Trusts, Limitation Periods and Unauthorised Gains

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Abstract

This article examines the relationship between trustees' duties and the statutory limitation regime that applies to claims for breach of trust. It argues that, historically, limitation periods did not apply to claims against express trustees, because express trustees incurred continuing accounting obligations for trust assets simply by receiving them upon trust, and that this principle continues to determine the application of the Limitation Act 1980 to claims for breach of trust today. It uses this insight to examine the practically important issue of what limitation periods applies to claims against fiduciaries who make unauthorised gains—and argues that the case law in this area exists in tension with fundamental principles of modern equity and trusts. Ultimately, it will be contended that no limitation period should apply to claims against fiduciaries for unauthorised profits held on constructive trust, just as no such period applies to claims to recover trust property from express trustees. This is because both types of trustee are liable in the same way for the trust assets.

The application of the Limitation Act to different types of claims for breach of trust is one of those thorny areas of law that is significant in practice but scholars have shied away from[1]—perhaps surprisingly given the trend for attacking differences in legal and equitable rules as unprincipled. While claims for the tort of deceit are generally limited to six years,[2] actions against fraudulent trustees are subject to no limitation period.[3] Further, while claims in conversion based on legal title are prima facie limited to six years from the original conversion,[4] claims to recover trust property or its proceeds from a trustee are subject to no limitation period.[5] In 2001, the Law Commission recommended the introduction of a general limitation regime for all civil claims—concluding that the special treatment of claims in respect of fraudulent breach of trust and to recover trust property from a trustee is unjustified.[6] Matters are made more difficult still by the unclear rules

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[1] The major exception is W. Swadling, "Limitation" in P. Birks and A. Pretto (eds), *Breach of Trust* (Oxford, 2002), 319.

[2] Limitation Act 1980 s.2.

[3] Limitation Act 1980 s.21(1)(a).

[4] Limitation Act 1980 s.2. See s.4 for special rules regarding theft.

[5] Limitation Act 1980 s.21(1)(b).

[6] Limitation of Actions, Law Comm No.270, 4.94–4.106.

determining which types of constructive trust are analogous to express trusts for limitation purposes. As Gareth Jones observed 25 years ago, this issue prompted a large proportion of 19th century judicial discussions of the nature of constructive trusts.[7]

This article addresses two related issues. First, why does English law have a separate limitation regime for claims against express trustees, as well as certain types of constructive trustees and fiduciaries? The article examines why, historically, Chancery did not apply the statutes of limitations to claims for breach of trust—and concludes that this was because trustees became liable for trust assets simply by receipt of those assets, rather than wrongdoing. It shows how modern courts, following the lead of *Paragon Finance v Thakerar*[8] and *Williams v Central Bank of Nigeria*[9] have treated that rationale as explaining why the limitation periods prima facie applicable to claims in respect of breach of trust in the Limitation Act 1980 s.21(3) do not apply to claims involving fraudulent breach by an express trustee (s.21(1)(a)) or claims in respect of trust property or its proceeds against the trustee (s.21(1)(b)).

Secondly, the article asks what limitation period applies to a claim against a fiduciary who makes an unauthorised profit. If a fiduciary holds an unauthorised gain on constructive trust for his principal following *FHR v Cedar Capital Partners LLC*,[10] is there a "trust" within the Limitation Act ss.21(1) and (3)? This focus has been chosen for because of the question's significant practical and theoretical implications. It is in this context of unauthorised gains that limitation periods have been most controversial in practice, having arisen in a number of appellate cases, but having received no decisive judicial determination. The weight of authority falls behind the view that claims to recover profits held on constructive trust are claims "by a beneficiary to recover trust property" for the purposes of s.21(3), and so any claim against him for disgorgement is subject to a six-year limitation period. However, no limitation period will apply (i) if the fiduciary has powers of disposition over his principal's assets; and either (ii) the gain was made by fraudulently breaching his duties to his principal; or (iii) the unauthorised gain consists of property owned beneficially by the principal before the fiduciary's receipt of it.[11] The odd feature is that where a fiduciary has no powers of disposition over his principal's assets—and so (i) is not met— any claim against him would be "an action by a beneficiary to recover trust property" under s.21(3), but the fiduciary could never be a "trustee" for the purpose of s.21(1). Even where such a fiduciary holds an unauthorised gain on constructive trust, such a trust is treated simply as a "formula for equitable relief",[12] and so the principal's claim for that gain is limited to six years under s.21(3).[13]

That reasoning is problematic because it exists in sharp tension with fundamental rules of equity. First, English law does not recognise remedial constructive trusts.[14]

[7] G. H. Jones, "The Role of Equity in the English Law of Restitution" in E. J. H. Schrage (ed), *Unjust Enrichment* (Duncker & Humblot, 1995), 149, 153.

[8] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400; (1998) 95(35) L.S.G. 36.

[9] *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189.

[10] *FHR v Cedar Capital Partners LLC* [2014] UKSC 45; [2013] 3 W.L.R. 535.

[11] Discussed below.

[12] *Selangor United Rubber Estates Ltd v Cradock* [1968] 1 W.L.R. 1555 at 1582; [1968] 2 All E.R. 1073.

[13] Subject to the Limitation Act 1980 s.32, which provides time will not start running in cases of fraud, concealment, or mistake, until the claimant has discovered it, or could with reasonable diligence have done so.

[14] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 714–715; [1996] 2 W.L.R. 802.

Where English courts order A to transfer particular rights to B, this usually involves recognising a pre-existing "institutional" constructive trust, and does not involve the imposition of a wholly new trust on A as a remedy.[15] If this is the case, why are limitation periods applied to claims by beneficiaries of constructive trusts on the basis that they are remedial? Secondly, in *Armitage v Nurse*,[16] Millet LJ held that the "irreducible core of obligations owed by a trustee" simply consisted of the duty "to perform the trusts honestly and in good faith for the benefit of beneficiaries", and did not include "duties of skill and care, prudence and diligence".[17] Why, for limitation purposes are express trusts defined more restrictively—excluding some fiduciaries who owe such duties? Thirdly, if a fiduciary holds all unauthorised gains on a "true trust", as held in *FHR v Cedar Capital Partners LLC*,[18] then why is the fiduciary not always a trustee for the purposes of the Limitation Act?

This article will argue that a fiduciary who holds an unauthorised gain on trust for his principal should always be treated as holding that gain as a trustee within the meaning of the Limitation Act 1980 s.21(1). It will be contended that such constructive trustees' ongoing custodial duties are rooted in receipt, just like express trustees, and so they are liable for the assets without reference to wrongdoing. It is the nature of this liability which justifies applying a different limitation regime to express trusts. Why, then, should fiduciaries who hold unauthorised gains on constructive trust not be treated in the same way for limitation purposes?

The arguments will be made in the following stages. First, the evolution of the law's approach to trusts and limitation periods will be set out. It will be shown that the distinctive type of trustees' liabilities for trust assets historically justified Chancery's refusal to apply limitation periods to claims by trust beneficiaries, and ultimately lies behind the continued exceptional treatment of trusts for limitation periods under s.21(1). This justification will be used to explain the scope of the section, and in particular to which types of fiduciaries and constructive trustees it applies. Secondly, the article will focus more specifically on the treatment of fiduciaries who hold unauthorised gains on constructive trust, and when limitation periods will apply to claims against them according to current authorities. It will be argued that it is today problematic to treat such trusts as "remedial" because English law does not recognise remedial constructive trusts arising only through court orders and, at any rate, such fiduciaries hold unauthorised gains on constructive trust without reference to wrongdoing.

Trusts and limitation periods

The Limitation Act 1980 s.21 provides:

> "Section 21, Time limit for actions in respect of trust property.
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

[15] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. See also J. McGhee, *Snell's Equity*, 34th edn (London: Sweet & Maxwell, 2019), [26-014] to [26-015].
[16] *Armitage v Nurse* [1998] Ch. 241; [1997] 3 W.L.R. 1046.
[17] *Armitage v Nurse* [1998] Ch. 241 at 253–54.
[18] *FHR v Cedar Capital Partners LLC* [2013] EWCA Civ 17; [2014] Ch. 1 at [76] (affirmed in *FHR v Cedar Capital Partners LLC* [2014] UKSC 45).

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

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

…

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."[19]

In *Paragon Finance v Thakerar*,[20] Millett LJ set out what has become the modern approach to interpreting the Limitation Act 1980 s.21, drawing heavily on 19th century authorities. Millet LJ made clear that the Act was the ultimate[21] successor of the Trustee 1888 s.8, which was designed to introduce, for the first time, statutory limitation periods for claims against all express trustees.[22] Before, the Trustee Act 1888 lapse of time might matter as evidence of acquiescence or under the doctrine of laches, but otherwise would not affect a beneficiary's claim against the trustee.[23]

The Trustee Act 1888 was ultimately succeeded by the Limitation Act 1980. Section 21(3), like its predecessor, was only designed to apply a limitation period for claims by beneficiaries of express trusts. As ss.21(1)(a) and (b) qualify the ambit of s.21(3) they determine when no limitation period will apply to claims against an *express trustee* in respect of breach of trust. They also qualify the ambit of the Limitation Act ss.15(1) and 18(1), which provide for a 12 year limitation period for claims based on an equitable interest in land. However, because s.21(1) is only relevant in cases of express trusts, it is irrelevant in cases where a claimant alleges that a defendant had become a constructive trustee only because of wrongdoing, "where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff".[24] For limitation purposes, there is no trust in such a case.

The rule governing express trusts: justification and scope

Justification

What then counts as a trust for limitation purposes? In order to answer this question it is necessary to first understand why Chancery historically did not allow express trustees to rely on the Statutes of Limitation. In *Paragon Finance*, Millet LJ

[19] Note that the limitation period for a claim against a trustee of land is 12 years, subject to the provisions of s.21(1) and (2), see Limitation Act 1980 ss.15 and 18.

[20] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400.

[21] Via the Limitation Act 1939 s.2(1).

[22] C. Stebbings, *The Private Trustee in Victorian England* (Cambridge, 2002), 186–187. Note that the Real Property Limitation Act 1833 (3 and 4 Will IV c.17) ss.24 and 25 provided a 20 year limitation period for claims by beneficiaries of trusts of land where the trustee had sold the land for valuable consideration in breach of trust.

[23] *Mill v Drewitt* 52 E.R. 748; (1855) 20 Bev. 623; *Bright v Legerton* 45 E.R. 755; (1861) 2 De G.F. & J. 606.

[24] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 409.

borrowed the reasoning of Lord Redesdale in *Hovenden v Lord Annesley*,[25] arguing that the rule was justified on the basis that a trustee's "possession" of the trust property was that of the beneficiaries:

> "The explanation for the rule 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*."[26]

This reasoning was accepted by treatise writers[27] and later authorities.[28] The difficulty is that the statement does not justify the rule, it simply states that a trustee is never allowed to assert that he holds title adversely to the beneficiaries. It does not explain why—nor why different limitation rules apply even to trustees who have no possession or rights to trust assets at all, such as those who have negligently failed to acquire assets on behalf of the trust, or have disposed of assets in breach to third parties. How then should we understand the law's willingness to treat trusts differently for limitation purposes?

It is suggested that the best way of understanding the rule is that advanced by Lord Sumption in *Williams v Central Bank of Nigeria*[29]:

> "The reason was that the trust assets were lawfully vested in the trustee. Because of his fiduciary position, his possession of them was the beneficiary's possession and was entirely consistent with the beneficiary's interest. If the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with the trust. There was nothing to make time start running against the beneficiary."[30]

Lord Sumption's point here is that the nature of a trustee's liability for trust assets he has received explains why no limitation period applied to claims against him. It goes further than the explanation in *Hovenden v Lord Annesley*, adopted by Millett LJ, in linking the treatment of express trustees for limitation purposes to the content of their duties. In the 19th century, suing a trustee who had misappropriated trust assets did not necessarily involve pleading that the trustee had committed a "wrong" which gave rise to a "remedy". As explained by Walter Ashburner in his *Principles of Equity*:

> "[A] trustee could never set up his own breach of trust in answer to a claim by his cestui que trust. If, therefore, the cestui que trust claimed property which the trustee had appropriated to his own use, the trustee could never allege by way of defence that he had so appropriated it. If the cestui que trust claimed to recover from the trustee property which the trustee had sold or

[25] *Hovenden v Lord Annesley* (1806) 2 Sch. & Lef. 607 (Ir. Ch.).
[26] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 408.
[27] e.g. T. Lewin, *The Law of Trusts*, 1st edn (A Maxwell, 1837), 611–612; W. Asburner, *Principles of Equity* (London, 1902), 711.
[28] *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319; *Sands v Thompson* (1883) 22 Ch. D. 614.
[29] *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189.
[30] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [13].

> given to some third person or which he had lost by his negligence, the trustee could not set up that he had so dealt with it—because such a dealing would be a breach of trust—and therefore the trustee was treated as still retaining the property in his own hands."[31]

In other words, a trustee became liable for trust assets simply because he had received them. His obligation to account for his stewardship of the trust assets was continuous and rooted in the initial receipt of the assets combined with his agreement to hold them on trust.[32] Even in cases where a trustee had disposed of assets in breach of trust, the beneficiary could recover the value of the assets from the trustee simply by proving that the trustee had received them: by enforcing the trustee's primary custodial duty.[33] The trustee would be unable to defeat the claim by saying he no longer had the assets, unless he had administered them in accordance with the terms of the trust. His liability was not wrong-based in that the beneficiary did not need to prove any wrongdoing to successfully bring the claim, only the fact of earlier receipt by the trustee. In this sense the trustee was treated "as still retaining the property in his own hands", even in cases where he had wrongly disposed of the assets to a third party. As Peter Birks put it, limitation periods did not apply to trustees because there was no "causative event" sufficient to trigger the limitation period apart from the trustee's "assumption of responsibility".[34]

This explains the rationale behind the Limitation Act 1980 s.21(1)(b)—which provides that no limitation period applies ~~by~~ a claim by a beneficiary of the trust to recover the trust property from the trustee. Such a limitation period would undermine the content of the trustee's custodial stewardship duties in respect of trust assets. For this reason, in the absence of a specific statutory provision, a trustee could never rely on a limitation period to defeat claims by a beneficiary seeking due administration of an existing trust fund.[35]

Scope The rule that no limitation period applied to claims for breach of trust has always prima facie been limited to express trusts. For that reason, s.21(1), which provides that no limitation period applies to claims in respect of fraudulent breach of trust or to recover trust property from a trustee, is prima facie limited in the same way—it functions as a limited preservation of the position before statutory limitation periods for claims against trustees were introduced. Limitation periods have always been applied to other equitable claims, such as those brought by mortgagors,[36] principals in purely personal fiduciary and accounting relationships.[37]

However, s.21(1) does apply to claims against some constructive trustees and fiduciaries. As regards the former, a constructive trustee who consensually undertakes the duties of an express trustee is treated as such for limitation

[31] W. Asburner, *Principles of Equity* (London, 1902), p.710.
[32] W. Swadling, "Limitation" in P. Birks and A. Pretto (eds), *Breach of Trust* (Oxford, 2002), 319. See also P. Millett, "Equity's place in the law of commerce" (1998) 114 L.Q.R. 214; S. Elliot, "Compensation claims against trustees" DPhil thesis, Oxford University (2002); C. Mitchell, "Stewardship of Property and Liability to Account" (2014) 78 Conv. 215.
[33] *Soar v Ashwell* [1893] 2 Q.B. 390 at 394, 396; *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319 at 325.
[34] P. Birks, "The Content of Fiduciary Obligation" (2000) 34 *Israel Law Review* 3, 27.
[35] *Re Cross* (1882) 20 Ch. D. 109.
[36] Limitation Act 1980 s.16. A mortgagee is expressly excluded from the definition of trustee in the Limitation Act 1980 see s.38 referencing Trustee Act 1925 s.68(17).
[37] Limitation Act 1980 s.23; *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 415–417.

purposes.[38] As regards the latter, the term "trust" in ss.21(3) and 21(1) also encompasses fiduciary relationships where a fiduciary has powers of disposition over assets beneficially belonging to another: in particular executors and administrators,[39] as well as those agents and company directors who have powers of disposition over their principal's assets.[40] This is because such fiduciaries owe duties for the assets they manage of the same type as express trustees do, incurred when they acquire powers over those assets. [41]

Limitation periods and constructive trusts arising in response to wrongdoing

Although there was no general statutory limitation period for claims against trustees until 1888,[42] since at least the early 19th century limitation periods did typically apply to claims under "constructive trusts" which arose in response to wrongdoing.[43] In such a case, the defendant's liability "as a trustee" does not arise from receipt of assets combined with an undertaking to hold them on trust. Instead, the beneficiary could only establish a "trust" by alleging a breach of duty. Millett LJ made the point in *Paragon Finance*, arguing that a knowing recipient or dishonest assistant was "not a trustee at all", because "[h]e never assumes the position of a trustee"—he is simply liable to account as if he were a trustee because of *wrongdoing*.[44] The reasoning has been influential and was adopted by the Supreme Court in *Williams v Central Bank of Nigeria*.[45]

Accordingly, courts have allowed defendants to rely on limitation defences in cases where they are alleged to be trustees simply due to fraud or other wrongdoing. *Paragon Finance* itself was such a case; mortgage lenders alleged, inter alia, that they had given legal title to loan money to the defendant-solicitors because of the solicitors' fraudulent misstatements about the loan transaction. This was said to give rise to a constructive trust over the loan monies, which meant that the applicable limitation period for the case was determined by s.21. The claimants argued that the six year limitation period in s.21(3) did not apply, because the defendant-solicitor's fraud meant that the claim arose "in respect of … fraud or fraudulent breach of trust", within the meaning of s.21(1)(a). Millett LJ dismissed the claim because the defendant was "not in fact a trustee at all", as discussed.[46] Section 21(3), and so s.21(1)(a), were irrelevant: the claim was based on the same facts as the common law claims in tort for fraud and conspiracy to defraud, and so the six year limitation period applicable to those claims applied by analogy.[47]

[38] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 409.
[39] Limitation Act 1980 s.38, incorporating the definition of trustee from the Trustee Act 1925 s.68(17).
[40] *Burdick v Garrett* (1870) 5 Ch. App. 233; *Re Sharpe* [1892] 1 Ch. D. 154; *Re Exchange Banking Co (Flitcroft's Case)* (1881) 21 Ch. D. 519; *Taylor v Davies* [1920] A.C. 636; *Paragon Finance v Thakerar* [1999] 1 All E.R. 400.
[41] *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467; [2002] B.C.C. 729; *Auden McKenzie v Patel* [2019] EWCA Civ 2291; [2020] B.C.C. 316.
[42] There was a specific statutory limitation period introduced against trustees of estates in land and rents in 1833.
[43] *Hovenden v Lord Annesley* (1806) 2 Sch. & Lef. 607 (Ir. Ch.).
[44] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 409.
[45] *Williams v Bank of Central Nigeria* [2014] UKSC 10 at [11].
[46] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 400. See Limitation Act 1980 s.36.
[47] Limitation Act 1980 s.2.

Likewise, in *Rashid v Nasrullah*,[48] a fraudster managed to get legal title to a house mistakenly registered in his name, and so acquired legal title to it under the LRA 2002 s.58. The mistakenly de-registered owner sought to recover the house 20 years after the fraud—arguing that the 12-year limitation period applicable to claims to recover land was inapplicable.[49] The claimant argued that the defendant held the house on trust for him, and that the claim was both in respect of a fraud and to recover trust property. For these reasons, both ss.21(1)(a) and 21(1)(b) were engaged.[50] Lewison LJ held that the fraudster had indeed held title on constructive trust for the claimant. However, because the constructive trust arose only due to wrongdoing, the defendant "was not a true fiduciary", and so not a trustee within the meaning of s.21(1).[51] Accordingly the claim was statute-barred.

Similar reasoning was applied by the Supreme Court in *Williams v Central Bank of Nigeria*,[52] resolving conflicting decisions in the lower courts,[53] to find that claims for knowing receipt and dishonest assistance were never claims "in respect of any fraud or fraudulent breach of trust", because neither involved a "true trustee". Building on the reasoning in *Paragon Finance*, Lord Sumption (with whom Lord Hughes agreed) and Lord Neuberger, held that neither knowing recipients nor dishonest assistants were trustees within the meaning of s.21(1)(a) because their duties only arose as a result of wrongdoing. The decision reversed the 19th century position, where it was acknowledged that knowing recipients and dishonest assistants were not trustees but, just as the extent of their liability was calculated *as if* they had been express trustees, so was any limitation period. This meant that before 1888 no limitation period applied, and after that time they were treated as within the Trustee Act 1888 s.8.[54] As Lord Mance and Lord Clarke point out in dissent, *Williams* has the effect of treating Knowing Receipt and Dishonest Assistance as claims "in respect of any breach of trust" within the Limitation Act 1980 s.21(3)—such that a six year limitation period applies to the claim—but not as claims "in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy", for the purpose of s.21(1)(a), which would disapply the s.21(3) limitation period.[55] How can the same word have different meanings within s.21, without any explanation? If knowing receipt and dishonest assistance do not involve trusts, why is s.21(3) applicable at all? Unlike *Paragon Finance* or *Rashid*, it is unclear in *Williams* what else the source for the underlying limitation period could be.[56]

[48] *Rashid v Nasrullah* [2018] EWCA Civ 2685; [2020] Ch. 37.

[49] Limitation Act 1980 s.15(1).

[50] Again, s.21(1) is relevant to claims based on equitable interests in land: Limitation Act 1980 s.18(1) "Subject to section 21(1) … of this Act, the provisions of this Act shall apply to equitable interests in land … as they apply to legal estates".

[51] *Rashid v Nasrullah* [2018] EWCA Civ 2685 at [61].

[52] *Williams v Central Bank of Nigeria* [2014] UKSC 10.

[53] *Cattley v Pollard* [2006] EWHC 3130 (Ch); [2007] Ch. 353; *Statek Corp v Alford* [2008] EWHC 32 (Ch); [2008] B.C.C. 266.

[54] *Bridgman v Gill* 53 E.R. 374; (1857) 24 Beav. 302; *Ernest v Croysdill* 45 E.R. 589; (1860) 2 De G. F. & J. 175; *Rolfe v Gregory* 46 E.R. 1042; (1865) 4 De G. J. & S. 576; *Soar v Ashwell* [1893] 2 Q.B. 390; *Heynes v Dixon* [1900] 2 Ch. 561; *Re Eyre-Williams* [1923] 2 Ch. 533; *Re Blake* [1932] Ch. 54.

[55] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [129].

[56] W. Swadling, "Limitation" in P. Birks and A. Pretto (eds), *Breach of Trust* (Oxford, 2002), 319, pp.341–44. Also see P. S. Davies, "Limitation in Equity" (2014) 3 L.M.C.L.Q. 313; J. Lee, "Constructing and limiting liability in equity" (2015) 131 L.Q.R. 39.

Limitation periods and unauthorised gains made by fiduciaries

The current law

Following the decision of the Supreme Court in *FHR v Cedar Capital LLC*, fiduciaries will hold all unauthorised profits made on proprietary constructive trust for their principals. This will be the case regardless of the type of fiduciary relationship, and regardless of whether the gain was one which the fiduciary ought to have acquired for their principal or a secret commission or bribe. What limitation period applies to claims by a principal to an unauthorised gain made by a fiduciary? The point is one which has arisen in a number of recent appellate cases. The basic position is that the claim is one "to recover trust property" within s.21(3), and so prima facie limited to a six year limitation period.[57] The complexity lies in determining when such a limitation period will be disapplied under s.21(1). This depends both on the nature of the fiduciary relationship and the type of breach.

First, claims for breach of a purely personal fiduciary relationship are never claims against trustees within s.21(1), and so a six-year limitation period will apply. This will be the case where an agent or company director has no powers of disposition over his principal's assets,[58] even if the unauthorised gain is held on constructive trust by the fiduciary for the principal. Following *Williams v Bank of Nigeria*, the courts are likely to deal with such claims by treating "trust" as having different meanings in ss.21(3) and 21(1): and so to treat claims to recover unauthorised gains from purely personal fiduciaries as limited to six years under s.21(3)—as claims "to recover trust property"—but to treat s.21(1) as automatically inapplicable, on the basis that such a fiduciary is not a "trustee".

Secondly, fiduciaries with powers of disposition over their principal's assets are "trustees" within the meaning of s.21(1). Accordingly, if such a fiduciary makes a profit by fraudulently breaching his duties to the company no limitation period will apply. As above, the claim would be prima facie within s.21(3), but no limitation period would apply because the claim would be one "in respect of fraud or any fraudulent breach of trust to which the trustee was a party or privy" under s.21(1)(a).[59]

Thirdly, in some circumstances, a claim to recover unauthorised profits from a fiduciary will be a "claim to recover from the trustee trust property or its proceeds in the possession of the trustee, or previously received by the trustee and converted to his use" within s.21(1)(b), and so no limitation period will apply to the claim. Based on the wording, it might be thought that a limitation period should never apply to claims to recover unauthorised profits held on constructive trust by a principal: on the basis that such claims are always to recover trust property. The current authorities, however, instead suggest that a limitation period will apply to the claim unless the profit consists of assets previously owned by the principal beneficially[60]—only then will the claim be one "to recover from the trustee trust property or the proceeds of trust property", and so within s.21(1)(b). The reasoning

[57] 12 years if the unauthorised profit consists of title to land, see Limitation Act 1980 ss.15(1) and 18(1).

[58] *Taylor v Davies* [1920] A.C. 636 PC; *Schulman v Hewson* [2002] EWHC 855 (Ch) at [36]–[39].

[59] *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048; [2004] 1 B.C.L.C. 131; *First Subsea v Balltec* [2017] EWCA Civ 186; [2018] Ch. 25.

[60] *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467; [2002] B.C.C. 729; *Energetics Holdings Pte Ltd v Hazarika Ltd* [2014] EWHC 1845 (Ch) at [79] to [81].

is that the defendant's custodial duties preceding the unauthorised gain only existed in relation to the principal's pre-existing assets. A fiduciary's duties in respect of a profit made from an outside source arise only upon the "wrong" of accepting the payment, and so the profit is not trust property within the meaning of s.21(1)(b). The only English judgment directly on point is *Halton International Inc v Guernroy Ltd*[61] where a company suing a director for unauthorised profits was found to have "no reasonable chance of success" of showing that s.21(1)(b) applied, and therefore of successfully bringing the claim more than six years after profit was made. According to dicta in *First Subsea v Balltec*, even if the fiduciary holds the payment on a proprietary constructive trust, he is not a "true trustee" of that payment and so cannot rely on s.21(1)(b).[62]

Difficulties with the way s.21(1) is currently applied

The current approach taken to limitation periods and unauthorised gains, as we can see, is heavily influenced by the reasoning of Millet LJ in *Paragon Finance*, as interpreted by the Supreme Court in *Williams v Central Bank of Nigeria*. Crucial to this reasoning is the adoption of the 19th century distinction between trusts arising due to the trustee's consensual holding of the assets and wrongdoing.

However, it is suggested this approach is problematic for two distinct reasons. First, the way the historical distinction has been applied to modern law overlooks changes in legal thinking, which mean that it is no longer safe to apply the distinction as it would have been applied in the 19th century.

Secondly, and in the alternative, even if the distinction between express trusts and those arising from wrongdoing were accepted, it is hard to see why a fiduciary who makes an unauthorised gain is not equivalent to an express trustee, including for limitation purposes. This is because a fiduciary who makes an unauthorised gain, and holds it on constructive trust for his principal, owes the same ongoing accounting duties in respect of that gain that an express trustee does in respect of trust assets. Each is liable for the assets they receive in the same way, and beneficiaries can therefore claim those assets without alleging wrongdoing against either.

Modern treatment of constructive trusts

The first point concerns the modern treatment of so-called proprietary constructive trusts—those where *A* is found by operation of law to hold rights on trust for *B*. In the 19th century, many "constructive trusts" were simply shorthand for when the courts would make particular types of orders, and the constructive trustee came under no duties until an order was made.[63] The 19th century cases treat the fact that court orders *create* constructive trusts in cases of wrongdoing as explaining why limitation periods applied to claims based on such trusts by analogy to common law. This is made very clear, for instance, in *Hovenden v Lord Annesley*,[64] which

[61] *Halton International Inc v Guernroy Ltd* [2006] EWCA Civ 801; [2006] W.T.L.R. 1241.

[62] *First Subsea v Balltec* [2017] EWCA Civ 186; [2018] Ch. 25 at [52] to [59]. Also see *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319, 325; *Clarkson v Davies* [1923] A.C. 100 PC; *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048.

[63] Swadling, "Fiction of the Constructive Trust" (2011) 64 C.L.P. 399.

[64] *Hovenden v Lord Annesley* (1806) 2 Sch. & Lef. 607 (Ir. Ch.).

was relied upon by Millet LJ in *Paragon* as the source of the distinction between express trusts and trusts arising in response to wrongdoing. Lord Redesdale, having explained that claims against express trustees were not subject to a limitation period, explained why the rule did not apply to claims based on constructive trusts arising because of fraud:

> "But the question of fraud is of a very different description: that is a case where a person who is in possession by virtue of that fraud, is not, in the ordinary sense of the word a trustee, but is to be constituted a trustee by a decree of a court of equity, founded on the fraud; and his possession, in the meantime, is adverse to the title to the person who impeaches the transaction, on the ground of fraud …"[65]

The point here is that when a constructive trust arises in cases of fraud, the defendant does not become a trustee until "a decree of a court of equity" has been made. "[I]n the meantime" his possession is adverse to the claimant—accordingly time will start running against the claim. Cotton LJ adopted identical reasoning in *Metropolitan Bank v Heiron*.[66] In short, the *Paragon Finance* distinction between consensually and non-consensually created trusts depends on the proposition that non-consensually created trusts arise out of court orders only.

This reasoning does not hold good today, because of changes in the way constructive trusts are understood. Although court orders can still give rise to trusts for the first time, (for instance in cases where the court orders A to transfer property to B under matrimonial legislation[67]), "English law is generally averse to the discretionary adjustment of property rights and has not recognised the remedial constructive trust favoured in some other jurisdictions … [i]t has recognised only the institutional constructive trust," as Lord Sumption put it in *Angove's Property v Bailey*.[68] The orthodox distinction between the categories is that an institutional constructive trust arises independently of a court order on settled principles, while a~~n~~ remedial constructive trust is created discretionarily by order of the court.[69] Though the point is contested by some,[70] as a matter of English authority constructive trusts arise in real time on fixed principles and give rise to duties independently of a court order: even where they are recognised following claims for proprietary restitution or breach of fiduciary duty.[71] For that reason, such trusts are not equivalent to those constructive trusts discussed by Lord Redesdale and Cotton LJ in the 19th century.

If modern English law does not recognise remedial constructive trusts, how then can the decisions in *Paragon Finance* and *Williams* to treat the constructive trusts imposed on dishonest assistants and knowing recipients as "remedial" be justified? The answer given by Lord Millet, Lord Sumption, and Lord Neuberger seems to

[65] *Hovenden v Lord Annesley* (1806) 2 Sch. & Lef. 607 (Ir. Ch.) at 633–34.
[66] *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319 at 325.
[67] e.g. *Mountney v Treharne* [2002] EWCA Civ 1174; [2003] Ch. 135; Matrimonial Clauses Act 1973 s.24(1)(a).
[68] *Angove's Property Ltd v Bailey* [2016] UKSC 47; [2016] 1 W.L.R. 3179 at [27] to [28].
[69] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 714–715; *Angove's Property Ltd v Bailey* [2016] UKSC 47 at [27].
[70] e.g. see Y. K. Liew, "Reanalysing Institutional and Remedial Constructive Trusts" (2016) 75 C.L.J. 528.
[71] *Angove's Property Ltd v Bailey* [2016] UKSC 47 at [27] and [30]; at [47]; *FHR v Cedar Capital Partners LLC* [2014] UKSC 45; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. For a fuller list see C. Mitchell, P. Mitchell, and S. Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (Sweet & Maxwell, 2016), 38-17 fn.48 and discussion at 38-39.

be that these are not really trusts, and so do not involve "remedial constructive trusts".[72] Such trusts do not involve the discretionary variation of property rights that Sumption warns against in *Angove's Property Ltd*: they are simply court orders that the defendant pay over a sum of money some to the claimant.

That characterisation though does not hold good for proprietary constructive trusts and is open to question even as regards knowing receipt. Constructive trusts in modern English law give rise to duties antecedent to and independent of a court order. The existence of these duties forms the heart of Lord Mance's dissent in *Williams v Central Bank of Nigeria*,[73] as well as academic criticism of that decision.[74] Imagine A holds assets on trust for B, and in breach of trust disposes of them to C, who knows about A's breach. C will owe duties to B from the time C acquires knowledge of the breach of trust.[75] In such a case C has a duty to restore the trust property,[76] may owe duties to preserve the assets,[77] and owes custodial duties not to use the assets for his own benefit.[78] Given these duties, even if the claim brought against C is purely personal, why is C not treated as a trustee for limitation purposes? One answer might be that C has not really been "trusted", given references to real trusting in *Paragon Finance* as applied in *Williams v Central Bank of Nigeria*. The problem with that argument is that, in *Paragon Finance*, Millett LJ emphasised that the way different trusts were created per se is not what matters for limitation purposes.[79] The way a trust is created only matters to the extent it affects its content—a non-consensually created trust, which imposes duties of the same type as an express trust, is simply a trust. It should be treated as such for limitation purposes.

In *Williams v Central Bank of Nigeria*, the Supreme Court also held that a wider range of management and fiduciary duties were necessary for a trust to come within the limitation provisions, on the basis that it was only these trusts to which the Trustee Act 1925 referred.[80] The argument though is problematic, as Stephen Watterson argues.[81] Expressly created bare trusts are after all within the scope of both subss.21(3) and 21(1). This is because, as Millett LJ recognised in *Armitage v Nurse*,[82] the "irreducible core of obligations owed by a trustee" simply consists of the duty "to perform the trusts honestly and in good faith for the benefit of beneficiaries". A trust can exist even if the terms expressly provide that the trustees owe no "duties of skill and care, prudence and diligence".[83] Indeed, the requirement of intention to declare a trust simply requires that the settlor intend that the trustee

[72] J. Lee, "Constructing and limiting liability in equity" (2015) 131 L.Q.R. 39, 41.
[73] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [161].
[74] C. Mitchell and S. Watterson, "Remedies for knowing receipt" in C. Mitchell (ed), *Constructive and Resulting* (Oxford, 2010); R. Chambers, "The End of Knowing Receipt" (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 32.
[75] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 702–709; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195; [2013] Ch. 91 at [71] to [129].
[76] C. Mitchell and S. Watterson, "Remedies for knowing receipt" in C. Mitchell (ed), *Constructive and Resulting* (Oxford, 2010), 123–126.
[77] C. Mitchell and S. Watterson, "Remedies for knowing receipt" in C. Mitchell (ed), *Constructive and Resulting* (Oxford, 2010), 138–142. See *Evans v European Bank Ltd* [2004] NSWCA 82.
[78] C. Mitchell and S. Watterson, "Remedies for knowing receipt" in C. Mitchell (ed), *Constructive and Resulting* (Oxford, 2010), 142–144. See *Arthur v Att-Gen of the Turks & Caicos Islands* [2012] UKPC 30 at [36].
[79] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 413.
[80] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [26], [31]; [69] to [73].
[81] See Watterson, "Limitations of actions, dishonest assistance and knowing receipt" [2014] C.L.J. 253.
[82] *Armitage v Nurse* [1998] Ch. 241.
[83] *Armitage v Nurse* [1998] Ch. 241 at 253–54.

does not have free use of the assets, and thus comes under custodial duties.[84] There is no requirement that the trustee have powers of "investment or management",[85] advancement, delegation, retirement or to appoint new trustees.[86]

In short, even if one accepts that a constructive trust of unauthorised gains arises in respect of wrongdoing, that does not prevent it from being a true trust. The underlying problem here is that the categorical distinction between the content of consensually and non-consensually created trusts no longer exists—because we no longer see the latter as *only* arising out of court orders. The conceptual basis for the Victorian distinction between express trusts on the one hand, and constructive trusts arising in response to wrongdoing on the other, has fallen away. The key question should be the *content* of a trustee's duties, not how the trust was created. If a defendant owes ongoing duties to account for assets he has received, whether those duties were created consensually or otherwise, then the defendant is a real trustee, and ss.21(3) and 21(1) should both apply to claims against him.

Unauthorised gains can be claimed without alleging breach of duty

The second difficulty with the current position relates to the assertion that fiduciaries who make unauthorised gains are trustees only because of their wrongdoing. As above, at present (under s.21(3)) a six year limitation period applies to claims for unauthorised gains unless (i) the fiduciary has powers of disposition over his principal's assets; and either (ii) the breach of duty which leads to the profit is fraudulent; or (iii) the gain consists of an asset previously owned by the principal beneficially. Unless conditions (i) and (ii) or (i) and (iii) are met s.21(1) is not engaged. In such a case, a fiduciary is not equivalent to an express trustee who is liable to his beneficiary for the trust assets simply by virtue of being a trustee, not due to any wrongdoing.

The difficulty is that, even if it were accepted that certain types of institutional constructive trust could be "remedial" for limitation purposes, it's hard to see how such reasoning could apply to fiduciaries who make unauthorised gains. This is because a fiduciary's liability to disgorge unauthorised gains *is not* dependent on proof of wrongdoing, and so it is problematic to categorise the constructive trust as "remedial" for limitations purposes. The point is made by Lord Neuberger in *FHR v Cedar Capital Partners LLC*.[87] Lord Neuberger confirmed that English law does not recognise remedial constructive trusts,[88] and cited Lord Russell's judgment in *Regal (Hastings) v Gulliver*[89] that a fiduciary is liable for all gains acquired in the course of his duty "from the mere fact of a profit, in the stated circumstances, been made", and "in no way depends on fraud, or absence of bona fides".[90] Lord Neuberger saw this reasoning as explaining why a fiduciary holds a gain on proprietary constructive trust:

[84] *Lamb v Eames* (1871) 6 Ch. App. 597; *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 A.C. 164 at [68] to [69]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch); 20 I.T.E.L.R. 905 at [268].
[85] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [31].
[86] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [71].
[87] *FHR v Cedar Capital Partners LLC* [2014] UKSC 45.
[88] *FHR v Cedar Capital Partners LLC* [2014] UKSC 45 at [47].
[89] *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134; [1942] 1 All E.R. 378.
[90] *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134 at 144–45.

> "equity does not permit an agent to rely on his own wrong to justify retaining the benefit: in effect, he must accept that, as he received the benefit as a result of his agency, he acquired it for his principal."[91]

The reasoning is that a fiduciary has agreed to act on behalf of his principal within a certain sphere of activity, and as a matter of law is disabled from acquiring rights for his own benefit whilst acting within that sphere—unless he obtains the informed consent of the beneficiary. For that reason, a fiduciary who makes an unauthorised gain is liable to yield that gain up to his principal simply because he has received the gain in the course of acting as a fiduciary, (unless he can show that the gain was authorised). Such a claim does not depend on the principal establishing anything more than the fact of the pre-existing fiduciary duty and receipt.[92] Although the reasoning is not without its critics,[93] its endorsement by a seven person bench in *FHR* means that it clearly represents English law today.

For limitation purposes, this reasoning is crucial. The reason a beneficiary of an express trust can rely on s.21(1) is that the trustee has ongoing duties to account for trust assets, for which he is liable without reference to wrongdoing. It is the content of the express trustee's duty which is central, and a fiduciary who makes an unauthorised gain owes exactly the same sort of duty. A principal's right to claim an unauthorised profit from a fiduciary simply depends on showing that the fiduciary received the property in a fiduciary capacity. The fiduciary, is therefore unable to assert a title to the gain against the principal, as doing so would involve admitting that he had acted in breach of fiduciary duty. This explains why, in *FHR*, the principal was held to have an equitable proprietary interest in the unauthorised gain. Why, then, can the principal not *always* rely on s.21(1)(b) to claim an unauthorised gain from his fiduciary, on the basis that it is real trust property held by a real trustee? It is hard to see how the principal's position in such a case is materially different to that of the beneficiary of an express trust—regardless of whether the prior fiduciary relationship is purely personal; regardless of whether the fiduciary was in fact fraudulent; and regardless of whether the unauthorised gain consists of assets that were previously owned by the principal beneficially. The duty is the same.

Conclusion

This article has argued that in cases where a fiduciary holds an unauthorised gain on trust for his principal that s.21(1)(b), so long as it remains on the statute book, should always be engaged. Claims against express trustees to recover trust assets were never time-barred historically because an express trustee owes a continuing duty to account for trust assets he has received. In this sense, his liability for those assets does not depend on later wrongdoing, and he cannot set up his title adversely to the beneficiaries. A fiduciary who has made an unauthorised gain is in the same position. He owes an ongoing duty to account for the unauthorised gains he has

[91] *FHR v Cedar Capital Partners LLC* [2014] 3 W.L.R. 535 at [30].

[92] See M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2011), 79–84; D. Hayton, "Proprietary Liability for Secret Profits" (2011) 127 L.Q.R. 487; P. Millett, "Bribes and secret commissions again" [2012] C.L.J. 583; L. Smith, "Constructive trusts and the no profit rule" [2013] C.L.J. 260.

[93] e.g. Y. K. Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017), Ch.10.

received. This means that he is not allowed to set up his title to the gain adversely to his principal, nor does his principal need to allege wrongdoing in order to claim the gain. That exact reasoning is used in *FHR v Cedar Capital* to explain why fiduciaries hold unauthorised gains on a proprietary constructive trust for their principals.[94] The deeper point is that fiduciaries who make unauthorised gains owe the same continuing accounting duties in respect of those gains as express trustees, and this justifies treating them as express trustees for limitation purposes. The current authorities, purporting to apply Millett LJ's judgment in *Paragon Finance v Thakerar*[95] and *Williams v Central Bank of Nigeria*,[96] overlook the facts that (i) a fiduciary's liability for gains does not depend on wrongdoing; and (ii) even where a constructive trust arises from wrongdoing, modern English law recognises the trust can impose rights and duties even before a court order is made. They also overlook the difficulty with treating claims against some fiduciaries as claims to recover trust property or in respect of breach of trust under s.21(3), but not as claims against trustees under s.21(1).

This argument also raises two broader issues. The first is whether the different limitation regime appliable to express trustees is still justifiable today. As above, that regime is based on a model of trustee liability, whereby a trustee is automatically liable for sums received on behalf of the trust, unless he can show some sufficient ground of discharge—such as having disposed of the assets with authority under the trust's terms. The difficulty is that this model has been challenged by the decisions in *Target Holdings v Redferns*[97] and *AIB v Redler*.[98] In those cases, the House of Lords and Supreme Court rejected the argument that a trustee was automatically liable for trust assets he had received, and instead held that a trustee was only liable for loss caused by *breach*. If it is the case that even an express trustee's liability for trust assets always depends on wrongdoing—and this is far from clear given restrictive interpretations of *Target* and *AIB* in later Court of Appeal decisions in *Various Claimants v Giambrone*,[99] *ITC v Ferster*,[100] and *Auden McKenzie v Patel*[101]—a question arises whether recognising separate limitation regimes for claims against express trustees remains justifiable. The Law Commission in 2001 clearly took the view it was not,[102] though such a view might be seen unjustifiably to undermine a beneficiaries' right to enforce a trustee's primary custodial duties for trust assets.

Secondly, these arguments emphasise that the law works as a system of interconnected rules, and that tinkering with one part can have unintended consequences for others. The decision in limitation cases to treat constructive trusts arising in response to wrongdoing as purely "remedial" creates tension within the legal system—in particular with the refusal of courts in other types of cases to describe constructive trusts as remedies. That distinction made good sense in the 19th century when such constructive trusts were seen only as court orders but

[94] *FHR v Cedar Capital Partners LLC* [2014] UKSC 45.
[95] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400.
[96] *Williams v Central Bank of Nigeria* [2014] UKSC 10.
[97] *Target Holdings v Redferns* [1996] A.C. 421; [1995] 3 W.L.R. 352.
[98] *AIB v Redler* [2014] UKSC 58; [2015] A.C. 1503.
[99] *Various Claimants v Giambrone* [2017] EWCA Civ 1193; [2018] P.N.L.R. 2.
[100] *ITC v Ferster* [2018] EWCA Civ 1594; [2018] 2 P. & C.R. DG22.
[101] *Auden McKenzie v Patel* [2019] EWCA Civ 2291; [2020] B.C.C. 316.
[102] Limitation of Actions, Law Comm No.270, 4.94-4.106.

makes less sense in today's legal system which does not recognise remedial constructive trusts that take effect only as court orders. It shows the danger of reviving historical legal distinctions and assuming those distinctions apply to the law today in the same way they were applied in the past, without properly taking other shifts in legal thinking into account.