



Some Crucial Aspects of Section 21 Limitation Act 1980

The Honourable Mr Justice David Hayton,
Judge of the Caribbean Court of Justice

**The Association of Contentious Trust and Probate Specialists
(ACTAPS) Annual Lecture**

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The Association of Contentious Trust and Probate Specialists (ACTAPS) was established on Monday 8th September 1997 for lawyers specialising in contentious trust and probate work. The objects of The Association of Contentious Trust and Probate Specialists (ACTAPS) are to: Provide a forum for specialists; To exchange experience, know-how and an appreciation of the law and statutes in this specialist area; To hold seminars, conferences and meetings for the discussion of contentious trust and probate issues; To promote the enhancement of the specific skills specialisation and expertise in this area by the provision of education and training and To enable representations to be made to the appropriate governmental and judicial bodies in relation to contentious trust and probate issues.

Remarks

By

The Honourable Mr Justice David Hayton, Judge of the Caribbean Court of Justice,

On the occasion of

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For the Association of Contentious Trust and Probate Specialists s 21 of the Limitation Act seems a worthy topic for my talk. In the time available I shall primarily focus upon whether or not any statutory limitation period applies in two cases: the case of breach of trust actions by objects of a discretionary trust or power (especially now that the Perpetuities and Accumulations Act 2009 allows accumulations for 125 years) and the case of actions against a dishonest assistant in a breach of trust or other fiduciary duty. In the absence of any forensic argument before me it has, of course, been easy to persuade myself of the provisional views I am about to utter: if contrary submissions were made I may be persuaded to take a different view.

The starting point for examining the position of discretionary objects is that when s 8 of the Trustee Act 1888 first provided for the Statute of Limitations to protect non-fraudulent trustees against actions for breach of trust it provided that time “shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.”

Section 8 was expanded in new provisions in s 19 of the Limitation Act 1939, which were reproduced in s 21 of the Limitation Act 1980, except for a new provision in s 21(2) to assist trustee-beneficiaries. Many offshore jurisdictions with a more flexible trust law than English law (eg as to perpetuities and accumulations) have adopted the provisions of either s 19 or s 21.

Section 21 provides:

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

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

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

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share.

This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

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

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary that he could have obtained if he had brought the action and this Act had been pleaded in defence.

1. **The position of objects of a discretionary trust or power**

Before dealing with s 21 and the case law thereon it helps, I think, to appreciate three background features.

Three background features

First, following upon *McPhail v Doulton*¹ and *Schmidt v Rosewood Trust Ltd*² there is no bright dividing line between objects of discretionary trusts, being objects of trust powers that trustees *must* exercise, and objects of discretionary powers, being objects of mere powers that trustees *may* or *may not* exercise. It is true that the former have a right to require the discretionary trustees to

¹ [1971] AC 424

² [2003] 2 AC 709, [2003] UKPC 26

exercise their discretion one way or another, while the latter only have a right to require the trustees to *consider* whether or not they might exercise their discretion, and that back in 1973 Templeman J in *Re Manisty's Settlement*³ considered that the latter's "only right and only remedy" for a breach of trust was to seek removal of the trustee. Both types of objects, however, are alike in having no present or future rights of enjoyment of trust property, having instead only an expectation or hope of benefiting under the trust, though - as emphasised in *Schmidt* - both are alike in having the right to invoke the inherent jurisdiction of a court of Equity to supervise, and if necessary, intervene in, the administration of a trust. As held by the Jersey Royal Court in *Freeman v Ansbacher (Trustees) Jersey Ltd*⁴, such intervention must extend in appropriate circumstances to ordering reconstitution of the trust fund⁵ eg by way of a money payment accruing to the trust fund as a substitute for performance of the trustee's primary obligations or as reparation for making good damage caused by a breach of trust.

If, however, trustees appoint an absolute or life interest in trust assets to an object, such object receives a proprietary interest in possession in such assets, just as a remainderman with a future interest in capital receives a proprietary interest in possession in capital that is validly advanced to him by the trustees or released to him by the life tenant, as pointed out by Wilberforce J (as he then was) in *Re Pauling's S.T.*⁶ There, although there had been some valid advancements to the remaindermen, so conferring interests in possession in the advanced property more than 6 years

³ [1974] Ch 17 at 25

⁴ [2009] JRC 003

⁵ Objects of discretionary trusts have this right: *Joel v Mills* (1857) 4 K & J 458; *Cosser v Radford* (1863) 1 De G J & S 585.

⁶ [1962] 1 WLR 86 at 115. Also *Kennon v Spry* [2008] HCA 56 at [49].

before some invalid advancements for the life tenant's benefit rather than her adult children's benefit as remaindermen, time could not run against the children in respect of the invalid advancements regarded as still within the trust fund until the children's interests therein fell into possession.

It follows that if a trustee makes an appointment of trust property to O, an object of a discretion, so that O receives an absolute or limited interest in possession in the appointed property, this has no relevance if more than 6 years later there is a breach of trust affecting the trust property in which O has no present or future entitlement. As to such property, a trustee cannot try to avoid future problems by now appointing to O some small interest in possession in other trust property.

A second feature to bear in mind is that if there is a beneficiary with an interest in possession that interest will normally be injured by a breach of trust, so that such beneficiary can normally be expected to take action within six years of discovering the breach. If there is a beneficiary with a proprietary interest in remainder, vested or contingent, indefeasible or defeasible, time does not run against him until such interest falls into possession, but if inaction may make it more difficult later to undo the harm caused by the breach, such remainderman (if of full capacity at that stage) may well take action fairly speedily. Thus there may well be no need for objects of discretions to take action. Indeed, because objects only have hopes they may see no point in bringing any action requiring the trustees to make good the value of the trust fund. In special cases, however, as will be shown, they may have realistically high hopes of significant appointments in their favour that will justify such an action.

Finally, instead of proceeding to a breach of trust action against the trustee, objects of a discretionary trust or fiduciary power of appointment may invoke the inherent jurisdiction of a court of Equity to supervise and if necessary intervene in the trustee-beneficiary relationship eg so as to compel production of accounts⁷ and disclosure of matters pertaining to the trustee's trusteeship and to compel proper administration of the trust.⁸ It appears, however, that by necessary implication from the Limitation Act this inherent supervisory power cannot be exercised to require the trustee to make good a loss where all breach of trust claims are barred by the Limitation Act and that if a loss has to be made good then any barred beneficiary will not be able to benefit from this.

Recent cases on s 21(3) and its rationale

In *Armitage v Nurse*⁹ Millett LJ (as he then was) put forward his rationale for the proviso to s 21(3) treating a right of action as not having accrued to "any beneficiary entitled to a future interest in the trust property until the interest fell into possession."

"The respondents submit that the policy to which s 21(3) gives effect is that it would be unfair to bar a plaintiff from bringing a claim unless and until he is of full age and entitled to see the trust documents and so has the means of discovering the injury to his beneficial

⁷ *Att-Gen v Cocks* [1998] Ch 414 at 420-421: where there is no claim to recover trust property and no claim for breach of trust there remains a duty to account at the core of the fiduciary obligation enabling a beneficiary or object of a fiduciary duty to discover whether or not there has been a breach of trust, with costs reserved until a breach is discovered and not found to be barred. See also *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 416, W Swadling, chapter on "Limitation" in P Birks & A Pretto (eds) *Breach of Trust* (2002) at pp 336-337.

⁸ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51], *Kennon v Spry* [2008] HCA 56 at [74] and [25], *Wingate v Butterfield Trust (Bermuda) Ltd* [2008] WTLR 357 at [28]

⁹ [1998] Ch 241 at 261.

interest. The difficulty with this argument, in my judgment, is that it proves too much. Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not. The rationale of s 21(3) appears to me to be different. It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favour.”

The New Zealand Court of Appeal when subsequently considering these dicta in dealing in 2004 with the equivalent provisions in New Zealand in *Johns v Johns*¹⁰, correctly pointed out that an object of a discretionary trust or power is not in a similar position to a beneficiary “*entitled to a future interest in the trust property,*” having merely a hope or an expectation of benefiting from a possible exercise of the discretionary trust or power. The Court thus held that it followed that though the six year period did not apply to beneficiaries with future entitlements it did apply to bar breach of trust claims of objects of a discretionary trust or power.

It would, however, be most surprising if Millett LJ, later Lord Millett, an outstandingly knowledgeable trust lawyer, had not appreciated that objects cannot fall within the proviso because not “*entitled to a future interest in the trust property*”. Was it not therefore the case that the exclusion of objects of a discretionary trust or power was because they did

¹⁰ [2004] 3 NZLR 202, [2005] WTLR 529

not fall within the main body of s 21(3) because not being beneficiaries with a present interest in possession in trust property just like beneficiaries only entitled to a future interest in trust property?

This seems to be the case when considering the position of the plaintiff, Paula Armitage, who had the possibility of receiving income through the discretion of the trustees until aged 25 whereupon she became entitled to income as of right. Millett LJ had stated¹¹

“The second question is whether Paula had a present interest while she was under the age of 25 or whether she had only a future interest which fell into possession when she attained that age. The judge held that she had merely a future interest. In my judgment, he was right. Until Paula attained 25 the trustees held the trust fund upon trust to accumulate the income with power instead to pay it to Paula or to apply it for her benefit ... That, in my judgment, is not an interest in possession.”

Thus, in 2006 the Cayman Island Court of Appeal in *Lemos v Coutts (Cayman) Ltd*¹² when dealing with the Cayman equivalent of s 21, held that objects of a discretionary trust or power fall outside the section, not having a present proprietary beneficial interest in possession in the trust property: *Johns v Johns* was rejected as having misunderstood *Armitage v Nurse*. Once, however, such an object receives a beneficial interest in possession in particular trust property the Limitation Act

¹¹ *Armitage v Nurse* [1998] Ch 241 at 261.

¹² (2006) 9 ITELR 616.

will apply in respect of that property but not the rest of the trust property in respect of which the object only has hopes.

This accords with the position under the 1888 Trustee Act at a time when the focus was upon fixed interests in trust property, though some fiduciary or personal powers of appointment or advancement might be vested in trustees or some special individual like a widow, while a discretionary trust could arise on the bankruptcy of a life tenant under a protective trust. Under the 1888 Act time did “not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.” It thus seems that an object of a discretion had to receive a beneficial interest in possession before ranking as a “beneficiary” and this position has continued under s 19(2) of the 1939 Act and s 21(3) of the 1980 Act.

The position of discretionary objects

Thus when trust property is appointed so as to confer a beneficial interest in possession on an object of a discretionary trust or power, he will have six years to complain of any breach of trust in respect of that property eg if receiving a seaside cottage that the trustee in breach of trust had allowed to fall into a dilapidated state. If, however, the trustee’s breach of trust concerned other trust property no statutory limitation periods apply to any action brought by a discretionary object to have the trustee make good the trust fund, though one might ordinarily expect there to be beneficiaries with interests in possession or remainder who would be taking such action within the statutory periods permitted to them.

Indeed, one might wonder why a discretionary object would bother to spend the time, trouble and money to try to have a trustee make good a loss, whether occurring one, five, ten or fifteen or fifty

years ago, especially when a discretionary object by definition has no present or future entitlement and so needs to curry favour with the trustee in the hope that the trustee may exercise his discretionary power in the object's favour.

One can, however, envisage a range of scenarios where a discretionary object finds it worthwhile to sue trustees, especially under trust laws permitting accumulation of income for extensive periods, even English law under the Perpetuities and Accumulations Act 2009 extending the permitted accumulation period from 21 to 125 years. A duty to accumulate precludes any interest in possession as does the existence of discretionary trusts.

There can be many trusts where no interest in possession subsists till the end of the perpetuity period, whereupon either an ultimate discretionary trust to distribute the capital between a class of objects will arise or, in default of exercise of discretions, capital will pass to a particular person or charitable entity which may or may not be ascertainable until the trust has been in existence for many years or, indeed, until the end of the perpetuity period.

Where there is a default beneficiary with a future interest in remainder falling into possession at the end of the trust period, the time for his right of action against the trustees will run from the expiry of the trust period. The default beneficiary will then have six years in which to bring the trustees to account for their stewardship of the trust property during the whole trust period. It will be no answer for the trustees to say that they had earlier made discretionary distributions (perhaps accompanied by a formal winding up of the trust) such that there was no trust property in which the default beneficiary could have any proprietary interest. The beneficiary can claim the distributions were improper so that but for breaches of trust there would have been property in

which he would have had an interest in possession at the termination of the trust period. The statutory expression “the trust property” in the Limitation Act is “an abstract rather than a concrete concept”, like the concept of “the trust fund”¹³, as pointed out in *Johns v Johns*,¹⁴ for, otherwise, the trustees could easily act improperly so as to evade or nullify all obligations to beneficiaries with future interests.

Where at the end of a trust period objects of a discretionary trust between them receive all the trust property, acquiring interests in possession therein, then time will run from the end of the trust period, whether receiving fractional parts of the trust fund or sums of money or other assets that can be reduced to fractional values of the trust fund. The objects can each argue that the value of their receipts would have been larger but for breaches of trust by the trustees eg distributing trust assets to non-beneficiaries, recklessly or negligently investing the trust fund, selling designated assets (like Microsoft shares acquired soon after its creation) without the requisite consent of a protector or investment advisor.

It would seem that such an argument can also be used in favour of a recipient receiving trust property as an object of a discretionary power as opposed to a discretionary trust.

What then of the position of the object of a discretionary trust or power who in the lifetime of a trust, as opposed to the end of a trust, receives an appointment in accordance with the settlor’s letter of wishes of, say, half the trust assets on attaining a certain age, but who suspects there may

¹³ An incorporeal concept retaining its identity till duly terminated: see FW Maitland, “State, Trust and Corporation” in 1911 *Collected Papers* CUP 2003, pp 94-95

¹⁴ [2004] 3 NZLR 202, [2005] WTLR 529 at [60] – [63] and appearing by implication from *Re Pauling’s ST* [1962] 1 WLR 86.

well have been an earlier breach of trust committed by the trustees that has significantly reduced the value of the trust fund and thus his half share? It seems that he will have six years to make the case that the property in which he has attained an interest in possession would have been larger but for the trustee's breach of trust.

Finally, what of the object of a discretionary trust or fiduciary power who has no interest in possession in trust property he believes to have been affected by a breach of trust? If there are no beneficiaries entitled to an interest in possession and no ascertained beneficiary with an interest in remainder or none prepared to take steps against the trustees who may have committed a breach of trust, it may well make sense for such an object who is one of the primary objects of the settlor's bounty, taking account of the settlor's letter of wishes, to take action to bring the trust fund up to the value it would have had but for the trustees' breach of trust. As in *Schmidt v Rosewood Trust Limited*¹⁵ he is entitled as an object of a discretionary trust or power to invoke the supervisory jurisdiction of the court so as to compel proper administration of a trust via obtaining orders for accounts, documents and information that may well enable breach of trust proceedings to be brought. No Limitation Act provision applies to bar breach of trust claims by such object who falls outside s 21(3), though under s 21(4) no barred beneficiary may benefit from a successful claim by such object.

¹⁵ [2003] 2 AC 709.

2. Actions against dishonest assistants in a breach of fiduciary duty

Here the focus is upon s.21(1) of the Limitation Act 1980 which states

“No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action

- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”

As established in Paragon Finance plc v DB Thakerar & Company,¹⁶ while the

expressions “trust” and “trustee” extend to constructive trusts¹⁷, constructive trustees who are fiduciaries (like trustees de son tort, company directors and agents holding property for trustees) who have assumed fiduciary obligations in respect of trust property fall within s 21(1) and so cannot plead the Limitation Act. What then is the position of non-fiduciaries who become liable as constructive trustees by reason of dishonest assistance in a breach of fiduciary duty?

¹⁶ [1999] 1 All ER 400.

¹⁷ Trustee Act 1925 s. 68 (17) imported by Limitation Act 1980 s. 38(1).

In *Statek Corporation v Alford*¹⁸ Evans-Lombe J in obiter dicta¹⁹, after examining relevant case law, opined that s 21(1) (a) applied to prevent time running against a dishonest assistant in a fraudulent breach of fiduciary duty because an action against such a defendant by a beneficiary under a trust was an action “*in respect of* a fraudulent breach of trust or other fiduciary duty.” He was fortified by Danckwerts J’s broad view of “in respect of” in *GL Baker v Medway Building & Supplies Ltd* and dicta of Millett LJ (as he then was) in *Paragon Finance v Thakerar*²⁰ indicating that there was a case for saying that a principled system of limitation would also treat a claim against an accessory as barred only when the claim against the principal was barred – and under s 21(1) time did not run against a fraudulent trustee.

Thus he refused to follow the decision of deputy judge, Richard Sheldon QC, in *Cattley v Pollard*²¹, who had been fortified by the following dicta in *Dubai Aluminum Company Limited v Salaam*²² where Lord Millett referred to the position of a dishonest assistant in a breach of fiduciary duty.

“He never claims to assume the position of trustee on behalf of others and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is

¹⁸ [2008] EWHC 32 (Ch).

¹⁹ At [108] – [126], the ratio being that the defendant as de facto director was a fiduciary ranking as a trustee within s 21(1).

²⁰ [1999] 1 All ER 400 at 412

²¹ [2007] Ch 353

²² [2003] 2 AC 366 at [141]

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

The deputy judge treated these dicta and the approach as a whole of Millett LJ in *Paragon Finance* to distinguishing *fiduciary* constructive trustees from *non-fiduciary* constructive trustees, as amounting to a rejection of any case for saying that a principled system of limitation would treat a claim against an accessory as barred only when the claim against the principal was barred. The distinction between fiduciaries and non-fiduciaries is a greater principle.

I agree with the deputy judge but, more significantly, so did Lord Hoffmann in the Hong Kong Final Court of Appeal decision, *Peconic Industrial Development Limited v Lan Kwok Fai*²³. As to the broad view of Danckwerts J and of Evans Lombe J on the expression “in respect of”, Lord Hoffmann said²⁴

“it simply means that the beneficiary must be claiming against the trustee on the ground that he has committed a fraudulent breach of trust. If it had been intended to include claims against dishonest assisters or other non-fiduciaries on the ground that they were accessories to the breach of trust, the language would have been a good deal clearer.”

I concur.

²³ [2009] HKFCA 17, [2009] WTLR 999

²⁴ *Ibid* at [25].

Lord Hoffmann's dicta also indicate that the open-ended liability under s. 21(1) is restricted to claims against fraudulent trustees, so supporting the view that a claim against a third party who innocently received trust property, whether from a fraudulent trustee or an innocent trustee, should merely be subject to the six year limitation period under s21(3). The key is not whether the trustee-transferor was a fraudulent or an innocent trustee, but that he was a trustee, while the recipient was an innocent third party. After all, the underlying rationale for limitation periods being inapplicable to a *trustee* is that the possession of the trustee from the outset was taken for and on behalf of the beneficiaries and so was treated as the possession of the beneficiaries.²⁵ This is not the position where there is an innocent recipient.

3. *Conclusions on actions by "a beneficiary under a trust"*

Having dealt with the appropriate defendant under s 21(1), one needs to consider who can rank as the appropriate claimant when on its face the benefit of s 21(1) is restricted to "an action by a beneficiary under a trust". Within s 21 it is noteworthy that s 21(2) focuses upon a trustee who is "also a beneficiary under the trust", s 21(3) concerns "an action by a beneficiary to recover trust property or in respect of any breach of trust" and s 21(4) prevents a beneficiary from benefiting if ranking as "a beneficiary as against whom there would be a good defence under this Act".

We have seen that s 21(3), subject to subsections (1) and (2), lays down a limitation period of six years for breach of trust actions by a beneficiary entitled to a present or future interest in the trust property, though time does not run against the latter till the interest falls into possession. Section

²⁵ *Halton International Inc v Guernroy Ltd* [2006] EWCA Civ 801 at [22]

21(3) seems not to apply to an object of a discretionary trust or power until the time, if any, when he receives an interest in possession in the trust property in respect of which he claims there to have been a breach of trust.

Section 21(1) prescribes no period of limitation for an action by a beneficiary under a trust against a fraudulent trustee or a trustee who retains trust property or its traceable product. What then of the position where an action is brought under s 21(1) or (3), not by a beneficiary entitled to a present or future interest but, by a trustee²⁶ against a defaulting co-trustee or a former trustee. In these cases the claimant trustee is essentially acting for the beneficiaries in seeking to have the defaulter make good the value of the trust fund, so that the courts by analogy with statute should treat the trustee's claim in the same way it would treat the claim if made by the relevant beneficiaries: it should make no difference whether there happens to be a beneficiary of full capacity bringing the action or the trustee²⁷.

It has already been noted that an object of a discretionary trust or fiduciary power, having only hopes or expectations, does not rank as a beneficiary under a trust with claims restricted under s21 (3), while he can hardly be affected by the equitable doctrine of laches or acquiescence until his right of action has accrued by receiving an interest in possession whereupon statute applies²⁸. He should not be compelled to litigate (at considerable personal expense) until he has come to receive an interest in possession in the trust property, as emphasized by Millett LJ in the earlier cited

²⁶ *Young v Murphy* [1996] 1 VR 279, *Re Benet* [1906] 1 Ch 216 at 230-231, *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 at 1074

²⁷ *Cattley v Pollard* [2007] 3 WLR 317 at [102]

²⁸ *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 at [140]

passage in *Armitage v Nurse*. If he does happen to receive an absolute or limited interest in possession in trust property he then falls within s 21 but only so far as concerns claims in respect of that property.

In the case of flexible discretionary trusts with lengthy accumulation periods there will, however, be objects who only obtain interests in possession near or at the very end of the trust period. This means that there is an open-ended liability of trustees to be sued by objects of discretionary trusts or powers to produce accounts, documents and information for the whole trust period and so, perhaps, be made liable to restore the value of the trust fund to what it should have been but for breaches of trust occurring many decades ago. Does this strike the right balance between the interests of beneficiaries and of trustee?

At first sight this seems unduly burdensome for trustees. There may well, however, have been little chance of anyone seriously monitoring the conduct of trustees where they have mainly accumulated income for extensive permitted accumulation periods (with England now having extended its period to 125 years) except for a few appointments to discretionary objects who appreciate their vulnerability if they fall out of favour with the trustees as by questioning the conduct of the trustees. The trustees ought to maintain accounts with supporting documents so that the core obligation of accountability is a reality. It is right and proper that they maintain professional accounts themselves or through an accountant, while in significant value trusts where realistic monitoring by beneficiaries is most unlikely there ought to be provision for the accounts to be independently audited at the expense of the trust fund.

The need from the trustee's viewpoint is for there to be enough to persuade the judge in his discretion that there is no need for any order as to accounts²⁹ or as to information and documentation. From the viewpoint of the object of a discretionary trust or power, he has to persuade the judge to require information and documentation relating to significant but obscure areas where there is some reasonable cause for suspicion in the light of the uncooperative stance of the trustee, though this suspicion could ultimately prove groundless: the trustee, however, was in control of matters and should not have left the position as unclear as it is. If the beneficiary's suspicions are fulfilled then the court can go on to order an account on a footing of wilful default or, perhaps, an account of profits³⁰.

Trustees have to act responsibly in looking after others' property and in accounting for this fiduciary task³¹ and the court, in the exercise of its powerful supervisory jurisdiction, will make the trustees act responsibly.

4. Objects and the Law Commission Report No 270 on Limitation of Actions

Finally, one needs to consider the impact of Law Commission Report No 270 on Limitation of Actions. The Law Commission, not having the benefit of *Schmidt v Rosewood Trust Ltd* decided in March 2003, did not deal with the position of objects of discretionary trusts and powers, though

²⁹ No common account ordered in *Wingate v Butterfield Trust (Bermuda) Ltd* [2008] WTLR 357 where there were accounts for underlying companies: orders were made, however for disclosure of certain information with supporting documentation.

³⁰ See *Glazier v Australian Men's Health (No 2)* [2001] NSWSC 6 dealing with English & Australian authorities (reversed on appeal on other grounds: *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146)

³¹ "the taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The trustee must show what he has done with that property": per Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1513]

the draft bill in clause 22(3) states “This Act does not apply to a civil claim made by the Attorney General or the Charity Commissioners for England and Wales with respect to a charity or the property or affairs of a charity.” The reason for this, set out in para 4.111 of the Report, is that “in the case of charitable trusts it may be some time before evidence of any breach of trust reaches the attention of anyone in a position to take action against the trustees.” This, of course, is also the position in the case of lengthy accumulation trusts featuring only objects of discretionary trusts and powers who may not be in a position to take action against the trustees till they receive appointments of capital at the end of the trust period.

The proposed core limitation regime for civil claims is set out in subclauses (1) and (2) of clause 1 of the draft bill as follows

- (1) It is a defence to a civil claim that the claim was not made before the end of the period of three years from the date of knowledge of the claimant³².
- (2) It is also a defence to a civil claim that the claim was not made before the end of the period of ten years from the starting date in relation to the cause of action on which the claim is founded³³.

Under the long-stop (2) it seems that an object of a discretion remains in a well-protected position because by clause 3(1) the “starting date” is the date on which the right of action accrued and, as

³² By cl 37(1) the onus is on the claimant to prove that the claim was made before the end of the limitation period applicable to the defence.

³³ By cl 37(2) the onus is on the defendant to prove that the claim was not made before the end of the limitation period applicable to the defence.

discussed earlier, the right of action does not appear to accrue to an object until acquiring an interest in possession in the trust property affected by the breach of trust.

An object, however, could be barred under the primary provision in (1) because the claimant must bring his “civil claim”³⁴ before the end of the period of three years from the date of knowledge of the claimant, so an object having only hopes of receiving trust property but who somehow acquires knowledge of a breach of trust is capable of being detrimentally affected - and a person’s knowledge extends to “knowledge which he might reasonably have been expected to acquire (a) from facts observable or ascertainable by him or (b) where he has acted unreasonably in not seeking expert advice, from facts ascertainable by him with the help of such advice.”³⁵

Unfortunately, an object of a discretionary trust or power does not receive the benefit of the dispensation from the limitation regime that clause 22(1) provides: “No limitation period under this Act which applies to a civil claim by a beneficiary to recover trust property or the proceeds of trust property shall run against him during any period in which he is entitled to a future interest in the trust property.” Objects of discretions, of course, only have hopes and are not entitled to any future interest, though they fall within the mischief covered by this dispensation and so ought to have a similar dispensation where needed to deal with the primary three year limitation period. Indeed, should not the dispensation for both objects and those with future interests extend to personal actions for breach of trust as well as to proprietary actions to recover trust property or the

³⁴ Being a claim in civil proceedings in which “the claimant seeks (a) a remedy for a wrong, (b) restitution, or (c) the enforcement of a right”: cl 1(4).

³⁵ Clause 4(1)

proceeds of trust property? A revised clause 22(1) might read, “No limitation period under this Act which applies to a civil claim by a person to recover trust property or the proceeds of trust property or in respect of any breach of trust shall run against him unless and until he has an interest in possession in relevant trust property.”

It may now be time for ACTAPS and also the Trust Law Committee to seek the help of other lawyers specializing in personal injuries and professional negligence so as to press for implementation of the Law Commission Report, though overtaken by some case law³⁶ and some statutory law³⁷. Subject to taking account of my point on the scope of the dispensation in clause 22(1), the Report is sensible and impressive as one would expect from all the time and trouble taken in its preparation by the Commission and many knowledgeable consultees, but now is not the time for me to review the detail of the Report.

³⁶ Eg *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384; *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844 ³⁷ Land Registration Act 2002