

CHAPTER 44

LIMITATION OF ACTIONS

2. FRAUD AND RETENTION OF TRUST PROPERTY

Apart from the Act—laches

- 44–15 NOTE 53. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.
- 44–16 NOTE 55. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

3. OTHER CLAIMS

Action “by a beneficiary”

- 44–31 NOTE 31. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

Effect of barring one beneficiary

- 44–38 NOTE 56. DELETE AND REPLACE BY: Note, however, that laches is a defence only to a claim within Limitation Act 1980, s.21(1) (fraud and retention of trust property) and not to one within s.21(3) (other breaches of trust), see §§ 44–15 to 44–16, 44–44.

Actions against personal representatives

- 44–45 NOTE 93. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), § 21–055.

4. CONSTRUCTIVE TRUSTS AND SIMILAR LIABILITIES

General

- 44–49 NOTE 20. AFTER THE REFERENCE TO *Halton International Inc. v Guernroy*, INSERT: *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16; (2008–09) 11 I.T.E.L.R 844 at [19]–[23]; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [55]–[80] (affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335).

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Knowing receipt

44–55 NOTE 40. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

NOTE 41. INSERT AT THE END OF THE FIRST SENTENCE: (though in *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16; (2008–09) 11 I.T.E.L.R 844, a decision on Hong Kong legislation in terms identical to the English predecessor of Limitation Act 1980, s.21, it was held at [25] that similar words in the equivalent of s.21(1) refer only to a claim against a trustee for breach of trust).

NOTE 42. AT THE END ADD: A defendant sought to be made liable for knowing receipt was treated as a constructive trustee of the second kind in Jersey in *Bagus Investments Ltd v Kastening* [2010] JRC 144. But see *Peconic*, above, *loc. cit.*

Dishonest assistance

44–56 DELETE THE LAST TWO SENTENCES OF THE TEXT AND REPLACE BY: Latterly, however, it has been held that it is not right and that an accessory liable for dishonest assistance fell outside section 21(1)(a);⁴⁹ hence he was held entitled to rely on a six-year period of limitation.⁵⁰ The point is not settled, and the contrary opinion has been expressed,^{50a} but our view is that such an accessory ought indeed to be treated as a constructive trustee of the second kind and so able to raise a defence of limitation.⁵¹

44–57 NOTE 55. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

⁴⁹ *Cattley v Pollard* [2006] EWHC 3130 (Ch); [2007] Ch. 353 at [80]–[89], relying on remarks of Lord Millett in *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [141], not following *Soar v Ashwell* [1893] 2 Q.B. 390, CA and disapproving a passage in the previous edition of this work based on *Soar v Ashwell*. See too *Peconic Industrial Development Ltd v Lau Kwok Fai* (2009) 11 I.T.E.L.R 844, HK CFA, in which the leading judgment was given by Lord Hoffman N.P.J., taking the same view of Hong Kong legislation in terms identical to the English predecessor of Limitation Act 1980, s.21(1).

⁵⁰ Either because the claim against him is “in respect of [a] breach of trust” within Limitation Act 1980, s.21(3) (but see *Peconic*, above, holding at [25] that similar words in the equivalent of s.21(1) refer only to a claim against a trustee for breach of trust) or because the claim is analogous to a claim of deceit, attracting a six-year period of limitation by way of Limitation Act 1980, ss.2 and 36; see *Cattley v Pollard*, above, at [92].

^{50a} *Statek Corp v Alford* [2008] EWHC 32 (Ch); [2008] W.T.L.R. 1089 at [108]–[126], *obiter*. The point was treated as open in *Williams v Central Bank of Nigeria* [2011] EWHC 876 (QB); [2011] All E.R. (D) 80 (Apr).

⁵¹ But subject to the extension provided by Limitation Act 1980, s.32(1)(a) (fraud), see §§ 44–132 *et seq.*

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NOTE 56. AT THE END ADD: but note *Peconic*, above, in which it was held at [25] that similar words in the Hong Kong equivalent of s.21(1) refer only to a claim against a trustee for breach of trust.

Diplock claims

44–60 NOTE 65. AT THE END ADD: and the references there to *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16; (2008–09) 11 I.T.E.L.R 844.

NOTE 68. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

Profiting from a trust

44–62 NOTE 74. AT THE END ADD: a point considered “noteworthy” in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [79] (affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335).

NOTE 75. DELETE AND REPLACE BY: See §§ 20–28 to 20–28C (including online supplement).

Retention of property

44–63 NOTE 82. AT THE END OF THE FIRST SENTENCE DELETE: (see § 20–36). AT THE END OF THE SECOND SENTENCE ADD: and (iii) *Metropolitan Bank v Heiron*, along with *Lister & Co v Stubbs*, were followed, and *Att-Gen for Hong Kong v Reid* not followed, in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [35]–[80] (affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335), see §§ 20–28A to 20–28C and 20–36 (online supplement).

AFTER § 44–64 INSERT THE FOLLOWING NEW PARAGRAPH:

44–64A The donee of a power of attorney, including a lasting power or (formerly) an enduring power,^{86a} owes a fiduciary duty to the donor and has a power of disposition over the property to which the power extends. We consider that if the donee makes an unauthorised profit (*e.g.*

^{86a} Granted under Mental Capacity Act 2005 and Enduring Powers of Attorney Act 1985 respectively.

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by accepting a commission on the sale of the donor's property) his liability is as a constructive trustee of the first kind.^{86b}

5. FUTURE INTERESTS IN LAND**Registered land generally**

44–109(2) IN THE SECOND SENTENCE OF THE TEXT DELETE *entitle* AND REPLACE BY *entitled*.

Adverse possession and registered land held in trust

No successive barring of equitable interests

44–114 IN THE SECOND SENTENCE OF THE TEXT DELETE *the trespasser either has an entitlement* AND REPLACE BY *either the trespasser has an entitlement*.

6. EXTENSION AND POSTPONEMENT OF LIMITATION PERIODS**Fraud, concealment and mistake**

Fraud

44–132 NOTE 75. AFTER THE REFERENCE TO *Beaman v A.R.T.S. Ltd*, INSERT: *Barnstaple Boat Co. Ltd v Jones* [2007] EWCA Civ 1124; [2008] 1 All E.R. 1124 at [31]–[33].

NOTE 79. *Cattley v Pollard* IS NOW REPORTED AT [2007] Ch. 353.

Deliberate concealment

44–135 AT THE END OF THE FIRST SENTENCE OF THE TEXT INSERT A NEW NOTE 88A: The scope of Limitation Act 1980, s.32(1)(b) is discussed in *Williams v Fanshaw Porter & Hazelhurst* [2004] EWCA Civ 157; [2004] 1 W.L.R. 3185.

AT THE END OF THE FOURTH SENTENCE OF THE TEXT INSERT A NEW NOTE 91a: But in a case of active concealment what must have been concealed is a fact relevant to the claimant's right

^{86b} See § 20–36 (including online supplement) on the possible distinction between cases where the commission derives from the property subject to the fiduciary relationship and cases where it does not.

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of action, not the right of action itself: *Williams v Fanshaw Porter & Hazelhurst*, above. How far the defendant must have been under a duty to disclose the fact is discussed in *ibid*.

Discovery and diligence

44–141 NOTE 10. AT THE END ADD: But a claimant is not expected to take exceptional measures: *Paragon Finance at ibid.*; *Biggs v Sotnicks* [2002] EWCA Civ 272; [2002] All E.R. (D) 205 (Jan).

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