



**Informing Progress** - Shaping the Future

## FOIL UPDATE 22<sup>nd</sup> July 2021



### Limitation where there is a fraudulent breach of trust

*Dixon Coles & Gill v The Rt Rev. Nicholas Baines and another (2021)*  
*EWCA Civ 1097*

These proceedings were brought by former clients (the respondents) against solicitors (the appellants) who acted for them in the past. One of the partners stole money held in the firm's client account on behalf of the claimants. The other two partners were entirely innocent of, and in no way implicated in, the frauds. Some of the losses sued for arose from transactions more than six years before the commencement of the proceedings. The issue on the appeal was whether the innocent partners, who were otherwise undoubtedly liable for the clients' losses, could rely on a limitation defence in respect of those transactions, under S21 Limitation Act 1980. The judge held that they could not, on the basis that they were to be regarded as party or privy to the dishonest partner's fraudulent breaches of trust.

The essential basis of the claim was that each of the three partners in the firm was a trustee of the money held in the client account, and each was therefore liable as trustee to account for what has happened to the money held in that account on behalf of the respondents.

The trial judge based his decision in favour of the respondents entirely on the proposition that the Partnership Act 1890 not only made the

#### IN BRIEF

Innocent partners retained the benefit of a six-year limitation defence, even where a dishonest partner had stolen money from client account, in breach of trust.

innocent partners liable for the dishonest partner's acts (as it clearly did by Ss 11 and 12) but also made them party or privy to those acts. The Court of Appeal held that the 1890 Act did not say so.

So far as was known, the present case was the first in which it had been suggested that the 1890 Act operated to make innocent partners party or privy to the frauds of another partner.

S8 Trustee Act 1888 applied provisions as to limitation to actions against trustees for the first time, but subject to the exceptions now found in section 21(1). Its opening words which corresponded to section 21(1) were as follows:

*"8(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 ..."*

Accordingly, the respondents' claim against the appellant was subject to a six-year limit under subsection 21(3) unless they were "party or privy" to the relevant breaches of trust.

The liability of the innocent partners was established by the Partnership Act but this was qualified by limitation defences generally, and in the case of fraud by S21 of the 1980 Act. The innocent partners thus had the benefit of the policy which lay behind the Limitation Act, that claims should be brought within a given time and potential defendants should not, in general, be at risk of being sued for ever. The fraudulent party, and others implicated in the fraud as party or privy, were not entitled to that protection, and even an innocent party might find that time was, in effect, extended under the 1980 Act. However, in general terms, the innocent client had the benefit of the innocent partners' liability under the 1890 Act but needed to pursue that liability by proceedings brought within six years, having regard to S21, though of course also with the benefit of the provisions of S32 as regards concealment of the cause of action.

Given that the purpose of S8 of the 1888 Act was, for the first time, to allow a trustee who had committed an innocent breach of trust to rely on a limitation defence, it would seem surprising if such a defence was not to be available in the not uncommon situation where a fraud was committed in the ordinary course of a partnership business, by abstracting money held on behalf of clients in respect of which all the partners were trustees, but only one partner was guilty of the fraud and the other or others were entirely innocent. It would be all the more surprising to find that this was the effect of the Partnership Act, passed only two years later, which said nothing at all on the point, or that the partnership relationship had that effect despite the silence of the 1890 Act on the point.

A co-trustee was not to be treated as party or privy to another trustee's fraudulent breaches of trust unless facts were alleged and proved which showed the co-trustee to have been implicated in the frauds in some way.

The full case report may be found at: [Dixon Coles & Gill \(A Former Firm\) v Baines, Bishop of Leeds & Anor \[2021\] EWCA Civ 1097 \(20 July 2021\) \(bailii.org\)](#)

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.

