeless or highly likely to fail that would be a strong if not conclusive factor against ordering a preliminary issue. In this case for the reasons set out above, I believe the Royal Court would conclude that either the claim against the first defendant, if established, was imprescriptible if he is found to have acted dishonestly. I do not regard the counter arguments that a fraudulent breach of fiduciary duty does not include dishonesty as convincing.

38 If claims against a dishonest fiduciary for breach of fiduciary duty fall within Article 57(1), as I consider they do, this also means that, if the allegations of dishonest assistance are established against the second and third defendants, they would not be worse off in terms of pleading limitation than the first defendant. Subject to questions of empêchement, they could plead the limitation period of three years recognised in *Nolan*. Their position as a

matter of Jersey law would therefore be the same as the position under English law as noted by Lord Neuberger at paragraph 118 of *Williams v Central Bank of Nigeria*. Claims against dishonest fiduciaries acting in breach of fiduciary duty would be imprescriptible and claim against dishonest assisters would be subject to the relevant limitation period applicable in each jurisdiction.

39 I accept this issue is a question of law but because I regard the defendants' arguments as unpersuasive, I am not prepared to delay progress of the case by ordering determination of this issue as a preliminary issue. If I were to do so, I would be falling into the trap of dealing with the dispute on an issue by issue basis which Southwell JA warned against in *Public Services Committee v Maynard* [1996] JLR 343

40 The other legal issue identified by Advocate Speck concerned the suggestion that the doctrine of empêchement did not apply to a claim for an account.

41 The basis of this submission arose out of the well-known decision of *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400. In response to a submission that a claim for an account in respect of a breach of fiduciary duty by an agent was not subject to any period of limitation, Millet LJ states at page 415 line H:-

> " ***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 the money which he received."
>
> " ***Accordingly, the defendant's liability to account for more than six years before the issue of the writ in*** *Nelson v Rye* ***depended on whether he was, not merely a fiduciary (for every agent owes fiduciary duties to his principal), but a trustee, that is to say, on whether he owed fiduciary duties in relation to the money***."

42 At page 416 lines E to F Millet LJ continued as follows:-

> " ***Unless the defendant was a trustee of the money which he received, however, the claim for an account was barred after six years***."

43 It is clear from *Nolan* that a claim against a dishonest assister for an account as if they were a trustee is not a claim against a trustee. Advocate Speck therefore contended this meant that even if the main claim was not time barred because the plaintiffs did not have sufficient knowledge until less than three years before the issue of the Order of Justice, the claim for an account was limited to a period beginning 3 years before the last payment made, i.e. the last act of dishonest assistance. Advocate Speck accepted that the doctrine of empêchement could prevent time running from the date of the last payment. However he argued it would not open up an earlier period for an account to be taken. Therefore an account could only be claimed for the applicable limitation period of 3 years prior to the last

payment being made, i.e. back to 31 st December, 2008, only.

44 Advocate Redgrave contended that Advocate Speck's position did not make sense. If Advocate Speck were correct in his analysis it meant that, even though claims for dishonest assistance could be brought in respect of the entire period when the second and third defendants were involved with the Scheme from 1977 until 2011, the amount of any money recoverable was limited to payments made in breach of fiduciary duty from 2008 onwards. The plaintiffs would then be prevented from recovering monies for earlier breaches of duty even though it had had no knowledge of them on their case until 2013.

45 In my judgment, Advocate Redgrave is correct. Firstly, there is nothing in *Paragon* to suggest that the doctrine of empêchement or any suspension of limitation cannot apply to a claim for an account. The point was simply not considered.

46 Secondly, in *Williams v Central Bank of Nigeria*, Lord Neuberger expressly recognised that even though the normal limitation period might have expired, a plaintiff could argue that the commencement of the time starting to run for the purpose of limitation could be postponed (see paragraph 119). While Jersey's approach is not based on a limitation statute but on customary law, the principle of limitation being suspended based on a plaintiff's lack of knowledge is no different. Whether in Jersey or England questions of suspensions of time periods can apply to allow claims to be pursued which are otherwise out of time.

47 There is also no logic to the time limit for a claim for breach of duty being suspended for the purposes of bringing a claim, but it not being suspended for an account following on from the claim for breach of duty if established. No authority was cited in support of such a proposition. It also has the consequences set out by Advocate Redgrave which would produce manifest injustice. In my judgment the question identified by Advocate Speck is one that I consider to be so weak it would bound to fail and accordingly it is not a factor that justifies the ordering of a preliminary issue. This is so even though the issue could be decisive and it is a pure question of law only. Again, in effect I concluded that I was being invited to approach matters on an issue by issue basis which is not generally appropriate.

Decision

48 I now turn to set out my reasons why I concluded that I should not order a preliminary issue based on the main preliminary issue identified namely whether or not the plaintiffs had sufficient knowledge to plead their claim before they did.

49 The questions I considered I should look at by reference to *Stock v Pantrust* were:-

(i) Has an issue which is decisive or potentially decisive been identified;

(ii) Is the issue a question of law, a mixed question of law and fact;

(iii) Can the matter be decided on the basis of a schedule of agreed or assumed facts;

(iv) Can the issue be tried without significant delay in making full allowance for the implications are used for appeal?

50 Taking each of these questions in turn, clearly an issue has been identified namely the question of limitation and in particular whether the plaintiffs had sufficient knowledge to plead their claim. There was no disagreement between the parties on this point.

51 The next question concerns whether or not the issue identified is a question of law or a mixed question of law and fact. Counsel were not in any real disagreement that the issue was a mixed question of law and fact. Both also agreed that the real issue was the extent of the plaintiffs' knowledge. Where counsel disagreed was on the extent of the factual enquiry required.

52 Advocate Speck argued that all the Court had to focus on was the plaintiffs' knowledge between May 2011, when Mr Lay first discovered material relating to the Scheme and discussed it with the first defendant, and July 2013 when the second and third defendants made their voluntary disclosure. This was a limited period of time which contrasted with a full blown trial having to review events over more than 30 years. Furthermore, he argued, a trial would involve a proliferation of parties. The second and third defendants could well want to join other past directors as defendants in order to seek an indemnity.

53 In relation to discovery, he contended that while it would be needed, it would be limited to documents received by the plaintiffs in the relevant period. It was not necessary to explore what they may have discovered later. The question was whether they had sufficient information in order to plead the claims now set in the Order of Justice.

54 Advocate Speck in particular stated that his clients wished to test whether in fact the material provided in 2013 had already been received by the plaintiffs. This was because such material had been provided to the Kenyan authorities in August 2012. If the plaintiffs had had access to that material at that time or more than 3 years prior to service of the Order of Justice, then their claim was too late. It was clear there were also investigations by PwC and a South African law firm know as Webber Wentzel which could also be relevant to the plaintiffs' state of knowledge.

55 It was also relevant that the trustee had direct communication with the plaintiffs as early as March 2012 to establish what to do with funds they were holding. The plaintiffs therefore knew about the trust, they knew about C96 Limited, they knew that the trust was secret, that the matter had been reported to the Capital Markets Authority in Kenya, that directors already had been disqualified for misconduct, and that the first defendant had benefited from offshore arrangements.

56 Apart from the limited discovery required, the issue would therefore turn on an analysis of the material provided by the plaintiffs showing the extent of their knowledge. While Advocate Speck reserved his position to cross-examine witnesses, he felt that cross-examination was unlikely because what the plaintiffs knew would be shown by reference to the material they had. Ultimately the Royal Court could decide whether or not the plaintiffs had adequate knowledge by looking at this material and hearing the parties' submissions.

57 Advocate Redgrave in response reminded me that in *Nolan*, the issue of the plaintiffs' knowledge could only be determined following a trial. On the facts of *Nolan* the Court was only able to conclude after a trial when the plaintiff had sufficient knowledge to find an action in dishonest assistance—see paragraphs 506–508 of *Nolan*. The plaintiffs' position was no different from that set out in *Nolan* when the Court could only decide the question of prescription having heard all evidence.

58 In addition at paragraphs 509 and 510 of *Nolan* the Court stated:-

> ***"509 In addition, as Minerva's summary of this issue recognized, we also need to consider the position from the more formal point of view of pleading the Nolans' case.*** Paragraph 704 of the Code of Conduct of the English Bar provides as follows:
>
> ***"A barrister must not … draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:***
>
> ***…***
>
> ***(c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud*** ."
>
> ***This statement reflects the decision of the House of Lords in*** *Medcalf v. Mardell (23)*, ***the headnote to which, in the report in The Law Reports, reads*** ([2003] 1 A.C. at 121):
>
> ***"… [T]he Code of Conduct of the Bar did not require that counsel should, when making allegations of fraud in pleadings and other documents, have before him 'reasonably credible material' in the form of evidence which was admissible in court to support the allegations; but that, at the preparatory stage, it was sufficient if the material before counsel was of such a character as to lead responsible counsel exercising an objective professional judgment to conclude that serious allegations could properly be based upon it*** ."
>
> ***Finally, any pleading of fraud must be properly particularized in accordance with the principles set out by Lord Millett in the Three Rivers (35) case to which we have already referred in para. 143 above.*** Mr. Preston

accepted that the same rules of pleading applied in Jersey. This court agrees .

510 We do not see how any Jersey advocate, even if instructed by the Nolans to do so, could have drafted an order of justice alleging dishonest assistance on the part of Minerva in the Buchanan Group companies' breaches of trust unless and until he had had a sight of the documents disclosed in response to the Jersey injunction. Prior to seeing such documentation he would not have had reasonably credible material establishing a prima facie case of fraud at all; still less would he have had the material properly to particularize such an allegation. We accede to Mr. Santos-Costa's submission that dishonest assistance in a breach of trust could not have been pleaded prior to 2010 ."

59 Advocate Redgrave argued that the present case was no different. The plaintiffs were not in a position to plead dishonest assistance having regard to the approach set out at paragraphs 509 and 510 of *Nolan*. There was a difference between being suspicious of a possible claim on the one hand and having sufficient material to plead the same on the other. All the plaintiffs had at best was suspicion. When Mr Lay produced his affidavit in support of an intended application for discovery from the second and third defendants he could only allude to the possibility of such claims as set out in paragraph 41 of his affidavit as follows:-

"Until we have more information it is not certain against whom CMCH would wish to bring claims. It would depend on the extent of involvement and benefit on the part of each person. None of the individuals is resident in Jersey and it is likely that attempts to pursue recovery from individuals would take place in other jurisdictions. It is likely that these claims would involve proprietary claims and/or personal claims. I am advised that the Jersey law concepts of most obvious relevance would be potentially unlawful means conspiracy. The information necessary to formulate such claims is, I believe, in Jersey." (emphasis added).

60 In addition he stated expressly at paragraph 45 the following:-

"I should make clear that we do not at present have any information to lead us to conclude that either of the Defendants was complicit in any fraudulent activity or otherwise responsible in such a way as to make them personally liable to compensate CMC. However that position could of curse change if we receive information that leads to a different conclusion."

61 While Advocate Redgrave did not disagree that the issue was the state of the plaintiffs' knowledge, he argued that in terms of discovery what was disclosable was not limited to the period commencing in May 2011. His clients' and his obligation would be to review all of the plaintiffs' material to consider what they knew as at May 2011. That would involve an assessment of material going back much earlier in time. It would involve a significant overlap with the material that would have to be disclosed for trial.

62 Furthermore, his clients would want to explore, by reference to the material voluntarily disclosed by the second and third defendants, what matters essential to plead the case against them the plaintiffs did not know until receipt of that material. The Royal Court would therefore be not only reviewing the plaintiffs' material but also the defendants' material to decide when the plaintiffs had sufficient information to plead the case they were now advancing.

63 Ultimately the Royal Court would therefore be looking at a significant amount of the same material that would have to be looked at if the matter went to trial.

64 Advocate Redgrave submitted that the prospect of joining large numbers of third parties, with the result that the claims might become more complicated, did not stand up to analysis. As far as the claim against the second and third defendants was concerned, the issue was their own conduct. It was difficult to see how dishonest conduct of past directors who were joined as third parties would assist the second and third defendants in defending the claims. In addition, to the extent that indemnities were sought, that was a separate issue which could await determination of the main claim. Such indemnities did not have to be decided upon in order to determine the liability of the second and third defendants.

65 In my judgment the extent of the enquiries that would have to be made to determine this preliminary issue cannot be limited in the way Advocate Speck suggests. I therefore agree with Advocate Redgrave that discovery is likely to be extensive and the Jurats would be considering a significant amount of material to show what the plaintiffs knew in 2011 and going back earlier in time. At this stage it is not possible to say what information the plaintiffs would have had to possess for the Royal Court to evaluate whether their claim could have been pleaded earlier and whether or not the doctrine of empêchement would apply. The plaintiffs are both entitled and obliged to produce all material showing their knowledge as at May 2011, which involves reviewing what they knew before that date and what was concealed from them. The plaintiffs are also entitled to draw to the Court's attention what they did not know until the voluntary disclosure by the second and third defendants in July 2013 to justify why the plaintiffs say they could only plead the claim and issue proceedings in 2016.

66 It also follows from the above observations that the preliminary issue cannot be decided on the basis of a schedule of agreed or assumed facts. At present there is no such agreed schedule. While Advocate Speck suggested that one might be produced following analysis of discovery, I do not consider that there would be agreement on any schedule produced by either party. This is because any such schedule would go to the heart of the issue to be decided. The key issue the Jurats would be asked to decide is what the plaintiffs knew during the period in question and whether that was sufficient to plead the present case or not. I regard it as highly unlikely, given the nature of the issue the Jurats would be asked to determine that any assumed or agreed facts could be produced.

67 In relation to the question of whether the main preliminary issue can be tried without significant delay, when Advocate Speck first issued his summons he also sought security for costs and provided a supporting schedule. That supporting schedule suggested that any preliminary issue would take at least a week. Advocate Redgrave suggested it would take longer. A preliminary issue of that magnitude whether for a week or longer will not be determined before the spring of next year. In addition it will also take some time for the plaintiffs to produce the requisite discovery and for witness statements to be produced showing the relevant knowledge.

68 Before determination of the preliminary issue there may also be arguments about whether or not certain without prejudice exchanges between the plaintiffs and the defendants should be before the Royal Court. This is because while for the purposes of the application before me I agreed to certain without prejudice material being redacted, applying *Kilbey v Grafters Limited & Ors* [2015] (1) JLR 1, there are exceptions to the rule that anything said or written in the course of without prejudice negotiations cannot be referred to as set out in *Unilever Plc v Proctor & Gamble Co* [2001] I All E.R. 783 cited in *Kilbey*. The proposed preliminary issue in this case may be complicated because one of the exceptions recognised in *Unilever* (at page 792 paragraph 5) is that evidence of negotiations may be given on an application to strike out proceedings for want of prosecution in order to explain delay or apparent acquiescence. It is in my judgment also arguable that evidence in negotiations may be permitted if such evidence is relevant to a Court deciding what a party knew or did not know to determine whether or not the doctrine of empêchement should apply. This is another complicating factor in respect of the preliminary issue proposed which points against making such an order.

69 There is also a significant risk of overlap between the Court trying the main preliminary issue and the trial Court. It cannot be guaranteed that the same Court would sit on any trial. The issue sought therefore has the danger if it is unsuccessful of a differently constituted Court having to revisit the same material and hear evidence from the same witnesses.

70 I am not persuaded that the risk of other past directors being joined as third parties is sufficient to justify ordering a preliminary issue. While adding third parties will make a trial more complicated if they choose to take part, the proposed third parties may be witnesses anyway. I also agree with Advocate Redgrave that the key evidence in relation to the dishonest assistance claim will be the evidence of present and past employees of the second and third defendants and their documents. The key documents are also likely to be those held by the existing parties. It is also possible, although for another day, to separate questions of an indemnity from a trial of the main action.

71 Finally, in relation to the question of appeals, this is a case where the amount claimed against the second and third defendants is in excess of £5,000,000, plus interest which, given the length of time the dispute covers, is likely to be very significant. The risk of an appeal to the Court of Appeal for a claim of this substance must be regarded as high. Assuming the preliminary issue could not be heard until the spring of next year, it is therefore unlikely that any appeal would be determined before the autumn of 2017 if not

later. If the matter were appealed to the Privy Council, the preliminary issue might not be resolved until the end of 2018. This would mean that substantive work on preparing the case for trial would not commence until 2019. Yet this a dispute that goes back to 1977. While the case may turn on documentary material, oral evidence will also be important. It is axiomatic that the longer time passes the more memories fade or witnesses are no longer available or have passed away. While these difficulties already exist in this case, if substantive preparation of the issues for trial did not start until the beginning of 2019, the position would only get worse. At this stage not even an answer has been filed. This means that to progress this case to trial if the preliminary issue fails and once all appeals have been exhausted means that two or even three years might pass until trial. This is too long and would make this case one where justice delayed would be justice denied.

72 In my judgment in conclusion this is exactly the sort of case Southwell JA had in mind when warning of the dangers of ordering a preliminary issue. For all the above reasons, I was not therefore persuaded that it was appropriate to depart from the normal approach to fix a date as possible for the trial of all issues. While a potentially decisive issue has been identified, the proposed issue involves complex questions of fact, discovery, and a need for witness statements, and it cannot be decided on the basis of a schedule of agreed or assumed facts. The main preliminary issue asked for would lead to significant delay in this case, in particular when appeals are factored into account. Any preliminary issue would also involve a significant overlap with the materials to be considered at trial. For the reasons I have already given the subsidiary questions of law are also weak and do not justify a preliminary issue. The correct approach in my view is not to fall into the trap of trying to resolve this case by taking one issue in isolation. To do so runs a significant risk of adding to costs in a major way. For all these reasons I therefore refused to order a preliminary issue and instead required the defendants to file an answer.