IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009HCV 06726

BETWEEN	**JOY DOUGLAS**	**1ST CLAIMANT**
AND	**MARLENE DOUGLAS**	**2ND CLAIMANT**
AND	**JACQUELINE DOUGLAS**	**3RD CLAIMANT**
AND	**IVAN DOUGLAS**	**4TH CLAIMANT**
AND	**BARCLAYS BANK PLC**	**1ST DEFENDANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**2ND DEFENDANT**

Mr. Wentworth Charles and Mr. Floyd Green instructed by Wentworth Charles & Company for the claimants

Mr. John Vassell, Q.C. and Miss Julian Mais-Cox instructed by DunnCox for the first defendant

Mrs. Sandra Minott-Phillips, Q.C. and Mrs. Alexis Robinson instructed by Myers, Fletcher & Gordon for the second defendant

Heard: July 24, September 6 and 18, December 4, 12, 2012 and June 21, 2013

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT CLAIM – LIMITATION OF ACTIONS ACT – FRAUD - BREACH OF TRUST

SIMMONS, J

[1] In this matter, the defendants have each filed an application to strike out the claimants' statement of case.

[2] The grounds on which the first defendant relies are:-

i) that no reasonable cause of action is alleged or disclosed

against it;

ii) the claim against the first defendant is frivolous, vexatious and/or an abuse of the process of the court;

iii) the action is statute barred in that the actions complained of occurred between October 1969 and August 1985 and all trust business in Jamaica of Barclays Bank D.C.O were transferred and vested in Barclays Bank Jamaica Limited which changed its name to National Commercial Bank Jamaica Limited in 1975;

iv) that the claimants have acquiesced in any alleged breach.

[3] The second defendant's grounds are that:-

i) The action is statute barred;

ii) The accounts between the claimants and the second defendant have already been stated and settled by payment and a discharge obtained from the claimants;

iii) The claimants by their execution of the Discharges have acquiesced in any alleged breach and;

iv) The claim is an abuse of the process of the court.

[4] The claimants are the children of Ivan George Leopold Douglas, deceased and are beneficiaries in his estate. The deceased by way of a will dated the 29th April, 1969 created a trust in their favour and Barclays Bank D.C.O was appointed as trustees. The responsibility for the administration of the trust was subsequently transferred to the first and second defendants.

[5] The deceased's widow was given a life interest in a dwelling house which after her death is to be administered in accordance with the trust that was created in favour of the claimants.

[6] A grant of Probate was made in Mr. Douglas' estate on the 1st day of December 1969 to Barclays Bank D.C.O. In 1971 Barclays Bank D.C.O. changed its name to Barclays Bank International. On the 2nd January 1975 by virtue of The Banking (Barclays Bank of Jamaica Limited) (Vesting of Assets) Order, 1974 (the Vesting Order) all of the trust business of Barclays Bank International was transferred to Barclays Bank of Jamaica Limited. The trust business referred to in that Order is *"all trust business of the transferor bank in a fiduciary capacity, whether as executors, administrators and trustees, or otherwise in Jamaica."*

[7] On the 12th August 1977 Barclays Bank of Jamaica Limited changed its name to National Commercial Bank Jamaica Limited.

[8] Written Discharges and acknowledgement were signed by the claimants on the 5th February 1987, the 26th January 1987 and the 19th November, 1986 respectively in respect to their interest in the trust fund.

[9] In December 2009 the claimants filed an action seeking an account of trust property, a declaration that the trustees were negligent and damages. That claim was amended in January 2012 to reflect the correct name of the first defendant.

[10] The first defendant in its defence raised the issue that the action for breach of trust is statute barred by virtue of the Limitations of Actions Act 1881 and the Trustee Act 1897. It has also pleaded that the claims for negligence and an account are statute barred by virtue of the Limitations of Actions Act 1623.

[11] In addition to the above it has pleaded the defences of accord and satisfaction, release, account already stated and settled by payment and laches and/or acquiescence. The first defendant has also denied that the second defendant is its servant and/or agent.

[12] The second defendant in its defence pleaded the same defences that were raised by the first defendant. No Reply has been filed by the claimants.

First defendant's submissions

[13] Mr. Vassell, Q.C. submitted that the action against the first defendant ought to be struck on the basis that it is frivolous, vexatious and an abuse of the process of the court as it is statute barred. He stated that this provided the defendant with a complete defence. Counsel referred to paragraphs 7.01 and 7.02 of Sime, ***A Practical Approach to Civil Procedure***, 14th edition which states:-

> *"Expiry of a limitation period provides a defendant with a complete defence to a claim. Lord Griffiths in Donovan v Gwentoys [1990] 1 WLR 472 said, 'the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal'. If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.*
>
> *Limitation is a procedural defence. It will not be taken by the court of its own motion, but must be specifically set out in the defence...Time-barred cases rarely go to trial. If the claimant is unwilling to discontinue the claim, it is usually possible for the defendant to apply successfully for the claim to be struck out ...as an abuse of the court's process."*

[14] Reference was also made to the case of ***Ronex Properties Ltd. v.***

John Laing Construction Ltd. And others [1983] Q.B. 398 at 408 in which Stephenson L.J. stated that where the expiry of the limitation period has been raised as a defence, whilst the defendant may not be able to say that the claimant has no cause of action, the claim may be struck out on the basis that it is an abuse of the process of the court.

[15] Mr. Vassell, Q.C. stated that the effect of the Vesting Order is that as of the 2nd January 1975 the first defendant ceased to have and authority in respect of the deceased's estate as either executor or trustee. In this regard he referred to paragraph g of exhibit "JD1" which is the Agreement between Barclays Bank International Limited (BBI) and Barclays Bank of Jamaica Limited (BBJ). That paragraph stipulates that upon completion BBI was required to hand over "…all books, records, data and security and other documents and information…" relating to its business and in its possession to BBJ.

[16] In these circumstances, it was submitted that if causes of action existed against the first defendant in relation to its trusteeship, they would at their latest arise upon the taking effect of the order on the 1st January 1975. An exception to this would be where the claimant was under a disability or if there was a concealed fraud. He also made the point that the deceased's youngest child would have attained the age of majority in 1978.

[17] Counsel also stated that this action which was filed in 2009 was concerned with alleged acts or omissions which would have occurred before the 1st January 1975 and that any action relating to these matters would therefore be statute barred. Mr. Vassell, Q.C. stated that there are two scenarios in which this may not be the case. Firstly, if it were the law that no period of limitation exists or is applicable to the causes of action pleaded. Secondly if any of the equitable defences or exceptions to the

entitlement to rely on the limitation period could be resorted to.

[18] Learned Queen's Counsel further submitted that the causes of action advanced against the first defendant are negligence and breach of fiduciary duty for which there is a prescribed limitation period. He indicated that a trustee is permitted by virtue of section 46 of the Trustee Act to rely on the Limitation of Actions Act except where there is an allegation of fraud or that the trustee has converted the trust property to his own use. He stated that there has been no such allegation in the pleadings. Mr. Vassell, Q.C. also submitted that an allegation of dishonesty does not amount to a claim for fraud and there must be sufficient information in the pleadings to ground such a claim. He also stated that a claim for fraud could not be introduced by affidavit evidence where it is not pleaded in the statement of case. It was also submitted that an assertion of dishonesty does not amount to a claim for fraud.

[19] Reference was made to paragraphs 21 and 25 – 27 of the Amended Particulars of Claim and it was submitted that the allegations contained in these paragraphs support a claim for negligent breach of trust and not fraud.

[20] Learned Queen's Counsel referred to the case of ***Paragon Finance plc v. D B Thakerar & Co. (a firm)*** [1999] 1 All E.R. 400 and ***para 1141, Halsbury's Laws, 5th edition Volume 68*** in support of his submissions.

[21] It was also submitted that once the first defendant raises the defence of limitation this places the onus on the claimant to prove that the action was filed in time. Reference was made to the case of ***London Congregational Union Inc. v. Harris & Harris (a firm)*** [1988] 1 All ER 15 in support of this submission.

[22] He also made the point that time began to run from the date when the

causes of action accrued. It was submitted that the relevant date would be that of the alleged negligence, breach of trust or failure to account. However, in the case of infant beneficiaries time would not begin to run until they attained the age of majority. He also made the point that time begins to run against a beneficiary when his interest in the estate becomes an interest in possession.

[23] In this matter, the youngest child of the deceased had attained the age of majority by 1978 which was three years after the second defendant had taken over the business of the first defendant in Jamaica. He also made the point that this action was brought thirty years after the first defendant ceased being executor of the deceased's estate. Mr. Vassell, Q.C. then proceeded to deal with the issue of whether the pleadings brought the claim within any of the exceptions to ***section 46*** of the ***Trustee Act (the Act).***

[24] With respect to the claim for an account, it was submitted that that claim is ancillary to the claims for breach of trust and negligence and as such, the first defendant is protected by the ***Limitation of Actions Act.*** Reference was made to the cases ***Tito v. Waddell (No. 2)*** [1977] 3 All ER 129 and ***Knox v. Gye*** (1892) LR 5HL 656.

[25] Learned Queen's Counsel proceeded to deal with the contents of a letter from Barclays Bank D.C.O. Trustee department to Barclays Bank D.C.O. in Jamaica. That letter which is dated the 5th March 1970 was referred to by the first claimant in her supplemental affidavit filed on the 13th July 2012. At paragraph 29 it is alleged that the letter indicates that trust property was sold to Douglas Fabricating at a depreciated value and that the proceeds were retained by the first defendant.

[26] It was submitted that the said letter that was allegedly discovered in

2003 is not evidence of any irregularity on the part of the first defendant. Additionally, there has been no allegation that the existence of the letter was concealed by the first defendant. There has also been no averment relating to concealed fraud.

[27] Reference was made to ***Brown & another v. Jamaica National Building Society*** [2010] JMCA Civ. 7 in which it was stated that the doctrine of concealed fraud only applies in Jamaica with respect to claims for the recovery of land or rent.

Second defendant's submissions

[28] Mrs. Minott-Phillips, Q.C. submitted that the claimants' case ought to be struck as an abuse of the process of the court. In the first instance, it was argued that the claim is statute barred against the second defendant as there is nothing in the claimant's statement of case which supports any allegation of fraud and/or that the trustee has retained trust property. Reference was made to ***section 46*** of ***the Act.***

[29] It was also submitted that the substance of the pleadings amount to allegations of a breach of trust by the second defendant. Such a claim based on the provisions of section 46 would be statute barred. In this regard reference was made to the case of ***Frank Douglas et al v. NCB Jamaica Limited and Vernice Douglas*** Claim no. C.L.1991/D083, delivered on the 13th November 2006.

[30] With respect to the claim for an account, learned Queen's Counsel submitted that it too was statute barred as it was ancillary to the claim for negligence.

[31] Mrs. Minott-Phillips, Q.C. also made the point that based on ***section 46 (1) (b)*** of ***the Act*** time did not begin to run against the claimants until they had been vested with their respective interests under the will upon

reaching the age of twenty five (25) years. She stated that the fourth claimant who was the youngest child would have attained that age in 1985.

[32] Learned Queens's Counsel also stated that on the 13th August 1985 the estate was wound up by the second defendant and the claimants signed their written discharge. The discharge it was submitted, indicated their receipt of the cash due to them in full satisfaction of their interest in the Joint Trust Fund. The first to fourth claimants signed the discharge on the following dates: February 5, 1987, January 26, 1987, November 19, 1986 and January 19, 1987 respectively.

[33] Where the issue of agency is concerned, it was submitted that the Heads of Agreement between the Government of Jamaica and Barclays Bank International did not create any such relationship. It was also submitted that there is no legal principle which states that a subsequent trustee is an agent of a former trustee. In those circumstances it was submitted that the second defendant could not be held liable for any breaches of trust allegedly committed by its predecessors. Mrs. Minott-Phillips, Q.C. also made the point that even if the pleading of agency was correct nothing would be gained as the alleged principal has been named.

[34] With respect to the allegation that the second defendant is liable for breach of trust, it was submitted that it would not be liable based on the following defences:

(a) Release;

(b) Account stated and settled by payment; and

(c) Laches.

[35] It was submitted that a beneficiary who is *sui juris*, that is, of full legal capacity and has full knowledge of the facts can release a trustee from subsequent liability. Reference was made to the cases of ***Burrows v.***

Walls (1885) 5 De GM&G 233 and ***Walker v. Symonds*** (1818) 3 Swans 1 in support of this submission.

[36] Mrs. Minott-Phillips, Q.C. submitted that the following words in the Releases signed by the claimants amount to a release from liability:

> *"I acknowledge to have received from National Commercial Bank Jamaica Limited, the executor, the cash shown due to me in full and complete satisfaction of my interest in the Joint Fund of my late father's estate."*

[37] With respect to the claim for an account, it was submitted that the account has already been stated and has been settled by payment. Reference was made to the above clause as stated in paragraph 36 in support of that submission.

[38] Where the defence of laches is concerned learned Queen's Counsel submitted that a claimant in equity must bring his claim without undue delay. Reference was made to ***Lindsay Petroleum v. Hurd*** (1874) LR PC 221 at 239-240 where Sir Barnes Peacock stated:-

> *"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material." But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of*

course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice …"

[39] Mrs. Minott-Phillips, Q.C. argued that in this case where there has been a delay of approximately twenty (20) years in bringing the action there would be a balance of injustice if the remedies sought by the claimant are granted.

Claimants' submissions

[40] Mr. Charles in his response submitted that the claim is not statute barred as fraud is not the only exception mentioned ***section 46*** of ***the Act***. He argued that the sale of property by the trustees at an undervalue and the failure to account for the proceeds of that sale amount to a retention of proceeds by the them.

[41] Counsel referred to the letter from Barclays Bank D.C.O. Trustee department to Barclays Bank D.C.O. in Jamaica dated the 5th March 1970, which was allegedly discovered in 2003 by the first claimant and submitted that time did not begin to run until the date of its discovery. Reference was also made to the case of ***In Re Richardson, Pole v. Pattenden*** [1920] 1 Ch 423 at in which Warrington, L.J. stated:-

"I think that it is a very serious question whether in a case like this, if the defendant were in a position to bring himself within sub-s. 1 (a) of s. 8 of the Act of 1888, it is possible for him to say that he is under no kind of liability at all, and for this reason: s. 8, while it does supply the trustee with a statutory defence, supplies a defence of a very limited

character."

[42] Counsel also argued that the instant case is in effect an action to recover property or proceeds that have been retained by the trustees and as such ***section 46*** of ***the Act*** does not apply.

[43] It was also submitted that the particulars of the first defendant's breach of trust contained in paragraph 21 (xv) (xvii) and (xxi) places the claimant's case within the exceptions stated in ***section 46 (1)*** of ***the Act***. They state as follows:-

> "(xv) Failed to account for the sale of the Testator's Yacht or the proceeds thereof.
>
> (xvii) Failed to distribute all of the pecuniary legacies in accordance with the will.
>
> (xxi) Failed to pay into the Trust account the Testator's profits from the voluntary liquidation of his majority shareholding

[44] Mr. Charles also argued that the issue of whether the action is statute barred is a triable one which should be determined as a preliminary issue at the trial.

[45] With respect to the issue of whether or not the trust had been wound up by the second defendant, counsel argued that that was not the case. He pointed out that the order of the Honourable Mr. Justice Marsh dated the 27th June 2003 expressly excluded the deceased's estate.

[46] In addition, Mr. Charles submitted that since the beneficiaries have an interest in the dwelling house occupied by Mrs. Vernice Alva Douglas time had not yet started run in respect of the second defendant's administration of the entire estate. That house according to the terms of the will is to be held on trusts for the beneficiaries, including the claimants after her death. Mr. Charles argued that the responsibility of the second

defendant to the estate is indivisible and completion of one aspect of the estate does not absolve them of further responsibility in respect of that bequest. In the circumstances the time afforded by the Statute of Limitations had not yet began to run.

[47] Counsel referred to the case of ***Mara v. Browne*** [1895] 2 Ch 69 as authority in support of his submission that where a beneficiary is entitled to two interests in property, one in possession and one in remainder, he does not lose a claim in the latter where time has run in the former. He maintained that based on that case and the case of ***Re Pauling's Settlement Trust; Young Husband v. Couts & Co.*** [1963] All E.R. 1, the claimants' rights in respect of limitation are preserved where they have a future interest.

[48] Mr. Charles also stated that the order of Marsh, J. dated the 27th June 2003 did not remove the second defendant as trustees of the estate of Ivan Leopold Douglas. It was further submitted that the trustees needed to present a proper inventory and obtain the court's approval to wind up the estate.

[49] With respect to the effect of the releases that were signed by the claimants, counsel submitted that the circumstances in which that occurred would have to be considered by a trial court. He argued that where certain information was not known to the beneficiaries the trustee could not rely on that release and discharge as a bar to a claim for an account. Reference was made to ***Bank of Credit and Commerce International SA v. Ali*** [2001] 1 All E.R. 961.

[50] Mr. Charles also stated that in the instant case the beneficiaries should have been advised to obtain independent legal advice. This he said was a matter of law and need not have been pleaded. Reference was

made to the case of ***Walker v. Symonds*** (1818) 3 Swain 1 and ***Burrows v. Walls*** (supra) in support of this point.

[51] Counsel also stated that the trustees could not demand a deed of release from the beneficiaries after the trust property was handed over to them. Reference was made to ***Chadwick v. Heatley*** (1845) 63 E.R. 671, ***King v. Mullins*** (1852) 61 E.R. 469 and ***Tiger v. Barclays Bank Ltd.*** [1951] 2 All E.R. 262.

[52] It was also submitted that effect of the release and discharge is a matter for the court's determination at a trial. The case of ***Bank of Credit and Commerce International S A v. Ali and others*** [2002] 1 A. C. 251 was cited in support of this submission. It was argued that based on that case the execution of the releases by the beneficiaries was not an absolute bar to their commencing proceedings against the trustees. He stated that the court was required to make a determination of the intention of the parties based on the information that was available at the time. Reference was made to ***Cole v. Gibson*** (1750) 1 Ves Sen 503 at 507, ***Ramsden v. Hylton*** (1751) 2 Ves Sen 304 at 311, ***Salkeld v. Vernon 1*** Eden 64 at 67-68 and ***Lindo v. Lindo*** (1839) 1 Beav 496 at 505-506.

[53] Where the defence of laches is concerned, counsel stated that where the Statute of Limitations applies that defence cannot be relied on. See ***Re Pauling's Settlement Trust*** (supra). Mr. Charles also argued that the ignorance of the claimants with respect to certain matters must be taken into account when the court is considering the issue of delay. Reference was made to the case of ***Lindsay Petroleum Company v. Hurd and others*** (1874) 5 LR PC 221 in support of that submission.

[54] It was also submitted that since laches and acquiescence are equitable doctrines they cannot apply in a case where a party has an

interest in possession as well as a future interest. In addition, Counsel submitted that based on the case of ***Fisher v. Broker*** [2009] 4 All E.R. 789, where a party fails to either raise or enforce an equitable right for a long period it may amount to acquiescence.

[55] Mr. Charles asked the court to find that in these circumstances the issues in this case need to be resolved by a trial court and as such the applications ought to be dismissed.

The law

[56] Where a defendant alleges that the claim against him is statute barred, he has two options. Whilst he cannot succeed to strike out the claim on the basis that there is no cause of action, he can however, plead the defence of limitation or apply to strike out the claim on the basis that it is frivolous, vexatious and an abuse of the process of the court.

[57] This principle was applied in ***Ronex Properties Ltd. v. John Laing Construction Ltd. and others*** (supra) where the court refused an application to strike out a third party notice on the basis that there was no reasonable cause of action. On appeal, it was held that such an order could only be made where *"…it was manifest that there was an answer immediately destructive of the claim; that since a defence under the Limitation Acts barred the remedy and not the claim and that defence had to be pleaded, the application …was misconceived".*

[58] **Rule 26.3 (1)** of the ***Civil Procedure Rules, 2002 (CPR)*** sets out the circumstances in which the court may strike out a litigant's statement of case. The rule states:-

> *"(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement*

of case if it appears to the court-

(a) .....

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;....."

[59] In addition to the above, the court also has an inherent jurisdiction to strike out pleadings which are shown to be an abuse of its process. This power is a discretionary one and the relevant case law indicates that it is only to be exercised in exceptional circumstances. Lord Diplock in ***Hunter v. Chief Constable of the West Midlands Police and others*** (1982) A.C. 529 defined the term "abuse of process" as the misuse of the court's *"….procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".* His lordship further stated: *"…the circumstances in which abuse of process can arise are very varied; It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power".*

[60] The defendants in this case have argued that the action ought to be struck out on the basis that it is an abuse of the process of the court. Where an action has been brought against a trustee, ***section 46*** of ***the Act*** makes it clear that he is permitted to raise a limitation defence except in

instances where there is an allegation of fraud or that he has converted trust property to his own use.

The section states:-

> *"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the following provisions shall apply-*
>
> *(a) all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner, and to the like extent, as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him;*
>
> *(b) if the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner, and to the like extent, as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute*

shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary as against whom there would be a defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this section had been pleaded.

(3) This section shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

[61] There are two issues which need to be resolved before the question of whether the action is statute barred can be addressed. They are:-

i.) Whether there is any allegation of fraud against the defendants; and

ii.) Whether there is any allegation that either defendant has retained trust property and converted same to its own use.

[62] In order to determine these issues the pleadings of the claimant must be examined to determine full extent of the allegations against both defendants.

[63] The amended claim form seeks the following:-

(i) An account for trust property;

(ii) A declaration that the trustees were negligent; and

(iii) Damages in sum of five hundred and four million six hundred and eighty-one thousand nine hundred and twenty-one dollars ($504,681,921.00); and

(iv) Costs.

[64] The particulars of claim in this matter are quite detailed. It lists the various assets of the deceased and states that the first defendant was authorized by the terms of the will to "sell, call in and convert all of the Testator's residuary estate into money and hold the net proceeds upon trust for all the children of the testator in equal shares as tenants in common." It also states that the first defendant was authorized to invest all money and to apply "the whole or part of the residuary estate" towards the maintenance, education or benefit of each child until he or she attained the age of twenty-five (25) years. Throughout the pleadings it is alleged that the second defendant acted as the agent of the first defendant.

[65] Paragraph 21 states:-

> "The 1st defendant is liable as result [sic] of the actions of Barclays, its successor company Barclays Bank International Limited, Barclays Bank of Jamaica Limited and the 2nd Defendant who administered the Testator's estate at one time or the other from on or about December 1969 and during which time undertook a number of transactions negligently, in breach of their fiduciary duties to the claimants and in breach of the terms of the Trust as a consequence of which the estate and the beneficiaries suffered loss and damage."

This is followed by an extensive listing of the particulars of the first defendant's breach of trust. The allegations include the failure to invest

monies in accordance with the will, wrongful transfer of property at Ivy Road to Douglas Prefabricating, selling property both real and personal at an undervalue, failure to exercise diligence in its choice of investments and failure to account to the beneficiaries in respect of their management of the estate.

[66] The second defendant is said to have failed to manage the trust property in accordance with the trust instrument. The particulars include failing to pay maintenance sums to the claimants after 1979 and to provide accurate statements of account. The said defendant is also said to have generally failed to exercise sufficient care and skill in the management of the trust property.

[67] The defendants' "negligent mismanagement and administration" of the trust and breach of their fiduciary duty is said to have resulted in loss and damage. The particulars of the loss are set out in paragraph 27 of the particulars of claim.

[68] The defendants have both sought to rely on the ***Limitation of Actions Act*** and ***section 46*** of ***the Act***.

[69] I will now proceed to consider whether any of the exceptions stated in ***section 46*** are applicable to this case.

Fraud

[70] It is settled that any charge of fraud must be pleaded and sufficiently particularized. This principle was expressed by Thesiger, L.J. in ***Davy v. Garrett*** (1877) 7 Ch. D. 473 at 489 in the following words:

> *"In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts".*

[71] A claimant is required to set out the facts and the circumstances that

are being relied on to prove that a defendant had or was motivated by a fraudulent intention. It is also clear that the court should not be asked to infer that intention from general allegations. This point was made by Selborne, L.C. in ***Wallingford v. Mutual Society*** 5 App. Cas. 685 at 697 who stated that *"…general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice".*

[72] In ***Re Rica Gold Washing Co.*** 11 Ch. D. 36, it was held that it is not sufficient for a party to make a vague allegation of fraud and that the facts which constitute the fraud must be stated. The court was also of the view that where only a vague general allegation of fraud is made, evidence of the acts which allegedly constitute such fraud is not admissible.

[73] Similarly, in ***Lawrance v Lord Norreys and others*** [1886-90] All ER Rep 858 at 864, Lord Watson stated:

> *"In my opinion, a plaintiff, who desires to avail himself of the provisions of s 26, is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by LORD SELBORNE, LC, in Wallingford v Mutual Society (1) (5 App Cas at p 697): "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice."*
>
> *It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff*

attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.

[74] The general principle pertaining to matters in which a party wishes to allege fraud was accepted also by the court in ***Paragon Finance plc v. D B Thakerar & Co. (a firm)*** (supra). Millett, L.J. said:-

"I accept the plaintiffs' submissions. It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the Court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the Court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the Court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud".

[75] In this matter, fraud has not been pleaded and there is no allegation that any particular act was done fraudulently. Counsel for the claimant has

asked the court to infer fraud on the basis of allegations contained in paragraph 29 of the affidavit of Joy Douglas sworn to on the 7th December 2011. These allegations were not stated in the pleadings. In fact, the words "fraud' or "fraudulently" do not appear anywhere in the pleadings and no particulars of fraud have been stated. There is also no claim for fraudulent breach of trust.

[76] In my view, it cannot be overemphasized that fraud is a very serious matter. It must also be borne in mind that the function of the particulars of claim is to inform the other side of the nature of the case they have to meet. In fact, ***rule 8.9 (1)*** of the ***CPR*** imposes on a claimant a duty to set out his case. The rule states:-

> *"The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies".*

This provision in my opinion is designed to further the overriding objective of enabling the court to deal with cases justly.

[77] The claimant has raised the issue of concealed fraud by the introduction of the letter dated the 5th March 1970 which was stated to have been discovered on a date which would have placed the action within the limitation period.

[78] ***Section 32 (1)*** of the English ***Limitation of Actions Act***, 1980 makes specific provision for such a situation. It states:

> *"(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

[79] There is however, no equivalent provision in the Jamaican legislation. The Court of Appeal in ***Brown & another v. Jamaica National Building Society*** 2010JMCA Civ. 7 dealt with this issue in a comprehensive judgment delivered by Harrison, J.A. The learned Justice of Appeal in his examination of the law stated:-

> "The law governing the limitation of actions in Jamaica is not, in our view has, in an entirely satisfactory state. Section 46 of the Limitation of Actions Act explicitly drives one back nearly 400 years to the United Kingdom Statute 21 James 1 Cap 16, a 1623 statute (and the first limitation statute passed in England)."

[80] His lordship then went on to state that actions based in either contract or tort are barred after six years. In this regard he referred to judgment of Rowe, J.A. in ***Muir v. Morris*** (1979) 16 J.L.R. 398 at 399. The court stated that although the equitable doctrine of fraudulent concealment is still relevant in Jamaica, it only applies to actions for the recovery of land or rent.

[81] The instant claim is not concerned with the recovery of land or rent and as such the doctrine of fraudulent concealment can provide no assistance to the claimant.

[82] Having considered the relevant authorities I accept the submissions of Mr. Vassell Q.C. that a claim for fraud cannot be introduced by way of affidavit evidence. I therefore find that the claimants have failed to establish that there is any allegation of fraud against the defendants in this matter.

Is this an action to recover trust property that has been retained by the trustees and converted to their use?

[83] It is settled law that there is no period of limitation in respect of a claim by a beneficiary to recover trust property that has been retained by a trustee and converted to his own use. In ***Wassell v. Legatt*** [1896] 1Ch 554 it was held that a trustee who had retained trust money and had not accounted for it could not rely on a limitation defence.

[84] Counsel for the claimants has asked the court to find that trust money was retained by the trustees based on the contents of a letter from Barclays Bank D.C.O. in London to its Trustee Department in Kingston Jamaica. That letter which is dated the 5th March 1970 states in part:-

> *"We thank you for your explanation of the way in which the deceased's Loan Account with the Company has been cleared and we appreciate the tactical reason for transferring the land and buildings to the Company on a depreciated figure. The point we were making however is that the Will gives no power to transfer assets to the Company so that, as we said in our letter of 30th January, the transaction is in effect a sale of the property to the Company. If therefore the Company became insolvent, the Bank might be liable for the difference between the true value of the property and the figure at which it was sold to the Company. Whilst we do not suggest any adjustment to the transaction already effected, this is a point which you should bear in mind in any future case where similar*

circumstances apply".

[85] There is no dispute that the company referred to in this letter is Douglas Prefabricating and Construction Company. The claimants have however alleged in the affidavit of Joy Douglas dated the 7th December 2011, that its contents reveal that trust property which formed part of the residuary estate, was sold at an undervalue and the proceeds retained by the trustee.

[86] This matter is dealt with in paragraph 21 (ii) and (iii) of the Amended Particulars of Claim where it is alleged that the first defendant breached its fiduciary duty in two ways. Firstly, by wrongfully transferring property to the company and secondly, by selling the said property to the company at an undervalue. There is no allegation that the proceeds of the sale were retained by the first defendant. What Mr. Charles seems to be saying is that the acts complained of equate to retention of trust property. I am unable to agree with that proposition.

[87] The letter does not state or even suggest that any funds arising out of that transaction were transferred to the trustees. It states that the property was transferred to liquidate a debt which was owed by the deceased to the company albeit, at an undervalue. It speaks to the necessity for the transfer to be treated as a sale in the event that the company became insolvent. In the absence of any evidence which suggests that the trustees had an interest in the company this cannot raise any presumption that the first defendant retained trust property and converted same to its own use.

[88] The contents of the letter in my view, taken at their highest, suggest that the first defendant may have exceeded its powers. This could therefore amount to a failure to comply with the duties imposed upon it by equity and under the Will of the deceased.

[89] The pleadings do not allege that the proceeds of sale have been converted by the first defendant to its own use. The conduct of the trustees is in my view, quite properly, addressed in the pleadings as a breach of trust. The term *"breach of trust"* is defined in ***Osborn's Concise Law Dictionary, 7th ed.*** as *"an improper act, neglect or default on the part of a trustee in regard to his trust, either in disregard of the terms of the trust or the rules of equity".* It can therefore be used to describe a range of acts or omissions by a trustee.

[90] In ***Tito v. Waddell (No 2)*** [1977] 3 All ER 129 at 247 Megarry V-C was unwilling to provide a comprehensive definition of the term 'breach of trust' on the basis that any to attempt to do so would be *"a perilous task".* It does however appear to have been accepted that where a trustee acts in a manner which is inconsistent with the terms of the trust or exceeds the powers that he has been granted by the trust, this will amount to a breach of trust. A failure by a trustee to carry out his duty either through neglect or omission or with the requisite standard of care will also amount to breach of trust.

[91] Having examined the pleadings, I have found no allegation that either defendant retained trust property and converted same to its own use. There can therefore be no action to recover such property. In the circumstances I find that there is no claim in this matter for the recovery of trust property that has been retained by the first defendant and converted to its own use.

Is the claim statute barred?

[92] Having found that the claimants' statement of case does not place this matter within any of the exceptions stated in ***section 46*** of ***the Act***, it must now be ascertained whether the claim in respect of each defendant is statute barred.

[93] The accepted principle is that where a defendant raises the defence of limitation, the burden is on the claimant to prove that the action was brought within the limitation period. In ***London Congregational Union Inc. v. Harris & Harris (a firm)*** [1988] 1 All E.R. 15 at 30 Ralph Gibson, L.J. said:

> *"The onus lies on the plaintiffs to prove that their cause of action accrued within the relevant period."*

[94] Counsel for the claimant has submitted that the limitation period has not yet started to run as the claimants are entitled to the residue of the estate after the expiration of the life interest held by Mrs. Vernice Alva Douglas and the trustees' obligations under the trust are indivisible. He asserts that the interest of the claimants in the residue of the estate is a future interest and as such time will not begin to run against them until that interest becomes an interest in possession.

[95] Whilst there is no dispute that time does not begin to run against a beneficiary until his interest becomes one in possession, there is disagreement as to precisely how this interest is to be applied in the instant case. Reference was made by Mr. Charles to the case of ***Mara v. Brown*** (supra) in support of that submission. In that case, the money of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself and her husband for her separate use. In the event that she died before her husband they were to pay the income to him during his life, and after the death of the survivor to hold the trust funds upon trust for the children of the marriage. No express life estate was given to the wife in case she should survive her husband.

[96] The husband died in 1885, and in 1890 the wife and her infant children commenced an action for breaches of trust committed in 1884, to which the defendants set up the defence of the Statute of Limitations under s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888. It was held that the wife took by resulting trust an estate for her life in remainder, which was said to be a different estate from the estate for the joint lives limited to her by the settlement. The court was also of the view that her life interest did not become an interest in possession until the death of the husband. In those circumstances the court found that the statute of limitations did not begin to run against the wife until then, and was therefore not a bar to her action.

[97] North, J. in his analysis of what was meant by the term *"interest in possession"* in section 8 of the **Trustee Act** (UK) examined the various entitlements of Mrs. Mara under the trust. He found that she was entitled to two different interests in the trust income. The first was for the joint lives of herself and her husband and the other after his death. The learned Judge found that the two interests could not coalesce as her interest in the residue could only commence after the death of her husband.

[98] In this matter, the trustees and in particular the second defendant, have submitted that they have completed their administration of the estate of the deceased with the exception of their interest in the house currently occupied by Mrs. Douglas. There is no dispute that this has not yet become an interest in possession. If the approach of the court in ***Mara v. Brown*** (supra) is applied to this case, time would not have stood still in respect of the acts of the trustees in their administration of the remainder of the estate.

[99] In the circumstances, I accept the submissions made by Mr. Vassell, Q.C. and Mrs. Minott-Phillips, Q.C. that there may be separate interests under a trust which have different commencement periods where limitation is concerned. I therefore find that the interest of the claimants in the residue of the estate is a separate one and does not affect the commencement of the limitation period in respect of the administration of the rest of the trust. I will now proceed to consider the facts in relation to each defendant.

[100] The first defendant's position is that the time for bringing an action against it expired on the 2nd January 1975 when the Vesting Order transferring its business to BBJ came into effect. The terms of this Order must therefore be examined in order to determine this issue.

[101] The ***Banking (Barclays Bank of Jamaica Limited) (Vesting of Trust Business) Order, 1974*** states that as of the 2nd January 1975 *"All trust business of the transferor bank in a fiduciary capacity, whether as executors, administrator and trustees, or otherwise, in Jamaica"* was transferred to BBJ.

[102] This Order was made to give effect to the agreement for sale between BBI and BBJ. Clause 5 (c) of that agreement also states that the purchaser agreed to *"…assume, pay, satisfy and discharge and indemnify the vendor against all liabilities, debts and obligations of every nature incurred by the Vendor in carrying on the said business prior to the Completion date".*

[103] Counsel for the first defendant has maintained that any cause of action which may have arisen in relation to its administration of the deceased's estate would have had to have been brought by the 1st July 1975. That was the last date on which first defendant would have been authorized to act in relation to the testator's estate.

[104] I accept the submissions of Mr. Vassell, Q.C. that as of the 2nd July 1975 the first defendant ceased to have any responsibility in respect of the deceased's estate. I also find that by virtue of clause 5 (c) any liability in respect of the deceased's estate would have been assumed by BBJ.

[105] Where the second defendant is concerned, the date when the cause of action arose must be determined. Mrs. Minott-Phillips, Q.C. submitted that as there is no prescribed period in respect of actions for breach of trust, the claim is one to which **section 46(1)(b)** of ***the Act*** apples. This in effect would result in the limitation period of six (6) years being applicable to this case. However, that section also states that time does not begin to run against a beneficiary until his interest becomes one in possession.

[106] The will which established the trust, stipulated that the claimants would be entitled to their interest in the trust fund when they attained the age of twenty-one (21) years. However, their interest in the residue did not become one in possession until they attained twenty-five years. The youngest child attained that age sometime in 1985.

[107] Learned Queen's Counsel submitted that at the latest, time would have begun to run against the claimants as a group, from 1986. She also stated that the acts complained of as itemized in the pleadings, occurred before the expiry of the six years limitation period. Mrs. Minott-Phillips, Q.C. referred to the fact that all of the claimants signed releases in which they acknowledged receipt of all sums that were due to them under the trust. It was said that as at the date of signing the second defendant officially ceased carrying out any of the functions involved in the management of the estate.

[108] It is not disputed that the claimants signed releases in which they each acknowledged receipt of their entitlement under the trust. The last

release was signed February 1987. Whilst legal the effect of these documents is being disputed, the fact is that the last of them was signed approximately twenty (20) years before the commencement of this action. There is also no dispute that the acts listed in particulars of the breach of trust against the second defendant occurred before 1986. The claimants were all adults at that time and had six (6) years in which they could have filed an action against the trustees.

[109] In the circumstances, I find that the claim against the second defendant is also statute barred.

Account

[110] With respect to the claim for an account, the ***Statute of Limitations*** 21 Jac. 1 c 16 states that such a claim is barred after the expiration of the time limit applicable to the substantive claim. In ***Knox v. Gye*** (18720 LR 5HL 656 at 673 Lord Westbury said that "...a Court of Equity will not , after the lapse of six years without acknowledgment, decree an account between a surviving partner and the estate of a deceased partner has long been settled by various decisions". His Lordship also referred to the case of *Lockey* v. *Lockey* (1719) Prec. Ch. 518, in which it was held that where a Court of Equity and the Courts of Law enjoy a concurrent jurisdiction no account will be given after the expiration of six years if the ***Statute of Limitations*** is pleaded.

[111] Counsel for the claimants has submitted that the claim is not statute barred as the substantive claim is one for the recovery of trust property that has been retained by the trustees and converted to their own use. Counsel also made the point that professional trustees are subject to a higher duty of care than that which is applicable to ordinary trustees. Reference was made to ***In Re Richardson, Pole v. Pattenden*** (supra) as authority for the

proposition that ***section 46*** of ***the Act*** should not be construed so as to afford a professional trustee the opportunity not to account in circumstances where beneficiaries have alleged that trust property had not been handed over to them. In this regard, counsel directed the Court's attention to a passage from the judgment of Younger, L.J. at page 449. It states:-

> *"I wish to make one further observation only. Peterson J., feeling himself bound by authority to hold that the statute of 1888 did apply to this case, nevertheless, following some observations of Cozens-Hardy M.R., in In re Blow (1), did order a modified form of account directed towards ascertaining the true position of the estate. I desire, if I may be allowed to do so, to reserve any opinion of my own upon whether that form of order or any substituted form of order would be permissible on the hypothesis upon which Peterson J. proceeded. I think that it is a very serious question whether in a case like this, if the defendant were in a position to bring himself within sub-s. 1 (a) of s. 8 of the Act of 1888, it is possible for him to say that he is under no kind of liability at all, and for this reason: s. 8, while it does supply the trustee with a statutory defence, supplies a defence of a very limited character. It gives no protection in case of fraud or where trust property is retained by the trustee or has been converted to his use, and I think it would be a matter of very serious consequence, if a trustee merely by being able to say that he is not liable to give any account, may also be in a position to assert after a lapse of six years that he is not bound to give any kind of information. If that be the law it may very well be that the limited protection given by the statute*

would in substance result in, and in fact become, a complete protection to the trustee from claims which under the statute are expressly left untouched.

Accordingly, I think that that is a matter which may require very careful consideration when and if it arises, and I therefore desire to reserve my opinion upon it".

[112] Whilst it is not disputed that a professional trustee is subject to a higher duty of care having examined the facts of that case I am unable to agree with counsel's interpretation of the dictum of Younger, L.J. In the above case, the estate of a testator who died in 1909 was administered by his widow and the defendant as executors of his will. The will provided that the widow was absolutely entitled to the whole of the residuary estate. The defendant did not furnish her with formal accounts but she was informed of all that was being done in the estate. In 1910 she was given a book which contained all the particulars of her property. The widow died in 1917. In 1918 the beneficiaries under her will, brought an action against the defendant who was also the executor of her will for the administration of the original testator's estate and for an account. There was no allegation any part of the estate had been misapplied. The defendant relied on the defence of limitation in the Trustee Act, 1888. It was held that the action was one to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and was subject to a prescribed period of limitation. In those circumstances it was also held that s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, did not apply, and the period of twelve years limited by the Real Property Limitation Act of 1874 had not expired when the action was brought.

[113] The Judge at first instance although ruling that a six year period of limitation was applicable, had however ordered the defendant to provide accounts in order to ascertain the facts. Lord Sterndale, M.R. expressed his disapproval of this course of action in the following terms:-

> *"...I have the greatest possible difficulty in seeing how, if an action for an account be barred by the statute, the Court can in its discretion direct an account".*

[114] A similar view was expressed by Warrington, L.J. who said:-

> *"Then with regard to the other point I must not be taken as at present assenting to the view that where a claim for an account is actually barred by the statute, the Court would be justified in directing an account for the purpose of ascertaining some facts the result of which might be to displace the period of limitation altogether. If the statute of limitations applies, that bars the claim for the account. I do not desire to say anything further on that point".*

[115] The view expressed by Younger, L.J. in my view, does not take the matter any further as he only confirms that trustees are not protected by a limitation defence in cases of fraud or where it is alleged that they retained trust property and converted it to their own use.

[116] In ***Tito v. Waddel (No. 2)*** [1977] 3 All ER 129, Megarry, V-C said:-

> *"Insofar as the claim to an account is ancillary to the claim for equitable compensation, the application of the Act and the doctrine of laches to the ancillary claim ought to be the same as its application to the substantive claim. Thus it seems clear that where a claim against a person in a fiduciary position is not*

barred by lapse of time, he must account without limit of time: see Halsbury's Laws of England".

[117] Megarry, V-C also described the law of limitation in relation to actions for an account as being in *"a curious state".* In considering the development of the law he confirmed that a six years limitation period applied in respect of actions to account. He said:-

"An action for an account lay at common law, and the Limitation Act 1623, s 3, laid down a six-years' period of limitation for 'actions of account'. However, the procedure in Chancery, and in particular the machinery for taking accounts, was so superior that by the 18th century the common law action for an account had come to be superseded by equitable proceedings for an account. Bills in Chancery for an account did not directly fall within the term 'actions of account' in s 3 of the 1623 Act, and so any application of the six-years' period to them had to be by way of analogy".

[118] In this matter there is no claim for the recovery of a legacy. The claimants have alleged that the defendants failed to properly carry out the duties required of them in accordance with the trust deed or imposed on them by the general principles of equity. This if proved, would amount to a breach of trust. The claimants have also asserted that the actions of the trustees resulted in loss and/or damage and have claimed damages. The claim for an account appears to be ancillary to the substantive claim and is in my view, geared towards the discovery of facts in the administration of the estate.

[119] I accept the views of the majority in the case of ***In Re Richardson,***

Pole v. Pattenden (supra) that where the limitation period has expired the court has no discretion to order an account for the purpose of ascertaining facts. The limitation period in respect of an action for a breach of trust having expired, it is my view that the court has no discretion in this matter, to order an account.

[120] In the circumstances it is ordered as follows:

i. The statements of case against both defendants is struck out;
ii. Costs of this application and of the claim to the defendants for more than one Attorney-at-law to be taxed if not agreed.

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