Hilary Term

[2018] UKSC 14

On appeal from: [2016] EWCA Civ 557

JUDGMENT

Burnden Holdings (UK) Limited (Respondent) v Fielding and another (Appellants)

before

Lord Kerr

Lord Sumption

Lord Carnwath

Lord Lloyd-Jones

Lord Briggs

JUDGMENT GIVEN ON

28 February 2018

Heard on 7 December 2017

Appellants	Respondent
David Chivers QC	Christopher R Parker QC
Matthew Parfitt	Matthew Smith
(Instructed by Addleshaw Goddard LLP)	(Instructed by Enyo Law LLP)

LORD BRIGGS: (with whom Lord Kerr, Lord Sumption, Lord Carnwath and Lord Lloyd-Jones agree)

1.
This appeal raises a well-formulated issue as to the construction of section 21 of the Limitation Act 1980, and a rather more diffuse question as to the meaning and application of section 32 of the Act, in both cases in relation to what is assumed to have been (although this is hotly contested in the proceedings) an unlawful distribution in specie by the Claimant company of its shareholding in a trading subsidiary by the directors of the Claimant (including the two defendants), six years and three days before the issue of the claim form in these proceedings.

2.

The Defendants sought summary judgment dismissing the claim on the ground that it was statute-barred, and succeeded at first instance, before HHJ Hodge QC, sitting as a judge of the High Court. The Court of Appeal (Arden, Tomlinson and David Richards LJJ) held, first, that time did not run against the Claimant company because of section 21(1)(b) of the Act and that, in any event, there was a triable issue as to whether, within the meaning of section 32 of the Act, there had been deliberate concealment of the facts involved in the breach of duty constituted by the unlawful distribution.

3.
Whatever the conclusion of this court as to the construction of sections 21 and 32, there could not now be summary judgment for the Defendant directors. This is because the Claimant has since amended its claim to include the allegation that the claimed unlawful distribution amounted to a fraudulent breach of trust to which the Defendants were party, within the meaning of section 21(1)(a). Nonetheless the issue as to the meaning of section 21(1)(b) is of sufficient importance to have made it appropriate for this appeal (for which permission had been sought prior to the amendment pleading fraud) to proceed.

The Assumed Facts

4.
At all material times before October 2007, the Claimant was a holding company with a number of trading subsidiaries. The subsidiaries operated in two business areas, the supply and construction of conservatories and a combined heat and power business. Two trading subsidiaries in the conservatory business are referred to in the particulars of claim, K2 Conservatory Systems Ltd (“K2”) and Cestrum Conservatories Ltd (“Cestcon”). The combined heat and power business was carried on by Vital Energi Utilities Ltd (“Vital”).

5.
The directors of the Claimant were at all material times the Defendants, Mr and Mrs Fielding, and three other executive directors, Mr Beckett, Mr Whitelock and Mr Kavanagh. The issued share capital of the Claimant comprised three classes of shares: 50,000 A ordinary shares, 50,000 B ordinary shares, and 50,000 D ordinary shares. The A and B ordinary shares were held by Mr and Mrs Fielding in equal parts, while the D ordinary shares were held by Mr Beckett, Mr Whitelock and The Burnden Group Trustee Limited (“TBGT”), the trustee of an employee share scheme. The controlling shareholders were Mr and Mrs Fielding.

6.
In or about July 2007, Scottish & Southern Energy plc (“SSE”) offered to purchase a 30% shareholding in Vital for £6m, subject to a significant number of conditions including, in particular, the complete separation of Vital from the conservatory business.

7.
In October 2007, the following pre-arranged transactions were carried out:

a. On 4 October 2007, the shareholders of the Claimant exchanged their shares for shares in a new holding company for the group, BHU Holdings Ltd (“BHUH”), with the shareholdings in that company precisely mirroring the former shareholdings in the Claimant.

b. On 12 October 2007, a distribution in specie of the Claimant’s shareholding in Vital was approved by a unanimous resolution of the directors of the Claimant and by a resolution in writing of BHUH as the sole member of the Claimant. The distribution was effected on 12 October 2007, with the transfer

of the only issued share in Vital from the Claimant to BHUH being registered in the register of members of Vital on that day. Although it is pleaded in the particulars of claim that Vital was a subsidiary of the Claimant until 15 October 2007, it is accepted by the Claimant for present purposes that the share in Vital was distributed in specie on 12 October 2007.

c. On 15 October 2007, BHUH went into members' voluntary liquidation. A special resolution to that effect was passed on that day by the members of BHUH, and the directors of BHUH made a statutory declaration as to its solvency. Also on 15 October 2007, pursuant to reconstruction agreements made on that day under section 110 of the Insolvency Act 1986, the liquidator of BHUH transferred the share in Vital to a new company, Vital Holdings Limited ("VHL") and the shares in the Claimant to a new company, Burnden Group Holdings Limited ("BGHL"). The two new holding companies issued shares to the former shareholders in BHUH, again precisely mirroring their shareholdings in BHUH and, previously, in the Claimant.

d. On 19 October 2007, Mrs Fielding sold a 30% shareholding in VHL to SSE for £6m. Of that sum, £3m was lent to the Claimant and the balance was, according to the Claimant's case, put towards the purchase of a property for £8.3m by Mr and Mrs Fielding in May 2008.

8.
Subsequently, on 2 October 2008, the Claimant, K2 and Cestcon all went into administration. In December 2009, the Claimant went into liquidation and the present liquidator was appointed in December 2012.

9.
It is alleged by the Claimant that the distribution in specie of the Claimant's shareholding in Vital to BHUH was unlawful, and it is claimed that the Defendants breached their duties to the Claimant in making the distribution. The basis of the claim that the distribution was unlawful, at least when the matter was before the Court of Appeal, was that the Claimant company did not have sufficient accumulated, realised profits to enable the distribution of its shareholding in Vital to be lawfully made. The detailed basis of that allegation has changed over time and has, throughout, been firmly challenged by the Defendants. The detail is irrelevant to the limitation issues before this court. It is simply to be assumed that the distribution was unlawful, that the Defendants' participation in it amounted to a breach of their fiduciary duties to the Claimant and that, because the distribution was made to a company, BHUH, in which they were majority shareholders and directors, the distribution was one from which they derived a substantial benefit.

Section 21

10.
Section 21 of the Limitation Act 1980 provides, so far as is relevant, as follows:

"21.- Time limit for actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession."

11.
It is common ground (and clear beyond argument) that, as directors of an English company who are assumed to have participated in a misappropriation of an asset of the company, the Defendants are to be regarded for all purposes connected with section 21 as trustees. This is because they are entrusted with the stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship: see Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400; JJ Harrison (Properties) Ltd v Harrison [2002] 1 BCLC 162, in particular per Chadwick LJ at paras 25-29; Williams v Central Bank of Nigeria [2014] AC 1189, per Lord Sumption at para 28 and, most recently, First Subsea Ltd (formerly BSW Ltd) v Balltec Ltd [2018] Ch 25, per Patten LJ at para 50. By the same token, the company is the beneficiary of the trust for all purposes connected with section 21. Complications have arisen where, although a director, the Defendant's breach of duty did not involve the misapplication of company property: see for example Gwembe Valley Development Co Ltd v Koshy (No 3) [2004] 1 BCLC 131, but those difficulties (if indeed they survive the decision of the Court of Appeal in the First Subsea case) do not arise on this appeal.

12.
It is also now common ground that, unless section 21(1) applies, the Defendants have the benefit of the six-year period of limitation laid down by section 21(3), because the relevant breach of duty arising from the distribution of the shareholding in Vital occurred on 12 October 2007, and these proceedings were issued more than six years later. At the time of the hearing before the Court of Appeal there was no relevant allegation of fraud: see para 32 of the judgment of David Richards LJ [2017] 1 WLR 39. Although such an allegation has since been pleaded, this appeal has been argued upon the basis that the only question to be decided is whether the Defendants' ability to rely upon a six year period of limitation under section 21(3) is denied to them by reason of section 21(1)(b).

13.
Section 21(1)(b) is about actions "to recover from the trustee trust property or the proceeds of trust property …" A preliminary objection was taken in the Court of Appeal by Mr David Chivers QC (who appears also on this appeal for the Defendants) that a claim such as the present, for an account of profits or alternatively equitable compensation, did not fall within section 21(1)(b) at all. This was rejected by the Court of Appeal (at para 38), upon the basis that a claim for equitable compensation, in a case where the trustee's indirect interest in the trust asset had been converted to the use of the trustee, was an appropriate remedy to seek in an action falling within section 21(1)(b). That analysis of David Richards LJ has not been challenged on this appeal. Rather, Mr Chivers' focus has been on the remaining part of section 21(1)(b), by way of submissions that the relevant trust property (namely

the shareholding in Vital) was never in the possession of the Defendants, or previously received by them and converted to their use. The gist of his submission, both here and below, was that from start to finish the shareholding in Vital had been in the legal and beneficial ownership and therefore possession of a succession of corporate entities, namely the Claimant company, then BHUH, to which the shareholding was unlawfully distributed, and later VHL, to which the shareholding was later transferred as part of the corporate reconstruction which led to these proceedings, and where it ultimately remained. Although the Defendants were from time to time shareholders and directors in all those corporate entities, the shareholding in Vital was never in their possession, nor previously received by them and converted to their use. To hold otherwise would, he submitted, involve the lifting of one or more corporate veils, or ignoring the separate legal personality of the companies concerned, all of which are prohibited, save in circumstances which do not apply to this case, by the reasoning of this court in Prest v Petrodel Resources Ltd [2013] 2 AC 415.

14.
In the Court of Appeal, David Richards LJ acknowledged (at para 35) that this submission responded well to a literal reading of section 21(1)(b) but that such an interpretation would be a recipe for avoidance by trustees because, in the modern world, it is commonplace for companies to be used to hold assets, where the beneficial ownership is vested in the company but the entire economic benefit is available for the shareholders. Relying upon and approving the analysis of Mr Richard Field QC in In re Pantone 485 Ltd; Miller v Bain [2002] 1 BCLC 266, David Richards LJ concluded that, in order to achieve its purpose, section 21(1)(b) had to be construed so as to include within its terms a transfer (in breach of trust) to a company directly or indirectly controlled by the defaulting trustee.

15.
In this court, Mr Chivers made a detailed and thorough attack on that analysis, which may be summarised as follows:

i)
There was no need to be concerned with anti-avoidance when construing section 21(1)(b). If trustees deliberately inserted a company between them and the misappropriated assets this would be a recognised ground for lifting the corporate veil: see the Prest case, at paras 34-35. It would be an abuse of corporate legal personality.

ii)
In any event, the deliberate use of a corporate vehicle to insulate trustees from liability, after six years, for breach of trust would in most cases give rise to a claim in fraud within section 21(1)(a).

iii)
It was wrong in principle to equate control of a company with possession of its assets save, perhaps, where the company was a pure nominee. For that purpose, he relied upon the analysis of possession for the purposes of section 8 of the Trustee Act 1888 (the distant predecessor of section 21) by Lindley LJ in Thorne v Heard [1894] 1 Ch 599, at 605-606. In practical terms, he submitted that majority shareholders had much less than absolute control over a company’s property, because of the requirement to have regard to the interests of other stakeholders, such as minority shareholders and creditors.

iv)
As to the Pantone case, he submitted that the deputy judge’s analysis had been based upon the Harrison case (cited above), in which Chadwick LJ’s conclusion was grounded on facts which included the acquisition (in breach of duty) by a director of the company by a purchase at an undervalue,

followed by an on-sale of it to a third party. In that type of case, Mr Chivers submitted, the company's property had indeed been "previously received" by the director/trustee before being converted to his use by its on-sale.

v)
In response to a question from the court as to whether an unlawful distribution in specie could itself be said to be a conversion of trust property Mr Chivers submitted that a distribution, even if unlawful, affirmed rather than denied the company's title to that which was distributed.

vi)
Finally, in response to the question whether a director could not be said to have "previously received" company property by virtue of his office as director, in advance of any misapplication of it in breach of trust, Mr Chivers submitted that this would render the requirement of previous receipt otiose, since it would apply in every case.

16.
These carefully constructed submissions were of real force, to the extent that they demonstrated that there was no need to have regard to anti-avoidance in construing section 21(1)(b). The deliberate use of a corporate vehicle to distance a defaulting trustee from the receipt or possession of misappropriated trust property might justify lifting the corporate veil. In any event it would in most cases justify a finding of fraud, within the meaning of section 21(1)(a). Furthermore, the submission that control of a company afforded by being a majority shareholder and director is not so absolute as to confer de facto possession of its property is persuasive: see eg Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627. But taken as a whole, Mr Chivers' submissions do not lead to the conclusion that section 21(1)(b) is inapplicable to the assumed facts with which this appeal is concerned, merely because the misappropriated property has remained legally and beneficially owned by corporate vehicles throughout, rather than becoming vested in law or in equity in the defaulting directors.

17.
The starting point in the construction of section 21(1)(b) is to pay due regard to its purpose. This was laid down, in relation to its predecessor, in In re Timmis, Nixon v Smith [1902] 1 Ch 176 at 186 by Kekewich J as follows:

"The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, ie, money of the trust received by him and converted to his own use."

That this is the purpose of what is now section 21 was confirmed by Chadwick LJ in the Harrison case at para 40. Mr Chivers did not, when it was put to him, challenge it in any way.

18.
It is necessary to bear in mind that section 21 is primarily aimed at express trustees, and applicable to company directors by what may fairly be described as a process of analogy. An express trustee, such as a trustee of a strict settlement, might or might not from time to time, or indeed at all, be in possession or receipt of the trust property. The property might consist of land in the possession of a tenant for life.

19.

By contrast, in the context of company property, directors are to be treated as being in possession of the trust property from the outset. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning of section 21 at all. Of course, if they have misappropriated the property before action is brought by the company (the beneficiary for this purpose) to recover it they may or may not by that time still be in possession of it. But if their misappropriation of the company's property amounts to a conversion of it to their own use, they will still necessarily have previously received it, by virtue of being the fiduciary stewards of it as directors.

20.
It may well be that, in relation to trustees who are company directors, the requirement in section 21(1)(b) that the property be previously received by them before its conversion adds little or nothing to the conditions for the disapplication of any limitation period which would otherwise have operated in their favour. But that requirement is not otiose in relation to trustees generally, for the reason already given. Thus, for example, the trustee of a strict settlement who had, without dishonesty, committed a breach of trust by neglecting to exercise available powers to prevent dissipation of the trust property by the tenant for life, would not be deprived of the benefit of the trustee's six year limitation period by virtue of section 21(1)(b). He would neither be in possession of the trust property, nor would he ever have received it nor, incidentally, would he have converted it to his own use.

21.
There is nothing in Mr Chivers' objection that to treat individual directors as being in possession, or in previous receipt, of company property by virtue of their office would unfairly assume a level of control over it which they might in practice lack, for example by being in a minority on the Board. Trustees of an express trust in whom the trust property is vested in law are each treated as being in possession or receipt of the trust property, notwithstanding that they hold title to it jointly with all the other trustees.

22.
In the present case, (of course only on the assumed facts), the Defendant directors converted the company's shareholding in Vital when they procured or participated in the unlawful distribution of it to BHUH. It was a conversion because, if the distribution was unlawful, it was a taking of the company's property in defiance of the company's rights of ownership of it. It was a conversion of the shareholding to their own use because of the economic benefit which they stood to derive from being the majority shareholders in the company to which the distribution was made. By the time of that conversion the Defendants had previously received the property because, as directors of the Claimant company, they had been its fiduciary stewards from the outset.

23.
For those reasons, although they differ to some extent from the Court of Appeal's analysis, I would dismiss this appeal so far as it relates to section 21.

Section 32

24.
Section 32 of the Limitation Act 1980, as amended by section 6(6) of, and paragraph 5 of Schedule 1 to, the Consumer Protection Act 1987, provides, so far as relevant for present purposes, as follows:

"32.- Postponement of limitation period in case of fraud, concealment or mistake.

(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.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty. …"

25.
The Court of Appeal reversed the judge's order by way of Defendants' summary judgment in relation to section 32, mainly because they regarded the issues as to its applicability as being too fact-sensitive to be suitable for summary judgment: see per David Richards LJ at paras 51 and 55. On the way to that conclusion David Richards LJ adopted an interpretation of section 32(2) which has, on this appeal, been subjected to significant, albeit commendably brief, criticism by Mr Chivers, both orally and in writing, centred around issues as to the meaning of the phrase "some time" in subsection (2), and the interpretation placed upon it by Lewison J in JD Wetherspoon plc v Van de Berg & Co Ltd [2007] EWHC 1044 (Ch); [2007] PNLR 28, at para 40.

26.
The in-depth analysis of this difficult question would take the court into a potential minefield of difficulties which surround section 32 and, in this corporate context, would also involve a consideration of questions of attribution. There cannot be summary judgment in favour of the Defendants in this case, both because of the recent plea of fraud and because of this court's decision about the meaning of section 21. Whatever the correct interpretation of section 32(2), there would still be fact-intensive issues calling for a trial. In view of the relatively summary way in which this issue has been addressed by counsel (about which I express no criticism at all), I have not therefore considered it appropriate to reach any final view about it. It is sufficient for present purposes for me to conclude that the appeal in relation to section 32 should be dismissed because the issue is unsuitable for summary judgment. I express no view one way or the other on the correctness or otherwise of the interpretation of section 32(2) adopted en passant by the Court of Appeal.