

No limitation period in breach of duty claim against director

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A recent UK Supreme Court decision establishes that where a director unlawfully transfers property to a company he controls, a subsequent breach of duty claim will not be subject to a limitation period.

The provision in question under the UK Limitation Act is mirrored in the Hong Kong Limitation Ordinance (Cap 347), so it will be interesting to see whether this decision will be applied by the Hong Kong Courts.

In any event, liquidators should be aware that there may be no limitation period for breach of duty and misfeasance claims where property is transferred by directors to companies in which they have an interest.

Background

The case involves an alleged breach of director's duty for transfer of a valuable asset of the company for no consideration.

On 12 October 2007, Mr Fielding and others (Fielding), as directors of Burnden Holdings (UK) Limited (Burnden), distributed the sole share in Burnden's subsidiary company to a company controlled by Fielding, for no consideration. After Burnden went into liquidation, its liquidators brought a claim against Fielding for breaches of duty.

However, the claim was made on 15 October 2013, meaning that it had exceeded the six-year limitation period set out in Section 21(3) of the Limitation Act 1980 in respect of an action by a beneficiary for breach of trust by three days. At first instance, summary judgment was entered against Burnden on the basis that the claim was time-barred.

Setting aside of summary judgment

The summary judgment was subsequently set aside by the Court of Appeal, which decided that the limitation period did not run against Burnden by virtue of Section 21(1)(b) of the Limitation Act 1980. The section provides that no limitation period shall apply to an action by a beneficiary under a trust to recover from the trustee trust property of the proceeds of trust property *in the possession of the trustee, or previously received by the trustee and converted to his use.*

Fielding then appealed to the Supreme Court on the correct construction of Section 21(1)(b), ie. whether the company directors are in possession of or have previously received trust property within the meaning of that section.

The UK Supreme Court decision

Fielding argued, among other things, that the trust property in question was never in their possession, or previously received by them and converted to their use. The trust property had been in the legal and beneficial ownership and therefore possession of a succession of corporate entities.

The UK Supreme Court, in dismissing the appeal, found that in the context of company property the company directors should be treated as being in possession of the trust property from the outset.

In reaching this decision, the Court considered the purpose of the section, which was to give a trustee the benefit of the lapse of time in respect of a legal or technical wrong but not to protect him where he would otherwise "*come off with something he ought not to have, ie. money of the trust received by him and converted to his own use*".

Lord Briggs held that, for the purposes of Section 21 of the Limitation Act 1980, a director should be treated as a trustee of the company as they are the fiduciary steward of the company's property, and thus are deemed to have 'received' it during his time in office. Also, in transferring the property to a company he controls, the director will have converted that property to his own use.

Summary

Although the directors in this case had not *directly* received company property, the fact that they transferred company property to another company they controlled placed them within the ambit of Section 21(1)(b) of the Limitation Act 1980. This meant that, in the circumstances, the company's claim for breach of directors' duties was not bound by any limitation period.

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