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UPDATE

The prescription period in breach of trust cases: A question of knowledge

Update prepared by Natasha Newell (Counsel, Guernsey)

The Royal Court of Guernsey, in what is believed to be the first Channel Islands' judgment of its kind, has stated the degree of knowledge a plaintiff is required to have for time to start to run under section 76(2) of the Trusts (Guernsey) Law 2007. Such welcome clarification came in the case of *Broadhead v Spread Trustee Company Limited & Ors*. The judgment merits close consideration, given its importance to the Channel Islands' trust industry.

In Broadhead, the Plaintiff, a residuary beneficiary of two trusts, brought claims against the trustees of those trusts (the Defendants) for failing to act with the reasonable care and skill of a prudent professional trustee (*en bon père de famille*) with regards to the investment of assets of the trusts, preserving the value of capital and enhancing the trusts' income. He alleged that the Defendants' conduct fell so far below the standards required of them that they amounted to gross negligence.

The Defendants applied to strike out the Plaintiff's claim on the grounds that it was time-barred under section 76(2) of the Trusts Law. Section 76(2) provides that the period within which an action founded on breach of trust may be brought against a trustee is three years from the date on which the claimant first had knowledge of the breach. The Court ordered prescription to be tried as a preliminary issue.

The key issue for the Court was the date on which the Plaintiff had the requisite knowledge of the breach(es) of trust to start time running for the purposes of section 76(2). This required the Court to consider the following sub-issues:

1. What is meant by 'knowledge' and in particular what are the requirements of actual knowledge and constructive knowledge?
2. In light of 1 above, what knowledge does a Plaintiff need to have (and about what) for the purposes of section 76(2)?
3. Applying the above, whether or not on the facts of this case the Plaintiff could prove that he first had such 'knowledge of the breach' for the purposes of section 76(2) earlier than three years prior to bringing his claim.

The Defendants argued that the Court should be guided by the test laid out in the English House of Lords authority of *Haward v Fawcetts (a Firm)* [2006] 1 WLR 682, where it was held that to set time running, what is required is knowledge which renders it reasonable for the Plaintiff to begin to investigate whether it is possible that there has been the relevant wrong to him. The Defendants alleged that it was clear on the documents, and on the Plaintiff's own evidence, that he had 'knowledge of the breach' of which he complained in the Cause, within the meaning of section 76(2), well before 6 July 2010, and in fact as early as August 2009 when he wrote a briefing note regarding management of the trusts (the 2009 Briefing Note). The Plaintiff resisted the Defendants' application on the ground that he was not in possession of the necessary information and documentation relating to the Defendants' administration of the trusts so as to enable him to make a proper assessment of it until November 2011 or January 2012. The Cause was launched approximately 18 months later, and was therefore, he argued, not out of time.

Lieutenant Bailiff Marshall QC, sitting with two Jurats, found that the required degree of knowledge was that which would have made it reasonable for the Plaintiff to begin to investigate whether there had been a

breach of trust such as he was now pleading. This concept had been variously described in the English cases as knowledge of the 'gist', the 'substance', the 'essence' or the 'thrust' of such a potential claim or complaint. Such knowledge would therefore include knowledge that loss had apparently been suffered and that there was a real possibility (as opposed to a mere suspicion or view that this was just one possibility) that such loss had been caused by the negligent acts or omissions of the Defendants as trustees.

The Court was only concerned with actual knowledge in this case and the parties had not advanced issues of constructive knowledge as a separate argument. The Court held that the Plaintiff would have needed to satisfy the Jurats that the degree of his knowledge had not reached such a level before 6 July 2010 in order for his claim to survive. The required degree of knowledge did not go so far as knowledge of such detail that a fully particularised claim could at that time have been formulated. Nor did it necessarily require knowledge of the 'how' or the 'why' of any relevant alleged acts or omissions by the Defendants. It did not require knowledge or belief that the Plaintiff had a worthwhile case in terms of any level of likelihood of success.

The Plaintiff was found to have had clear knowledge of the potential thrust of his claim from 19 May 2010 (46 days before the relevant date for limitation purposes) being the date on which the First Defendant had provided a CD-ROM to the Plaintiff with considerable and detailed accounting information relating to the trusts, including annual accounts and portfolio valuations showing exactly how the trust assets had been invested, with whom, and how much they were yielding, as well as detailed information about running costs.

This information gave the Plaintiff sufficient knowledge to support any claim in respect of the breaches of trust ultimately alleged, and he therefore had 'knowledge of the breach' within the meaning of the Trusts Law from 19 May 2010.

The Court went on to say that the 2009 Briefing Note was also revealing in terms of the Plaintiff's knowledge and concerns at the time. From 2009 he clearly held suspicions of mis-management and that something was amiss; he plainly envisaged the possibility of litigation. Indeed the Court went further in saying that the Plaintiff 'had a very high level of knowledge prior to 6 July 2010'. The Plaintiff's claim was therefore time-barred under section 76(2) of the Trusts Law. Accordingly, it was struck out.

The case is subject to appeal. However, in any event and irrespective of the Court of Appeal's ultimate ruling, the judgment contains useful guidance on the circumstances in which the Court will order the trial of a preliminary issue (paragraphs 34–35).

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