Neutral Citation Number: [2011] EWHC 2449 (Ch)

Case No: CH/2011/0112

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2011

Before :

MS SUSAN PREVEZER QC
(Sitting as a Deputy Judge of the Chancery Division)

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Between :

1. ANTHONY JOHN PAGE **2. TERENCE ALBERT PAGE (as administrators of the estates of ANNIE HARRIET PAGE AND AUBREY WILFRED PAGE**	**Claimant**
- and -	
1. HEWETTS SOLICITORS **2. CHRISTOPHER ROBERT FULLER**	**Defendant**

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Mr Graham Platford (instructed by **Caversham Solicitors**) for the **Claimants**
Mr Dan Stacey (instructed by **Henmans Solicitors** and **Hewetts solicitors**) for the **Defendants**

Hearing date: 25 and 26 July 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS SUSAN PREVEZER QC

Ms Susan Prevezer QC :

Introduction

1. On 8 February 2011, on the Defendants' application for summary judgment pursuant to CPR Pt 24, Master Bragge dismissed the Claimants' claims against the Defendants on the grounds that they were statute barred by reason of limitation. The Claimants now appeal that decision with the Master's permission.

Background

2. The Claimants are the sons and the present administrators of the estates of Annie and Aubrey Page, husband and wife, who both died in 1997. They are also the principal beneficiaries under their wills. Administration was taken out in 2001. An important asset of the estate was the former family home at 262 Kidmore Road, Caversham, Reading, Berkshire ("the Property"). For ease of reference, I refer in this judgment to Messrs Anthony Page and Terence Page collectively as the Claimants, albeit that it appears that for the most part, the actions in question were taken by Mr Anthony Page alone.

3. The First Defendant is a firm of solicitors and the Second Defendant was a legal executive employed by the First Defendant at the material time. In early 1998, the Defendants were retained to advise and act for the Claimants in the administration of their parents' estates.

4. In late 1998, the Second Defendant was instructed by the Claimants in relation to the sale of the Property and a neighbouring property owned by the Pages. At that time and unknown to the Claimants, the Second Defendant carried on business as a property developer or consultant through Exnine Developments and Exnine Developments Limited (collectively "Exnine").

5. On 17 February 1999, Exnine entered into an agreement with the prospective purchaser of the Property, Sahana Enterprises Limited ("Sahana"), pursuant to which Exnine would be paid either (i) £6,000 or £10,000 "joint venture profit" and £5,000 "introduction fee" in respect of each dwelling unit built on the site, or (ii) if Sahana should sell the site before planning permission was obtained, £10,000, or (iii) if Sahana should fail to obtain planning permission and sell the site, 25% of the net profit. This arrangement was not disclosed to the Claimants at the time. Subsequently, the Second Defendant recommended to the Claimants that they sell the Property and the neighbouring land to Sahana, and on 12 March 1999, the sale to Sahana of the Property completed for £190,000. The Second Defendant drafted the contract of sale for the Property and on the Claimants' behalf, signed and exchanged contracts for the sale.

6. Some time after the sale of the Property, the Claimants discovered that the true value of the Property was in the region of £350,000 and on 25 November 2000, the Claimants wrote to the Office for the Supervision of Solicitors ("OSS") about the Defendant's conduct, inter alia, setting out their grounds for suspicion with regard to the sale. Almost two years later, the OSS put these complaints to the Defendants in a letter dated 7 November 2002, and in response, on 5 December 2002, the Second Defendant sent a letter to the Claimants enclosing a cheque for £6,000, explaining that this payment was in respect of "overage" due to the Claimants from Sahana pursuant to an agreement made by the Second Defendant, allegedly on the Claimants' behalf. Enclosed with this letter were copies of certain correspondence between Sahana and the Second Defendant but not, so it appears, the letter of 17 February

1999. The letter from the Second Defendant of 5 December 2002 made clear his connection with Exnine and that a payment had been made by Sahana to Exnine, and, specifically, in a manuscript postscript to the letter, the Second Defendant referred to a fee structure agreed between Exnine and Sahana from which, it is said by the Defendants, it can be inferred that Exnine had received a fee pursuant to that agreement. This letter of 5 December 2002 is pleaded by the Claimants (at Paragraph 20 of the Particulars of Claim) as the trigger to their knowledge of the Defendants' misconduct. The letter was received by the Claimants on 6 December 2002, and the Defendants contend that at its lowest, this letter indicates (and was taken by the Claimants' then advisors to indicate) that these matters were known to the Claimants by this date.

7. By letter dated 22 December 2002, the Claimants sought an explanation from the Second Defendant with regard to the contents of his letter of 5 December 2002, and on 13 January 2003, the Second Defendant responded, restating the position that the £6,000 was overage for the Property pursuant to an agreement he alleged he had discussed with Anthony Page.

8. On 30 January 2003, the OSS sent the Claimants the abovementioned letter of 17 February 1999 between Sahana and Exnine, and the Claimants responded on 18 February 1999 to the OSS commenting on that letter and other matters of complaint with regard to the Defendants' conduct. The receipt by the Claimants on 30 January 2003 of this letter of 17 February 1999 is important, as it is the Defendants' case, and the Master found at Paragraph 19 of his Judgment, that upon receipt of this letter, the Claimants had all the material facts necessary, even if not all the evidence, to formulate a claim in common law and equity against the Defendants, notwithstanding the ongoing investigation by the OSS. There is no dispute that the 17 February 1999 letter was received by the Claimants under cover of the letter from the OSS of 30 January 2003 and that it would have been read by the Claimants no later than 6 February 2003. In fact, in her witness statement dated 25 August 2010, Dorothy Page, Anthony Page's wife, confirms that whilst they had their suspicions shortly after the sale, "*we had no real evidence until this letter was sent to us on 30 January 2003"* (Paragraph 4)…."*In February 2003, in the course of investigation of my husband's complaint to the Law Society, we received a copy of Sahana's letter dated 17 February 1999. On the face of it, that letter suggested that Mr Fuller stood to benefit personally from the sale of 262 to Sahana*" (Paragraph 9).

9. On 19 February 2003, Ms Page wrote to the Law Society with her comments on the Second Defendant's conduct, and on 3 March 2003, the Claimants' advisors wrote to the Second Defendant raising further questions about his conduct. There does not appear to have been a response to this letter. On 21 August 2003, the OSS Adjudicator issued his hybrid first instance decision, and referred the matter to the Solicitors Disciplinary Tribunal for consideration under Section 43 of the Solicitors Act 1974. The Tribunal hearing took place on 28 February 2006, and the Tribunal ordered that the Second Claimant should not be further employed without the Law Society's permission. The Tribunal's findings were issued on 24 April 2006.

10. The Claimants then instructed their then solicitors to pursue a claim against the Defendants. However, for various reasons, as explained in Mr Last's witness statement dated 17 January 2010, matters did not progress. According to Mr Last, who has had conduct of the matter on behalf of the Claimants since February 2007, it was not until November 2008, having recovered the papers from the last firm of solicitors, that he and Mr Platford were sufficiently

confident in the Claimants' claim to offer conditional fee agreements so that matters could be moved forward (Paragraph 6).

11. There is an issue as to what happened after November 2008. Mr Last states that the drafting of the Claim Form and the Particulars of Claim were not completed until 3 December 2008, and that four bundles of documents were then sent to the Court by DX on that date. Mr Last did not personally take the documents to the DX box and his firm keeps no positive record of committal to the DX, but he states that if the documents had not been committed to the DX, they would have remained in the firm's offices, and they did not. Accordingly, he believes that the Claim Form and letter of request to issue were most probably received in the Court Office on Thursday 4 December 2008 and certainly no later than Friday 5 December 2008. However, the date shown on the Claim Form is 17 February 2009 and it is alleged by the Claimants that this is because the Claim Form and the Particulars of Claim were either lost or mislaid by the Court Office and a fresh Claim Form had to be sent to the Court for issue. Mr Last states that when he heard nothing from the Court with regard to the documents sent on 3 December, he made enquiries of the Court office. This was in mid January 2009, and the answer from the Court was that the Court had no trace of the documents. A check was then made with Mr Last's accounts department and it appeared that the cheque sent with the papers had never been presented. Accordingly, Mr Last's firm cancelled that cheque and issued a fresh cheque along with a further four bundles of documents. Those documents were copies of the documents sent on 3rd December 2008, and the Court eventually sealed and issued the Claim on 17 February 2009. None of the missing documents have ever been returned to Mr Last's office, which Mr Last states would normally occur if documents are not delivered by the DX system.

The Claim

12. The claims pleaded against the Defendants in the Particulars of Claim are for an account and payment of profits made by the Defendants from and as a result of their retainer in early 1998; compensation for breach of fiduciary duty and for dishonestly assisting a breach of trust, together with damages and interest. In answer to the limitation defence raised, the Claimants argue that (i) the Defendants held any secret profit on (constructive) trust for the Claimants and there is no limitation period in respect thereof by virtue of the Limitation Act 1980 s 21 (1)(b); (ii) by virtue of CPR 7 APD5.1, the Claim was brought on 6 December 2008 when on a balance of probabilities the Claim Form was received in the Court office (not 6 February 2009 when a duplicate Claim Form was received in the Court office or on 17 February 2009, when the duplicate claim form was issued), and was within time, as Mr Page was first alerted to the matters pleaded on 6 December 2002, when he received the letter from the Second Defendant; and (iii) the Defendants deliberately concealed some of the facts necessary to the Claimants' rights of action until 17 February 2009 (alternatively 6 December 2008) so that, by virtue of Section 32(1) of the Limitation Act 1980, the 6 year limitation period for the personal claims did not start to run until less than 6 years before proceedings were brought.

13. As I have mentioned, the Master acceded to the Defendants' application for summary judgment on the grounds that the claims were statute barred. He delivered a very full and reasoned judgment on 8 February 2011 ("the Judgment") in which he considered in

considerable detail the submissions made by Mr Platford on behalf of the Claimants. I am told that the hearing before Master Bragge lasted for 3 days.

The Appeal

14. Mr Platford's complaints with regard to the Judgment are set out in the Grounds of Appeal and in four separate skeleton arguments; two filed for the hearing before me, and a further two filed since the hearing which address the issues raised by the judgment of Newey J on 7 September 2011 in *Cadogan Petroleum Plc v Mark Tolley and Others, [2011] EWHC 2286 (Ch),* and in particular, the application of the Court of Appeal's decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Group plc [2011] EWCA Civ 347,* in relation to the question whether a proprietary claim can be advanced in circumstances where it is alleged that a bribe or secret commission has been accepted by a fiduciary. As the decision in *Sinclair v Versailles* was debated at some considerable length at the hearing before me in July, I considered it appropriate for the parties to have an opportunity to address me on the Judgment. The decision in *Sinclair v Versailles* was itself handed down after the Judgment.

The issues

15. There are essentially three issues on this appeal:

    a. Was the money received by the Defendants from Sahana in 1999 trust property or the proceeds of trust property, such that by virtue of the Limitation Act 1980, s 21 (1)(b), no limitation period applies?

    b. On the footing that there was a deliberate concealment of material facts by the Defendants, and in the event that the Limitation Act applies, when did time start running against the Claimants? The Defendants case, which was accepted by the Master, is that the Claimants had sufficient knowledge by no later than 6 February 2003 or at all events by 17 February 2003.

    c. When was the Claim Form issued or when is it to be treated as having been issued- the 4th or 5th December 2008 or 17 February 2009?

    I will deal with each of these in turn,

(a) Whether the money received by the Defendants was trust property.

16. Mr Platford's primary submission before Master Bragge and before me was that the secret profit received by the Defendants from Sahana arising from and/or connected to the sale of the Property was trust property, on the basis that it derived from an asset of the Estates, namely the Property, with respect to which the Defendants owed fiduciary duties and because the Defendants took advantage of the Estates' right or opportunity, with respect to which the Defendants owed these fiduciary duties.

17. In developing this submission, Mr Platford put forward the following arguments:

    a. The Defendants were retained to advise and act for the executors of Mr and Mrs Page, in getting in and realising the full value of all the assets of their respective Estates,

including the Property. They were entrusted with the power to sell the Property and to obtain the best price reasonably obtainable in the market.

b. Pursuant to this retainer, the Defendants owed the Claimants certain fiduciary duties; to act in good faith; not to make a profit out of the trust; not to place themselves in a position where their duty and interest may conflict; and not to act for their own benefit or the benefit of a third person with the informed consent of the Claimants (*Bristol & West Bromwich Building Society v Mothew [1998] Ch 1 at 18).*

c. The Defendants' secret profit from the arrangement with Sahana was or should have been part of the Property, in respect of which the Defendants' owed these fiduciary duties. To put it another way, it was "a cut" of the price of the Property, which was part of the Estates, and the Defendant therefore held this on constructive trust for the Claimants.

d. Accordingly, the case falls within the first of the two categories identified by Millett LJ in *Paragon Finance plc v D B Thakerar & Co [1999] 1 AER 400*, namely it is a situation where the Defendants, though not expressly appointed as trustees, have assumed the duties of trustees by a lawful transaction (here, the retainer) which is independent of and precedes the breach of trust and is not impeached by the Claimants. This is in contra distinction to the situation (which was identified by Millett LJ as "Category Two") where a trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the Claimant and where the Defendant is liable to account as a constructive trustee by virtue of the alleged secret profit. In the present case, the Claimants do not impeach the sale to Sahana nor any arrangement made by the Defendants to benefit from the sale of the Property. Rather, the Claimants maintain that any such benefit is an asset of the Estates.

e. It follows that the Master was wrong in his analysis of the authorities at Paragraphs 20 - 32 of the Judgment in concluding that the claim was not one which should properly be characterised as a claim to recover trust property but was closer to a *Paragon Finance* Category Two claim.

f. Further, just as in *AG for Hong Kong v Reid [1994] 1AC 324*, where the Privy Council held that a bribe accepted by a servant of the Crown acting in breach of his fiduciary duties, was trust property, the Master ought to have found that the secret profit in the present case was also trust property, by reason of the antecedent retainer relationship between the Claimants and the Defendants, and by reason of the fact that Defendants had acquired the secret profit by taking advantage of an opportunity or right in respect of the Property, which was properly that of the Claimants. If control or the ability to dispose of the Property was necessary for there to be a trust of the secret profit, then the Defendants had this, and the Defendants' secret profit arose out the sale of the Property which was effected by the Second Defendant, as the Claimants' agent.

g. Finally, the Claimants pleaded claim for an account is an account by reason of the retainer not by reason of a later unlawful act, and the fact that an account is sought does not mean that the claim falls short of an action to recover trust property or the proceeds of trust property. The taking of an account is the primary remedy of a beneficiary (see *Ultraframe (UK) Ltd v Fielding and others [2005] EWHC 1638)* and the pleaded claim

is entirely consistent with a claim to recover trust property or the proceeds of trust property in the possession of the Defendants.

18. As I have mentioned, this matter came before Master Bragge before the Court of Appeal gave its decision in *Sinclair v Versailles*, and before me Mr Platford's submissions before Master Bragge were revised in the light of that decision and then further revised in light of the decision in *Cadogan Petroleum*. To understand Mr Platford's arguments in relation to these two cases, it is necessary to provide some context.

19. In *Sinclair Investments*, the Claimant asserted a proprietary interest in sums Mr Cushnie, a director of the Claimant, had received from selling shares in a company referred to as VGP, on the basis that the apparent value of VGP had been artificially inflated by the misuse of monies entrusted to the Claimant, in breach of Mr Cushnie's fiduciary duties. The Claimant alleged that the proceeds of sale of the shares represented an unauthorised gain made by Mr Cushnie in the course of his fiduciary relationship with the Claimant, and through the use of the Claimant's money. Mr Justice Lewison and the Court of Appeal both rejected this claim, concluding (and I summarise), that an asset or money which a fiduciary has acquired in breach of his duties to the beneficiary will not necessarily be held on trust for the beneficiary of the fiduciary's duties, and that a beneficiary can not claim a proprietary interest "*unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary*". Specifically, at Paragraphs 80, 88 and 89 of his Judgment, Lord Neuberger stated:

"80. It seems to me that there is a real case for saying that the decision in Reid … is unsound. In cases where a fiduciary takes for himself an asset which, if he chose to take , he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary. However, a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary. There can thus be said to be a fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset sand (ii) a fiduciary enriching himself by doing a wrong to the claimant. Having said that, I can see a real policy reason in its favour (if equitable accounting is not available) but the fact that it may not accord with principle is obviously a good reason for not following it in preference to the decisions of this court"

88. In my view, Lewison J was right to reject TPLs proprietary claim to the proceeds of sale o the Shares. It is true that the decisions in Reid…., Sugden….and (at least arguably) Pearson's case…. go the other way. However, there is a consistent line of reasoned decisions of this court (two of which were decided with the last ten years) stretching back into the late 19th century, and one decision of the House of Lords 150 years ago, which appear to establish that a beneficiary of a fiduciary's duties can not claim a proprietary interest but is entitled to an equitable account, in respect tof any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was property that of the beneficiary.

89 For the reasons I have given, previous decisions of this court establish that a claimant can not claim proprietary ownership of an asset purchased by the defaulting fiduciary with funds which, although they could not have been obtained if he had not enjoyed his fiduciary status, were not beneficially owned by the claimant or derived from opportunities beneficially owned

by the claimant. However, those cases also establish that, in such a case, a claimant does have a personal claim in equity to the funds. There is no case which appears to support the notion that such a personal claim entitles the claimant to claim the value of the asset (if it is greater than the amount of the funds together with interest) and there are judicial indications which tend to militate against that notion"

20. In *Cadogan Petrolium*, Newey J considered the application of Lord Neuberger's Judgment with regard to a bribe or secret commission, and concluded that he was obliged to proceed on the footing that a beneficiary will have no proprietary interest unless, as in *Sinclair v Versailles*, it can be said that the bribe or secret commission "*is or had been beneficially the property of the beneficiary or the fiduciary acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary"*. Further, as a result of the Court of Appeal's judgment, Newey J held that was not open to him to follow *AG of Hong Kong v Reid* in preference to *Lister & Co v Stubbs (1890) LR 45 Ch D 1*, a case where the Court of Appeal held that bribes that an employee had taken from suppliers to his employers were not held on trust for the employers, but were monies acquired in such a way that the employers were entitled to get an order for the payment of those monies to them, as a debt due from the employee to them in consequence of the corrupt bargain which the employee had entered into.

21. Before me Mr Platford contended that, properly understood, *Cadogan Petroleum*, in its application of *Sinclair v Versailles* was fatal to the Defendants' argument and to the Master's decision on this first issue. Mr Platford argued that in *Cadogan Petroleum*, a distinction was clearly made between (a) a secret profit obtained from the disposal by a beneficiary of an asset or opportunity with respect to which the defendant owed fiduciary duties and (b) a secret profit obtained from the acquisition by a beneficiary of any asset in circumstances where the defendant owed fiduciary duties in respect of that transaction. In the former case the secret profit was received on constructive trust; in the latter case, it was not. This was because, (as Newey J confirmed) in the former case, the right or opportunity to receive the whole proceeds of sale (including the secret profit) is the beneficiary's by virtue of his ownership of the asset or opportunity, so that by taking the secret profit, the defendant deprives the beneficiary of that asset or opportunity; whereas in the latter case, the possibility that the beneficiary might have paid a reduced price but for the secret commission is neither a relevant opportunity owned by the beneficiary nor money which was part of the assets subject to the fiduciary's duties or derived from such assets. Mr Platford argued that the present case falls into the former category. Further, Mr Platford argued that, albeit obiter, in *Cadogan Petroleum* Newey J confirmed that the power to dispose of the asset which is subject to fiduciary duties is not a necessary condition for the existence of a constructive trust, so that if there was any doubt as regards the Defendants ability to dispose of the Property, without more, this was not fatal to the Claimants' argument.

22. Accordingly, Mr Platford contended that *Cadogan Petroleum* confirmed the Claimants' argument that the Defendants received the secret profit from the sale to Sahana on constructive trust, because the secret profit was derived from the Property with respect to which the Defendants owed fiduciary duties and because the Defendants took advantage of the Estates' right or opportunity, with respect to which the Defendants owed fiduciary duties. It is, said Mr Platford, the receipt of the secret profit which founds the Claimants claim, not the wrongful diversion of the monies thereafter, and in line with Lord Neuberger's comment at Paragraph 80 of his Judgment that " *in cases where a fiduciary takes for himself an asset, which if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why*

the asset should be treated as the property of the beneficiary" the secret profit obtained by the Defendants derived from [the disposal of] an asset subject to the Defendants' fiduciary duties, which, if the Defendants chose to take (which they did) the Defendants were under a duty to take for the Claimants.

23. I cannot accept Mr Platford's arguments on this first issue- neither those made at the hearing before me or subsequently with regard to *Cadogan Petroleum*. In my judgment, the Master correctly concluded (at Paragraph 26 of the Judgment) that the Claimants' claim was not a claim to recover trust property or the proceeds of trust property within Section 21(1) (b) of the 1980 Act and there is, in my view, no real prospect of the Claimants establishing that Section 21(b) of the 1980 Act applies so that there is no limitation period.

24. In *Halton v Guernroy* (Court of Appeal, 27 June 2006, Lawtel), Lord Justice Carnwath stated:

"Section 21(1) provides an exception to the ordinary limitation rule that civil actions are barred after six years. Such an exception needs to be clearly justified by reference to the statutory language and the policy behind it. It is important therefore to keep in mind the reasoning behind the exception. It is not about culpability as such; fraud may not be sufficient to avoid the ordinary rule. It is about deemed possession; the fiction that the possession of a property by a trustee is treated from the outset as that of the beneficiary. In the words of Millett LJ [sc from Paragon] the possession of the trustee is "taken from the first for and on behalf of the beneficiaries" and is "consequently treated as the possession of the beneficiaries". An action by the a beneficiary to recover that property is not time barred, because in legal theory, it has been in his possession throughout"

25. In my judgment, the secret profit that the Second Defendant received from Sahana, by, in effect, securing the sale of the Property by the Claimants to Sahana, cannot be regarded, in legal theory or otherwise, as having been the property of the Claimants throughout. As the Master correctly concluded, having analysed the case law at Paragraphs 23-26 of the Judgment, the trust obligation in the present case arises as a direct consequence of the unlawful transaction, namely the taking of a bribe, which transaction is rightly impeached by the Claimants. The secret profit obtained by the Second Defendant is not and has never been beneficially the property of the Claimants, and the Defendants did not acquire the secret profit by "taking advantage of an opportunity or right", which was properly that of the Claimants. In other words, the secret profit was not, as Mr Platford contended, "a cut of the Property". On the contrary, the secret profit was a bribe obtained by the Second Defendant by doing a wrong; it was not obtained by depriving the Claimants of an opportunity, for example, to obtain an increased price from Sahana for the Property. I do not accept Mr Platford's argument that because the secret profit was in some way connected to the disposal of the Property, it follows that the Defendants were depriving the Claimants of an asset (as opposed to simply enriching themselves as a result of wrong). The secret profit, properly viewed, was not money which was part of the Property subject to the Second Defendant's fiduciary duties owed pursuant to the Defendants' retainer nor derived from the Property.

26. The claim made by the Claimants in the present case is not an uncommon one: (i) a defendant is retained to advise a claimant in respect of a sale of a property; (ii) the defendant recommends to the claimant a sale of a property to a third party, with whom the defendant has entered into an agreement to receive a secret profit, and (iii) by reason of the claimant's agreement to that sale, the defendant makes a secret profit. Further, as with most situations

where a solicitor undertakes a conveyance for a client, under its retainer, the Defendants did not have absolute power to dispose of the Property; they could only recommend a sale. The ultimate decision lay with the Claimants; (see Chadwick LJ in *JJ Harrison (Properties) Ltd v Harrison [2002] 1BCLC 162* at Paragraph 37), and the Claimants do not in fact impeach the sale to Sahana. The transaction which is rightly criticised is the secret transaction between the Second Defendant and Sahana. Whilst it is correct that the Second Defendant owed certain fiduciary duties to the Claimants by reason of the retainer, it is the transaction by which the Second Defendant obtained the allegedly concealed or secret profit which creates the constructive trust. It does not follow from the Master's reference to the Defendants' being "constructive trustees" of the secret profit received by the Defendants that Section 21(1)(b) of the Limitation Act 1980 applies. The Master was clearly using the phrase in the sense commonly used by judges when referring to *Paragon Finance* Category Two trusts; to cover a situation where there is in fact no possibility of a proprietary remedy but where the fiduciary is liable to account for the monies, by way of debt, as in *Gwembe Valley Developments v Koshy [2004] 1 BCLC at 131*, referred to at Paragraph 25 of the Judgment.

27. Further, in my judgment, the matter is put beyond doubt by the decision of the Court of Appeal in *Sinclair v Versailles*, as applied in *Cadogan Petroleum* to secret profit/bribe allegations. In *Cadogan Petroleum*, as in the present case, there was a proprietary claim made on the basis of an allegation of a breach of fiduciary duty in accepting a bribe/secret commission by a party subject to a fiduciary duty (company directors in *Cadogan Petroleum*, and solicitors in the present case). Applying *Sinclair v Versailles* (which, to be clear, was not a secret profit/bribe case), Newey J concluded that a beneficiary will have no proprietary interest in a bribe or secret commission unless it can be said that it is or has been beneficially the property of the beneficiary or the fiduciary acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary (Paragraph 27). Although Mr Platford sought valiantly to argue that the present situation was precisely one where the Defendants took advantage of an opportunity or right which was properly the Claimants and which the Defendants had a duty to take for the Claimants, in my view, this is simply not borne out on the facts, and the Second Defendant simply enriched himself by doing a wrong to the Claimant.

28. The problem with Mr Platford's analysis is that it elides the existence of the fiduciary duty which every solicitor owes his/her client by reason of his/her retainer in relation to a property conveyance, with the existence of a trust in respect of the property conveyed. A solicitor instructed, as here, to dispose of an asset of an estate is not a trustee of that asset but has fiduciary duties in relation to it, and the authorities clearly show that it is not enough to show fiduciary obligations owed by a defendant with regard to a particular property (see for example, *Taylor v Davies [1920] AC 636*, cited in *Gwembe* at 160). It is about deemed possession; the fiction that the possession of a property by a trustee is treated from the outset as that of the beneficiary and the fiduciary takes for himself an asset which he is under a duty to take for the beneficiary. Here, the secret profit paid to the Second Defendant could not possibly be said to be an asset which he was under a duty to take for the Claimants, nor was the Second Defendant taking advantage of an opportunity or right which was properly that of the Claimants. The Second Defendant was obliged to act in respect of the Property with a duty of loyalty to the Claimants who retained him, and as I have said, there is nothing exceptional in the present case to distinguish it from the ordinary case where a solicitor is retained to dispose of or convey a property. In my view, the Master was correct to characterise the authorisation given to the Second Defendant to sell the property as "an administrative authorisation of a fiduciary". As Lord Neuberger pointed out in *Sinclair v*

Versailles "In cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary. However, a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary". Even if, as Newey J in *Cadagon Petroleum* was prepared to consider, the position might have be different if the contracts in respect of which the bribes and secret commissions were allegedly paid had been rescinded, in the present case, the sale of the Property to Sahana has not been rescinded, and in my judgment, the claim for any proprietary remedy is bound to fail.

(b) In the event that the Limitation Act applies, when did time start running against the Claimants.

29. It was accepted by Mr Stacey, Counsel for the Defendants, that for the purposes of the Defendants' summary judgment application, it is to be assumed that there was a deliberate concealment of material facts by the Defendants, albeit that this is strongly denied by them. The issue that arises therefore is whether, as the Defendants contend, and as the Master found, the Claimants had sufficient knowledge by no later than 6 February 2003, alternatively at the latest by 17 February 2003. If they did, then their claims against the Defendants are statute barred.

30. I have set out above the main events leading up to the issue of the claim against the Defendants. With regard to these events, Mr Platford made the following criticisms of the Judgment:

a. The Master failed to properly address the issue of concealment and the discovery of facts necessary to complete the relevant causes of action, having regard to Section 32(1) of the Limitation Act 1980. What the Claimants had to discover was the "gist of the cause of action" (*The Kriti Palm [2007] 1 Lloyds Rep 55* at Paragraphs 453, 453-458), ie, those facts essential to the cause of action, not simply the general `drift' of the claim.

b. The Master wrongly concluded, at Paragraph 14 of the Judgment, that the Claimants' letter to the OSS of 25 November 2000 appeared to him to show, on the basis of the *Kritti Palm*, that the Claimants knew sufficient facts to start time running in respect of the breach of retainer/negligence claim- at least the gist of the claim for damages for causing the Property to be sold at an undervalue. The letter however set out only the reasons for suspicion that the Defendants had done wrong, no more than that.

c. Further, with regard to the `secret profit' claim, the Master failed to ask himself when the Claimants had discovered that the Defendants had received a secret profit from the sale of the Property. There was no evidence before the Master of any discovery by the Claimants of any payment made to the Second Defendant <u>in his own right</u>, and the Master was wrong to conclude, at Paragraph 19 of the Judgment, that upon the receipt by the Claimants by 6 February 2003 of the 17 February 1999 from Sahana to the Second Defendant, the Claimants had all the material facts necessary, even if not all the evidence, to formulate such a claim. What the Claimants had to discover was not simply that the Second Defendant was entitled to recover a secret profit, but did in fact recover this profit in his own right, as the equitable claim for an account pleaded by the Claimants depends on actual receipt by the Defendants. The Master was not in a

position to conclude on the evidence that the Claimants either did or should have discovered this by 6 February 2003.

d. In particular, whilst on the face of the 17 February 1999 letter the Claimants would have been aware that an arrangement had been made by the Second Defendant with Sahana for himself or Exnine, at the time when the Claimants received the letter (in February 2003), they had been told by the Second Defendant that the whole arrangement had been made on behalf of the Estates. If the Claimants had in mind the manuscript postscript to the 5 November 2002 letter when they received a copy of the letter of 17 February 1999 in February 2003, the Claimants would still not have understood that the Second Defendant had received money on his own account or that he was entitled to receive money from Sahana separate from the fee structure told to them by the Second Defendant in his letter of 5 November 2002. This is clear from the Claimants' then solicitors letter of 17 January 2003 to the Second Defendant, where the Claimants' solicitor seeks full details of the Second Defendant's involvement in his capacity as Exnine in the sale of the Property, including details of any financial interest that Exnine had in the development, and specifically asks why any payment was made to Exnine when the contractual overage provisions were between Sahana and the Estates.

e. Further, even as at 3 March 2003, when the Claimants' then solicitors wrote again to the Second Defendant, neither the Claimants nor his then solicitors had the essential facts. The questions asked in that letter make this clear. Again, critically, the Claimants did not know that the Second Defendants had received or was entitled to receive money in his own right from Sahana. The Master never reached the conclusion that the Claimants could, with reasonable diligence, have discovered these facts at this point, and in his analysis, the Master wrongly confused what was actually known by the Claimants and what the Claimants might be deemed to have known. The Claimants did not actually know, because the Second Defendant never told the Claimants that he received money in his own right; and the Claimants can not be deemed to have known this from the correspondence.

f. In short, the Master failed to ask himself when the Claimants discovered that the Second Defendant knew or shut his eyes to the fact that the sale was at an undervalue and similarly when the Claimants discovered that the Defendants had received a secret profit from the sale of the Property.

31. For my part, I cannot see any fault in the Master's analysis on this issue. He correctly identified the task at hand at Paragraph 8 of the Judgment and then proceeded to analyse the correspondence between the parties in light of the authorities. Section 32(1) of the Limitation Act 1980 provides that:

"(1) where in the case of an action for which a period of limitation is prescribed by this Act….

(b) any fact relevant to the plaintiffs right of action has been deliberately concealed from him by the defendant…..

the period of limitation shall not begin to run until the plaintiff has discovered the concealment… or could with reasonable diligence have discovered it".

The purpose of Section 32 is to ensure that the Limitation Act does not operate to bar a Claimant whose ignorance of the relevant facts is due to the improper actions of the Defendant (see *Cave v Robinson Jarvis & Rolf [2003] 1 AC 384*)

32. As regards the knowledge that is required, as Mr Stacey submitted, (i) the relevant facts are those which the Claimants have to prove to establish a prima face case against the Defendants (*C v Mirror Group Newspapers [1997] 1WLR 131, CA)* (ii) it is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it (*the Kriti Palm (ibid), Buxton LJ at Paragraph 453)* and (iii), as cited by the Master at Paragraph 9 of the Judgment, the statutory words in Section 32 "*any fact relevant to the plaintiffs right of action*" are to be given a narrow rather than a wide interpretation and therefore mean any fact which the Plaintiff has to prove to establish a prima facie case. (Rix LJ in the *Kriti Palm* at Paragraphs 323-4).

33. As regards the common laws claims, in my judgment the Master was correct in holding that the breach of retainer/negligence claim was known to the Claimants by or after 25 November 2000 and that both this claim and the breach of fiduciary duty claim are both statute barred. I agree with the Master, at Paragraph 14 of the Judgment, that the Claimants' letter to the OSS of 25 November 2000 shows that the Claimants knew sufficient facts to start time running in respect of these claims. At least the gist of the claim for damages for causing the Property to be sold at an undervalue appears to have been known to the Claimants by this date.

34. As regards the equitable claims, the question which arises is when did the Claimants know enough to make out a prima facie case, from which time the six year period would run. Before the Master, and before me, Mr Stacey submitted that there were two primary dates when relevant knowledge should be attributed to the Claimants; (i) 6 December 2002, after receipt of the letter from Exnine or (ii) 6 February 2003 or shortly thereafter (and certainly by 17 February 2003), after the Claimants received the letter from the Law Society which enclosed Sahana's letter of 17 February 1999 to the Second Defendant. The Master rejected the 6 December 2002 date and there is no appeal against that decision, but Mr Stacey relied on the correspondence from 5 December 2002 as relevant to the already existing state of knowledge of the Claimants at the date of receipt of the letter from the Law Society.

35. As Mr Stacey correctly submitted, the essence of the Claimants' claim for an account relies upon (i) the failure of the Second Defendant to disclose his connection with Exnine and/or Sahana and (ii) the fact that the Second Defendant was making a profit or potential profit from the transaction. As regards the former, in my judgment, the letter of 5 December 2002, received by the Claimants from the Second Defendant on 6 December 2002, made plain not only that the Second Defendant was connected to Exnine, but also the connection between Exnine and Sahana. It refers to a payment having been made by Sahana to Exnine (albeit said to be on the Claimants' behalf) and in the manuscript note, there is also reference to a fee structure between Exnine and Sahana, independent to the Claimants overage element. In fact, the Claimants plead (at Paragraph 20 of the Particulars of Claim) that this letter was the trigger for their knowledge not simply of (i) but of (ii) above, and accordingly, at its lowest, the letter indicates that these matters were known to the Claimants by 6 December 2002.

36. However, if the letter of 5 December 2002 was not sufficient to inform the Claimants of (i) and (ii) above, then, in my view, the Law Society letter dated 30 January 2003, was. In my judgment, the Master was entirely correct to find (at Paragraph 19 of his Judgment) that upon

receipt of this letter, which enclosed Sahana's letter of the 17 February 1999, the Claimants had all the material facts necessary, even if not all the evidence, to formulate a claim in respect of both the common law and the equitable claims. It is not suggested that Anthony Page did not read the letter of 17 February 1999 when it was received. Indeed, his letter dated 18 February 2003 refers expressly to the letter from the Law Society under cover of which the 17 February 1999 letter was sent. Further, there is no reason to dispute that this letter would not have been received and read by no later than a few days after posting, and therefore no later than 6 February 2003. The Sahana letter of 17 February 1999 made it abundantly clear that the Second Defendant was to receive commission payments from Sahana via Exnine in respect of the sale of the Property and any developments on the site, and as I have mentioned above, Mrs Dorothy Page's evidence is that the letter, on its face, suggested that the Second Defendant stood to benefit personally from the sale of the Property to Sahana (see Paragraph 9 of her statement). Further, Mrs Page' letter of 19 February 2003 also makes clear this point. Accordingly, by 6 February 2003 at the latest, the Claimants would have had within their knowledge the facts relevant to alleging a prima facie case and/or to properly plead their case.

37. As regards the specific points raised by Mr Platford in his Grounds of Appeal, I agree with Mr Stacey that they are misconceived. In my judgment, there is no basis for contending that Master Bragge failed to address concealment and the discovery of facts necessary to complete the relevant cause of action. It is abundantly clear from his Judgment, that the Master addressed the right case law and the relevant test set out in the *Kriti Palm*. Similarly, there is no warrant for suggesting that the Master failed to ask when the Claimants discovered that the Second Defendant knew of the sale at an undervalue. The Master addressed this specifically at Paragraphs 13 and 14 of the Judgment.

38. It does not follow from the fact that the Second Defendant consistently denied to the Claimants both his concealment of his receipt of any secret profit and any dishonesty on his part that these matters could not be inferred by the Claimants from, inter alia, the correspondence received by the Claimants, such that the Claimants had sufficient knowledge to plead their claim. For example, the (or an) obvious inference from the letter of 17 February 1999 which provided for payment to Exnine of a joint venture profit in the event that planning permission was obtained, was that on the obtaining of planning permission, payments would be made. In the November 2000 letter, Mr Page stated that Sahana was building detached properties on the land and that they were being advertised for £350,000 each- the reasonable inference there being that planning permission had been granted. Putting these two facts together, the Claimants had sufficient to plead that it was probable (and it was proper for the Court to infer) that the Second Defendant had received a secret profit. Indeed, Mr Platford pleads at Paragraph 21 of the Particulars of Claim, quite properly, the probable receipt of a secret profit, and he is able to do so, without being in possession of express evidence of the same. In short, the essential elements that were necessary for the Claimants to know to plead a claim against the Defendants were all capable of being inferred in February 2003, and the Master was correct in my view to conclude that the Claimants had the necessary knowledge to satisfy the Kriti Palm test by 6 February 2003 (or at the latest by 17 February 2003, which is the crucial date, having regard to the actual issue date of the claim). Whilst the Claimants might not have had sufficient evidence to win their claim in February 2003, they certainly had sufficient to plead it.

(c) When was the Claim Form issued or when is it to be treated as having been issued- the 4th or 5th December 2008 or 17 February 2009.

39. In light of my findings with regard to Issues 1 and 2, the date on which the Claim Form was issued (or is to be treated as issued) is obviously critical. The date on the Claim Form is 17 February 2009, and if that is the relevant date, then the Claimants are out of time with regard to their equitable claim against the Defendants. The Master dealt with this issue at Paragraphs 33 -52 of the Judgment and concluded that the Claim Form was issued for purposes of limitation on 17 February 2009 and accordingly that the Claimants' claim was barred by limitation.

40. I have set out the relevant facts above. It is not alleged by the Claimants that the Claim Form was issued late; the case is that the Claim Form and Particulars of Claim were apparently lost or mislaid and a fresh Claim Form had to be sent to the Court for issue.

41. CPR 7.2(1) provides that "*proceedings are started with the Court issues a Claim Form at the request of the Claimant*", and CPR 7APD5.1, which is headed "**Start of Proceedings"** states "*Proceedings are started when the Court issues a claim form at the request of the Claimant (see Rule 7.2) but where the claim form as issued was received in the Court Office on a date earlier than the date on which it was issued by the Court, the claim is "brought" for the purposes of the Limitation Act 1980 and any relevant statute of that earlier date"*. Paragraph 5.2 of the Practice Directionn provides that the date on which the Claim was received by the Court will be recorded on a date stamp either on the Claim Form held on the Court file or on the letter that accompanied the Claim Form when it was received by the Court. Paragraph 5.3 deals with to whom inquiry should be made as to the date when the Claim From was received by the Court and, of importance Paragraph 5.4 states "*Parties proposing to start a claim which is approaching the expiry of the limitation period should recognise the potential importance of establishing the date the claim form is received by the Court and should therefore make arrangements to record that date"*.

42. Mr Platford complains that the Master wrongly concluded that CPR 7APD5.1 refers to the same piece(s) of paper being received and issued, and that this flouts the text of CPR 7APD5.1 and 2 APD1 and contradicts the spirit in which the Master accepted the Rules should be construed- namely that the Court should assist where there is a real possibility that the Court's handling of a matter had contributed to a problem (as illustrated in *In the matter of TT Industries Limited [2006] BCC 372).* Further, Mr Platford argues that the Master failed to consider the relative probability of the Claim Form having been lost in the DX or after it reached the Post Room and in particular, that the Master failed to consider whether the Claim Form was lost in the DX before delivery to the Post Room; whether it was lost after delivery to the Post Room and before being opened: whether it was lost after being opened and before being delivered to the Chancery Registry and whether it was lost in the Chancery Registry before it was logged. Mr Platford argues that had the Master considered these four questions, and in any event on the evidence before him, he could not properly conclude that the Claim Form was lost before it reached the Post Room. Mr Last's evidence explained what had occurred and although the Master found there to be a gap in the evidence as to the actual transmission of the Claim Form by the solicitors to the DX (at Paragraph 50 of the Judgment) the Master did not conclude that this alleged inadequacy in Mr Last's evidence was incapable of remedy at trial. Finally, Mr Platford makes much of the point that at Paragraph 48 of his Judgment, the Master refers to not being satisfied "*on the balance of probability"* that the Claim Form did reach the Post Room or the Chancery Registry, albeit that Mr Platford's submission before the Master, as reflected in his Skeleton Argument, was that the Master was

required to consider the "relative probability" of the Claim From having been lost in the DX or after it reached the Post Room.

43. In my judgment, the Master came to the correct conclusion on the evidence and applied the correct test. On its proper construction, CPR7APD5.1 does not apply to the factual scenario alleged by the Claimants, namely where documentation has been sent to the Court which was either nor received or possibly mislaid and which has necessitated the issue of a fresh claim. Rather, it is intended to deal with the situations referred to by the Master at Paragraph 47 of the Judgment, where the Claim Form has been received by the Court but there is some problem with the mechanics of issue. In my judgment, the construction of the Rule is plain on its face. The phrase "claim form, as issued" indicates that the claim form which is relevant is the one which was actually issued, and in the present case, this was on 17 February 2009. Further, the sub rules immediately following indicate the importance of the Claim Form being the same document; the date of receipt is recorded either on the Claim Form or the letter accompanying it (Paragraph 5.2) and Paragraph 5.3 refers to inquiring as to the date on which the Claim Form was received. In short, the wording indicates that the Claim Form which was received on the earlier date has to be the same Claim Form which was eventually issued, and this caters for the scenarios indicated by the Master- for example, where an outdoor clerk arrives at the Court office on the last day before the limitation period is due to expire, only to find that the Court office is closed for some unforeseen reason (for example, industrial action being taken, as was the situation in *Barnes v St Helens Metropolitan Borough Council [2007] 1WLR 879).* In other words, the mischief which the Practice Direction is aimed at rectifying is late issue through no fault of the claimant. Although there does not appear to be any case law in which the present issue is directly addressed, I agree with Mr Stacey, that the Court of Appeal's decision in *Barnes v St Helens Metropolitan Borough Council (above)* (in particular, Lord Justice Tuckey's judgment at Paragraph 16, 17 and 20) lends strong support to the argument that it is the actual delivery of the Claim From which is the originating procedure which is necessary to commence proceedings, and the Practice Direction does not address the situation, where, as appears to have occurred here, the Claim Form is sent to the Court and a different Claim Form (albeit apparently a photocopy of the original Claim Form) is subsequently issued.

44. Although the Master indicated that he was not satisfied on the "balance of probabilities" that the Claim Form had reached the Post Room (Paragraph 48), he had already concluded, rightly in my view, that the Practice Direction did not assist the Claimants. There is no doubt, in my view, that the Master knew precisely what test he was required to apply in relation to this issue and to the Defendants' application as a whole, and he stated this clearly at Paragraph 53 of his Judgment, where he concluded that the Claimants did not have a real prospect of success at trial. As regards the Master's assessment of the facts –and in particular, whether the Claim Form did in fact reach the Post Room or the Chancery Registry- he was, in my view, correct in his assessment. There is a real `gap' in the evidence one would expect from the Claimants' solicitors in defence of a summary judgment application. Mr Last does not in his witness statement deal with the procedure by which the Claim From was put in the DX (in particular, who would have done this, in circumstances where Mr Last says that it was not him), nor whether or not there is any record of documents logged by the firm. Indeed, Mr Last gives no evidence of any searches undertaken to find the documents. The Master carefully analysed the evidence that was before him- including the text of the Chancery Operations Manager's Note (set out at Paragraph 48) and rightly, in my view, concluded that it was unlikely that any loss of the document occurred in the Registry. The evidence put in by the Defendants was that the Chancery Registry had no record of receipt of any documents in

relation to the Claim during December 2008, and I agree with Mr Stacey, that no good explanation has been given by the Claimants for the failure to inquire as to whether the Claim Form had been received by the Court. The Claimants were perilously close to the limitation deadline in December 2008, and it appears that no inquiry whatsoever was made for over 6 weeks from early December 2008 to mid January 2009, even though the sealed Claim Form had not been returned to the Claimants' solicitors and the solicitors' cheque had not been cashed. As mentioned above, the Practice Direction makes clear that the burden is on a claimant to ensure that the date of receipt of a Claim Form is established, and in this case, the Claimants' solicitors manifestly failed to do this.

45. Accordingly, in the circumstances, the relevant date for the purposes of limitation was 17 February 2009 and the proceedings were issued out of time. It follows that for the reasons set out above, I dismiss the Claimants' appeal against the Judgment.