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**SYMPTOMS OF NEGLECT:
TRUST CLAIMS UNDER THE LIMITATION ACT 2010**

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ABSTRACT

New Zealand's limitation legislation was overhauled with the enacting of the Limitation Act 2010. Despite this comprehensive reform, the way in which trust claims are best to be addressed appears to have been largely overlooked in the reform process. Consequently, the multitude of historic issues that have plagued statutory provisions dealing with trust claims endure in the 2010 Act, with the few changes to the structure of drafting compounding these problems. This paper explores the policy considerations at work, and, by way of example, undertakes a thorough analysis of the exception for fraudulent breaches of trust in light of these policy considerations to illustrate some of the new problems that are bound to arise in practice. Given the numerous and significant difficulties, and the substantial implications for parties seeking to rely on these provisions, this paper argues that a broad reconsideration of the way in which trust claims are dealt with in the 2010 Act is urgently needed.

KEY WORDS

*Limitation of actions, Limitation Act 1950, Limitation Act 2010, Trusts,
Breach of Trust, Equity*

I INTRODUCTION

Early in 2014, issues surrounding the limitation of actions for breach of trust were once again thrust into the limelight with the United Kingdom Supreme Court's decision in *Williams v Central Bank of Nigeria*.¹ This is the most recent of a number of cases in the senior courts across common law jurisdictions demonstrating the very real, significant and ongoing difficulties engendered by the way in which statutes of limitation deal with breaches of trust.² This is a crucial area of law. The

¹ *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355.

² Recent examples include *Armitage v Nurse* [1998] Ch 241 (CA); *DEG-Deutsche v Koshy* [2002] 1 BCLC 478; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ

repercussions for claimants, particularly in the commercial and family contexts, are significant. This is well demonstrated by the £6 million at stake in the *Williams* case. In light of these difficulties and their implications, this paper considers the law relating to breaches of trust under New Zealand's Limitation Act 2010 (2010 Act).

Despite the otherwise comprehensive overhaul of New Zealand's statutory limitation regime in 2010, issues relating to trusts appear to have been largely overlooked, such that historic issues endure and in some respects have been compounded by the drafting of the New Zealand legislation. Focusing specifically, by way of example, on the treatment accorded to fraudulent breaches of trust, this paper analyses the way in which the 2010 Act deals with trust claims in light of the inherent policy tensions in all limitation statutes, and the particular policy considerations concerning the special relationship between trustee and beneficiary. In doing so, it is identified that the relative neglect as to the way in which trust claims are to be affected by the 2010 Act presents serious problems that need to be addressed before the 2010 Act begins to have an undesirable effect in practice.

The paper begins by describing the core reforms to limitation periods in the 2010 Act, indicating that issues arising in respect of trust claims were overlooked. It then turns to consider how claims in respect of trusts are dealt with under the 2010 Act and its predecessor, the Limitation Act 1950 (1950 Act), and the problems that arise. Part IV then focuses on the specific example of the statutory exception to the ordinary six-year limitation period for fraudulent breaches of trust. It demonstrates, in light of the relevant policy considerations, how the drafting of the 2010 Act has created new complications for claimant beneficiaries seeking to rely on the exception. Part V concludes by suggesting that it may be more appropriate to treat trust claims as a separate species of claim, rather than lumping such claims in with other civil claims, albeit while providing for specified exceptions. This would go some way to ameliorating many of the issues that arise under the 2010 Act as currently drafted.

104; *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch); *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA); *Peconic Industrial Development Ltd v Lau Kwok Fai* (2009) 12 HKCFAR 139; and *Paki v Attorney-General* [2009] 1 NZLR 72 (HC).

II THE LIMITATION ACT 2010

The 2010 Act replaced the 1950 Act,³ which was based on a 1936 Report of the English Law Revision Committee⁴ and the resulting Limitation Act 1939 (UK).⁵ New Zealand's Attorney-General, presiding over the Limitation Act reform in 2009, adopted Prime and Scanlan's description of the United Kingdom limitation rules as a "ghastly network of unreformed legal fossils ... impervious to natural understanding and intelligence".⁶ And of the 1950 Act, the Attorney-General was similarly scathing: "The 1950 Act is creaky and outmoded. It is fair to say that it is in an advanced state of legislative putrefaction."⁷ The aim of the 2010 Act was, then, to address a multitude of concerns with the 1950 legislation "by both improving and simplifying the general limitation rules".⁸

The enacting of the 2010 Act concluded a long stretch during which the 1950 Act was under review. The Law Commission first recommended that the 1950 Act "be repealed and replaced with a new statute" in 1988.⁹ This Report, while advocating a complete overhaul, was very much focused on the issues surrounding latent defects. Indeed, in its Preliminary Paper, the Commission noted that the Minister of Justice, in requesting the Commission to examine the 1950 Act, "made specific reference to ... liability for latent defects ... but saw no great merit in examining only one aspect rather than the whole of the 1950 Act".¹⁰ Consequently, examination of issues relating to latent defects was front and centre in both the Preliminary Paper,¹¹ and the Report.¹² The Commission's recommendations in the 1988 Report were not acted upon at the time, and in 2000, the Law Commission

³ However, the Limitation Act 1950 continues to apply to most actions based on acts or omissions before 1 January 2011: Limitation Act 2010, s 59.

⁴ Wright Committee *Statutes of Limitation* (English Law Reform Committee, Cmnd 5334, 1936).

⁵ Limitation Bill 2009 (33-1) (explanatory note) at 1–2.

⁶ (24 August 2010) 666 NZPD 13557 per Christopher Finlayson, referring to comments made by Terry Prime and Gary Scanlan "Fiduciaries and Limitation, the Courts and the Law Commission" (2009) 30 Stat LR 140 at 144

⁷ (4 August 2009) 656 NZPD 5379 per Christopher Finlayson.

⁸ (4 August 2009) 656 NZPD 5379 per Christopher Finlayson.

⁹ Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) [*Limitation Defences in Civil Proceedings*], following a Preliminary Paper: Law Commission *The Limitation Act 1950: A Discussion Paper* (NZLC PP3, 1987) [*Preliminary Paper*].

¹⁰ At [2].

¹¹ See chs 5 and 6.

¹² Chapter 4.

issued a further Report. This Report was far more directed, the Commission recognising that as a result of the "root and branch approach [of the 1988 Report] having found no favour, we have in this report confined our recommendations to urgently needed changes".¹³ These changes revolved around discoverability, again in respect of latent defects, and also concerning claims relating to sexual abuse against children.¹⁴ Little attention was paid in either report to the way in which the 1950 Act dealt with issues relating to trusts. The 1988 Report proposed a general limitation period of three years for general civil claims,¹⁵ which would include trust claims.¹⁶ In terms of the exceptions for claims relating to fraudulent breaches of trust, and for possession and conversion of trust property under s 21(1) of the 1950 Act, the Report simply noted, "the policy underlying s 21(1) ... should be continued".¹⁷ The second Report did not deal with trusts at all.

After over 20 years under review, Christopher Finlayson MP, then in opposition, drafted a Private Member's Bill on limitation,¹⁸ after which the Law Commission released a Miscellaneous Paper in which its prior reports were summarised.¹⁹ The draft Bill was published in December 2007, after which the Law Commission convened a working group to review the Bill and certain technical issues that had been identified.²⁰ Finally, upon becoming Attorney-General in 2008, Finlayson introduced as a Government Bill, the Limitation Bill 2009 (the Bill).²¹

As is the case with any limitation statute, the resulting 2010 Act sought primarily to balance the claimant's right to justice and the defendant's right not to be

¹³ Law Commission *Tidying the Limitation Act* (NZLC R61, 2000) [*Tidying the Limitation Act*] at [2].

¹⁴ See at [8]–[14], [22] and [28].

¹⁵ *Limitation Defences in Civil Proceedings*, above n 9, at [128].

¹⁶ At [305].

¹⁷ At [306]. Section 21(1) is detailed in Part III:A below.

¹⁸ Letter from Christopher Finlayson (Member of Parliament) to Sir Geoffrey Palmer (President of the Law Commission) regarding first draft of Limitation Bill, with the Bill appended (1 December 2006) (Obtained under Official Information Act 1982 Request to the New Zealand Law Commission).

¹⁹ Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission (Miscellaneous Paper prepared by Chris Corry, Barrister)* (NZLC MP16, 2007) [*Miscellaneous Paper*].

²⁰ Limitation Bill 2009 (33-1) (explanatory note) at 2.

²¹ Limitation Bill 2009 (33-1). On the lead up to the introduction of the Bill, see further Chris Finlayson "A Foreword From the Attorney-General" in Peter McKenzie and Paul Radich "Limitation – the new regime" (New Zealand Law Society seminar, October 2010) 1.

burdened by stale claims.²² More specifically, however, the Act sought to address three key issues arising out of the earlier Act.²³ First, the limitation rules were simplified through provision of a general limitation defence for "money claims", which covers any claim for monetary relief.²⁴ Certain specific claims falling outside the definition of "money claims" were dealt with in pt 3 of the Act. Secondly, the Act was designed to clarify the starting date of the primary limitation period; generally, the date of the act or omission giving rise to the claim.²⁵ Thirdly, the Act introduced a "late knowledge period".²⁶ The purpose of the late knowledge period, in conjunction with provision of longstop periods, was to address difficulties arising in situations where the limitation period could end before the potential claimant knew enough to encourage them to bring their claim.

The Act also makes provision for certain claims to which it would be inappropriate to apply a strict limitation period: claims for abuse of a minor, or claims for personal injury caused by gradual process, disease or infection.²⁷ Certain enforcement claims also fall within this category: a claim to enforce judgment by action,²⁸ a claim to enforce an arbitral award by action or entry of judgment,²⁹ and an ancillary claim.³⁰ In these situations, the court is afforded discretion to grant relief as if no statutory limitation period applied.³¹

The 2010 Act was therefore focused primarily upon addressing the issues identified in the Law Commission reports. For instance, clarification of the starting date of the primary period was designed to address the uncertainty engendered,

²² Limitation Bill 2009 (33-1) (explanatory note) at 3.

²³ See generally (4 August 2009) 656 NZPD 5379 per Christopher Finlayson; Letter from Sarah Lynn (Ministry of Justice for the Secretary of Justice) to Chester Borrows (Chairperson of the Justice and Electoral Committee) regarding the Limitation Bill 2009 Initial Briefing (8 September 2009) at 1; and Limitation Bill 2009 (33-1) (explanatory note) at 3–4.

²⁴ Limitation Act 2010, s 4 definition of "money claim" and ss 12 and 48. See (4 August 2009) 656 NZPD 5379 per Christopher Finlayson. Different rules apply in respect of some pt 3 claims, for example, claims in respect of land held on trust (s 24), claims to recover personal property held on trust (s 31), and claims for account (s 32). See further McKenzie and Radich, above n 33, at 20 and 41–46.

²⁵ Limitation Act 2010, s 4 definition of "primary period" and s 11(1).

²⁶ Limitation Act 2010, s 4 definition of "late knowledge period" and s 11(3)(a).

²⁷ Limitation Act 2010, s 17.

²⁸ Section 35.

²⁹ Section 36.

³⁰ Section 50.

³¹ Sections 17(6), 35(5), 36(4) and 50(3).

especially in tort claims, by the 1950 Act's reference to "the date on which the cause of action accrued",³² it not being clear whether the date ran from when the act or omission occurred, or from the point at which the (often latent) damage was incurred.³³ Similarly, both the late knowledge period and specific instances of discretion afforded to the court were designed to ameliorate the unfairness to plaintiffs in situations where the plaintiff did not know they had a claim within the primary limitation period, or were labouring under a "disability" as a result of the conduct giving rise to the claim, thus preventing them from making reasonable judgements in respect of that claim.³⁴ The focus of the legislative reforms is therefore clear, and, as in the Law Commission reports, issues relating to trusts were very much overlooked.

The following part reviews the way in which each of the 1950 and 2010 Acts operate in respect of trusts, highlighting the fact that the approaches are not significantly different, but that the drafting changes that have been made in the 2010 Act have the effect of compounding, rather than addressing, the historic issues.

III NEW ZEALAND LIMITATION LEGISLATION AND TRUST CLAIMS

A The Limitation Act 1950

Section 21(1) of the 1950 Act provided:

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

³² Limitation Act 1950, s 4(1).

³³ Peter McKenzie and Paul Radich "Limitation – the new regime" (New Zealand Law Society seminar, October 2010) at 6.

³⁴ See Andrew Beck "Litigation: The New Law of Limitation" [2010] NZLJ 337 at 338; Christopher Finlayson "Limitation Bill passed" (press release, 26 August 2010); and McKenzie and Radich, above n 33, at 32–33 and 35.

All other actions for breaches of trust, or the recovery of trust property, were subject to a six-year limitation period.³⁵ Breaches subject to the limitation period were those involving a "technical or legal wrong", but where the trustee "had done nothing morally wrong"³⁶ such as the conduct in *Bristol and West Building Society v Mothew*, where a solicitor's provision of incorrect information to a client was held to be "unconscious", and not "dishonest" or "intentional".³⁷ By contrast, the exceptions prevented the limitation period running in respect of a "dishonest breach of trust", arising in circumstances in which the trustee "acts in a way which he does not honestly believe is in" the beneficiary's interests,³⁸ and situations where the trustee would come away with the trust property or its proceeds, which "he or she ought not to have".³⁹

Therefore, there are three ways in which limitation periods affected actions arising out of the beneficiary–trustee relationship, each with discrete policy justifications. First, where the beneficiary's action was to recover from the trustee trust property or its proceeds possessed by the trustee, or previously received by the trustee and converted to the trustee's use, no limitation period applied per s 21(1)(b). This was explicable on the basis of the nature of the action. Although the trust assets were legally vested in the trustee, the beneficiary was beneficially entitled to them. Therefore, as Swaddling has explained, "the beneficiary in such a case ... does not allege a wrong, but simply asks that a certain thing be declared to have belonged to the beneficiary".⁴⁰ Secondly, where the beneficiary's action was based on "fraud or fraudulent breach of trust" under s 21(1)(a), again no statutory limitation applied. This was because the fiduciary position occupied by the trustee vis-à-vis the beneficiary justified a strict rule that the dishonest trustee not be allowed to benefit

³⁵ Limitation Act 1950, s 21(2).

³⁶ Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1039 at [38.1.2(3)].

³⁷ *Bristol and West Building Society v Mothew* [1998] Ch 1 at 15 and 19.

³⁸ *Armitage v Nurse*, above n 2, at 251 and 261.

³⁹ Butler and Every-Palmer, above n 36, at [38.1.2(3)], citing *In re Timmis* [1900] 1 Ch 176 and *Thorne v Heard* [1895] AC 495 (HL).

⁴⁰ William Swaddling "Limitation" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 319 at 321. See also *Williams v Central Bank of Nigeria*, above n 1, at [13] per Lord Sumption.

from his or her fraudulent conduct.⁴¹ The residual category – actions by a beneficiary against trustees not falling within either of the two exceptions above – was subject to a six-year statutory limitation period on the basis that "the honest trustee [should be treated] as any other businessman".⁴²

Although no statutory limitation period applied in respect of the exceptions under the 1950 Act, the equitable doctrine of laches would apply to protect prejudiced defendants, where appropriate.⁴³ The doctrine operates against a claimant by allowing a defendant a defence where there has been unreasonable delay in the claimant's assertion of his or her rights.⁴⁴ There is no fixed point, under the doctrine, by which time a claim will be barred. Rather, the doctrine of laches is discretionary, and the court will consider the circumstances of each case, making "an assessment of where the balance of justice lies".⁴⁵

The doctrine did not, however, apply in respect of proprietary claims under the 1950 Act. The policy justification for this was the same as that which justified the s 21(1)(b) exception: that the trustee's possession of the property is, at all times, in effect the possession of the beneficiary.⁴⁶ As noted by Sir John Romilly MR:⁴⁷

Lapse of time [laches] and acquiescence apply to cases where [trust property] is parted with or becomes deficient, and where you seek to make a trustee answerable or liable to pay something by reason of his conduct ... But [the fund subject to this claim] is the property of the [beneficiary].

⁴¹ This policy justification is explored in more depth below in Part IV:A:1.

⁴² Donovan WM Waters *Law of Trusts in Canada* (2nd ed, Thomson Reuters, Toronto, 1984) at 1016.

⁴³ Geraint Thomas and Alastair Hudson (eds) *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [32.99] citing *Nelson v Rye* [1996] 1 WLR 1378; and Gary Watt "Laches, estoppel and election" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 353. See, in respect of the New Zealand 1950 Act specifically, *Preliminary Paper*, above n 9, at [25]. Note however Mummery LJ's approach to the application of the doctrine of laches in *Gwembe Valley Development Co Ltd v Koshy (No 3)*, above n 2, at [140]. Mummery LJ's contrary approach to the equivalent provision in the Limitation Act 1980 (UK) is critiqued in Gary Scanlan "The DEG case: the final chapter – the need for a consistent limitation regime" (2006) 27 Co Law 186.

⁴⁴ Butler and Every-Palmer, above n 36, at [38.1.4(1)].

⁴⁵ Butler and Every-Palmer, above n 36, at [38.1.4(4)]. See also *Preliminary Paper*, above n 9, at [26]–[27].

⁴⁶ As Lord Sumption explains it in *Williams v Central Bank of Nigeria*, above n 1, at [13].

⁴⁷ *Mills v Drewitt* (1855) 52 ER 748 at 750, cited in Swaddling, above n 40, at 322.

As such, the doctrine of laches only applied to actions arising out of fraud or fraudulent breaches of trust.

B The Limitation Act 2010

The wording used in s 21 of the 1950 Act has caused significant issues across numerous jurisdictions in which similar wording is used. As Prime and Scanlan note in respect of the 1950 Act's equivalent in the United Kingdom:⁴⁸

The law ... is regrettably both unclear and complex and offers no encouragement to those of us who believe that modern law should be rational, principled, and within the capacity of the diligent and reasonably intelligent layman to understand.

These issues include, among others: whether the law applies to constructive trusts generally, or only constructive trusts pre-existing the impugned transaction;⁴⁹ whether the standard of fraud for a fraudulent breach of trust is actual or equitable fraud;⁵⁰ and whether the doctrine of laches does in fact apply to fraudulent breaches of trust.⁵¹ Despite such scathing indictments as that of Prime and Scanlan, the lack of attention paid to such issues in the reform process saw the drafters of 2010 Act adopt, in many respects, a materially similar approach, notwithstanding some differences in the structure of drafting.

The three ways in which limitation periods may affect actions arising out of the beneficiary–trustee relationship, identified in the previous sub-part, remain the same regardless of differences in the structure of drafting. Trust claims not falling within the fraudulent breach of trust, or possession and conversion exceptions, will be subject to the standard six year limitation period. However, the start date will differ depending on whether the claim is a personal or proprietary claim. If the claim is a personal claim for equitable compensation, the claim will be dealt with as a money claim under s 11 and the start date will be the date on which the act or omission giving rise to the claim, occurred. If the claim is an equitable proprietary claim, the

⁴⁸ Prime and Scanlan, above n 6, at 142 discussing s 21 of the Limitation Act 1980 (UK).

⁴⁹ See for recent examples *Williams v Central Bank of Nigeria*, above n 1; *Paragon Finance plc v DB Thakerar & Co*, above n 2; *Peconic Industrial Development Ltd v Lau Kwok Fai*, above n 2; and *Paki v Attorney-General*, above n 2.

⁵⁰ See *Armitage v Nurse*, above n 2. Compare with the discussion in Butler and Every-Palmer, above n 36, at [38.1.2(3)(c)].

⁵¹ See *Gwembe Valley Development Co Ltd v Koshy (No 3)*, above n 2, at [140], critiqued in Scanlan, above n 43.

relevant pt 3 period⁵² and the relevant pt 3 start date will apply.⁵³ The policy justification for the six-year period remains the same as under the 1950 Act: the honest trustee is to be treated the same as any other defendant.

Section 49 deals with the exception for trust property possessed by the trustee, or converted to the trustee's use. The key difference with the 1950 Act is that a late knowledge period is imposed in the 2010 Act. If the claim is brought three years after the beneficiary gained or ought to have gained knowledge of the trustee's breach of trust, the claim will be time barred.⁵⁴ Given the policy informing this exception, the appropriateness of the application of a late knowledge period is somewhat open to question. As noted above, the s 21(1)(b) exception in the 1950 Act and the non-applicability of the doctrine of laches was justified on the basis that the beneficiary's entitlement to the property meant that the trustee's possession of that property was always considered, in equity, to be the beneficiary's possession. There is therefore a logical difficulty in imposing any limitation period in respect of such a claim.⁵⁵ On the other hand, it is not clear whether that policy justification is the best way of explaining the justification. Indeed, Swaddling refers to it as "obscure",⁵⁶ and it begs the question whether it is really appropriate that a trustee faces "perpetual liability"⁵⁷ in respect of an ownership claim. The Law Commission of England and Wales, for instance, has proposed that the proper balance is achieved by the application of a "discovery" principle, which "swallows up" the need to impose indefinite liability in achieving fairness to the beneficiary.⁵⁸ In doing so, the Commission ignored the traditional policy justification. Instead, it explained the policy underlying the exception for such claims, as a variation of that applying to fraudulent breaches of trust: "that the trustee bears a special responsibility to the beneficiaries of his or her

⁵² On Part 3 periods see above n 24.

⁵³ See for example s 31 dealing with claims to recover personal property held on trust. See generally JC Corry *Limitation Act Handbook* (LexisNexis, Wellington, 2011) at [O.14].

⁵⁴ Such a claim may arise, for example, out of a breach of the "self-dealing rule": see John Mowbray and others *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) at [44-12] and [20-63]–[20-64].

⁵⁵ See Corry, above n 53, at [49.1].

⁵⁶ Swaddling, above n 40, at 321.

⁵⁷ Adopting the phrase used in David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law Relating to Trusts and Trustees* (17th ed, LexisNexis Butterworths, London, 2006) at 1128.

⁵⁸ Law Commission of England and Wales *Limitation of Actions: Consultation Paper* (EWLC CP151, 1998) at [13.99]–[13.108].

trust, and that it would be wrong to allow the trustee to benefit from the property which he or she holds for others".⁵⁹ It would seem that by introducing a late knowledge period to claims in respect of trust property, the drafters of the New Zealand 2010 Act have taken the same approach.

In respect of fraudulent breaches of trust, the 2010 Act defines "fraud" as including "fraudulent breach of trust", and leaves such breaches to be dealt with by s 48, the general fraud provision. Relevantly, s 48(1) provides:

A claim's longstop period or Part 3 period does not apply to the claim if the claimant proves that, because of the fraud by or on behalf of the defendant, at the close of the start date of that period, the claimant neither knew nor reasonably ought to have known all or any of [the facts listed in paragraphs (a)–(e) of subs (1)].

While s 48 provides an exception for claims arising out of fraudulent breaches of trust, it imposes a number of requirements that must be met in order to prevent the defendant relying on the relevant statutory limitation period; requirements which did not exist in respect of fraudulent breaches of trust under the 1950 Act.

First, a causation requirement is imposed. The fraudulent breach of trust must itself cause the lack of knowledge on the part of the claimant. By contrast, s 21(1)(a) of the 1950 Act merely required that there had been a fraudulent breach of trust. Secondly, fraudulent breaches of trust became subject to a "late knowledge period".⁶⁰ Where a claimant, prevented from knowing of the facts giving rise to a claim because of the fraudulent breach of trust, eventually gains knowledge, the relevant Part 3 period, or longstop period, is disapplied,⁶¹ and instead the late knowledge period⁶² will apply. From this point the claimant has three years to bring the claim.⁶³ No such statutory late knowledge period began to run in respect of fraudulent breaches of trust under the 1950 Act.⁶⁴ A third requirement was imposed by virtue of the second. The late knowledge period will start to run from the point at which the claimant either

⁵⁹ Law Commission of England and Wales *Limitations of Action* (Law Com No 270, 2001).

⁶⁰ See s 11 in respect of "money claims" and s 48(3) in respect of Part 3 claims.

⁶¹ Section 48(1).

⁶² Per s 11(3) in respect of "money claims" and s 48(3) in respect of Part 3 claims.

⁶³ Sections 11(3) and 48(3).

⁶⁴ See generally on the statutory late knowledge requirement in the 2010 Act, Corry, above n 53, at [48.2].

"gained" or "ought reasonably to have gained knowledge" of the relevant facts.⁶⁵ The 2010 Act therefore imposes a constructive knowledge standard. The consequence of all of this is that the exception for fraudulent breaches of trust applies only where the claimant beneficiary's lack of knowledge is caused by the fraudulent conduct, and that, once the beneficiary has constructive knowledge of that conduct, a three-year limitation period is imposed.

IV THE FRAUDULENT BREACH OF TRUST EXCEPTION

As a means of illustrating the difficulties that arise out of the way in which breaches of trust were dealt with by the 2010 Act, the remainder of this paper analyses each of the three new requirements applying to the fraudulent breach of trust exception. This assessment is conducted against the background of the general policy tensions inherent in all limitation statutes, and the special policy considerations arising out of the trustee–beneficiary relationship. The following sub-part recapitulates and expands upon the earlier discussion of the relevant policy considerations.

A Policy Considerations

1 In favour of the exception

Limitation periods must be drawn so as to ensure justice is done in respect of a claim, and often difficulties in gaining the requisite knowledge to bring a claim justify certain extensions to the statutory limitation periods. This is to be balanced against the need to protect defendants from indefinite liability. The broad policy underpinning the approach in limitation statutes to breaches of trust was concisely put by Kekewich J in *Re Timmis*:⁶⁶

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 ...

⁶⁵ Listed in s 48(1).

⁶⁶ *In re Timmis*, above n 39, at 186. See also *Thorne v Heard*, above n 39, at 504–505 per Lord Macnaghten.

It has long been recognised, however, that the statutory limitation period should not "permit a trustee to protect fraudulent conduct",⁶⁷ where "fraudulent conduct" amounts to dishonesty.⁶⁸ This is because of the special fiduciary relationship between trustee and beneficiary. The nature of the relationship is such that the trustee occupies a powerful position vis-à-vis the beneficiary. The Ontario Law Reform Commission echoed the same concern: "The very nature of a trust pre-supposes a confidence in the trustee."⁶⁹ The corresponding primary obligation of any trustee is "to preserve and promote the interests of the beneficiary".⁷⁰ Therefore, even though honest breaches of trust will be subject to statutory limitation, treating the honest trustee "as any other businessman",⁷¹ the power exercised by a trustee over the property of another justifies precluding the *dishonest* trustee from benefitting from protection of the ordinary statutory limitation period.

2 *Against the exception*

While seeking to protect the right of the claimant to achieve justice, limitation statutes equally aim to protect defendants from having to defend stale claims. This latter consideration is strongly in favour of setting clear, relatively constrained limitation periods. The sentiment of the policy was well expressed by David Parker in the first reading of the Bill: "People do make mistakes in life and they have consequences, but those consequences ought not to be held above someone's neck forever like the sword of Damocles."⁷² This, however, is only one of three justifications for the imposition of limitation periods. Limitation periods are also important because they mitigate the difficulties of proving a claim as time passes, documentary evidence is destroyed and witnesses' memories become hazy. They also encourage claimants to act promptly in enforcing their rights.⁷³

⁶⁷ Butler and Every-Palmer, above n 36, at [38.1.2(3)].

⁶⁸ *Armitage v Nurse*, above n 2, at 261.

⁶⁹ Ontario Law Reform Commission *Report on Limitation of Actions* (1969) at 60. This statement was cited with approval in Law Reform Commission of British Columbia *Report on Limitations* (Report No 6, 1974) at 50.

⁷⁰ See *Armitage v Nurse*, above n 2, at 251; and Swaddling, above n 40, at 337 citing *Speight v Gaunt* (1883) 9 App Cas 1 (HL) and *Learoyd v Whiteley* (1887) 12 App Cas 727 (HL).

⁷¹ Waters, above n 42, at 1016.

⁷² (4 August 2009) 656 NZPD 5379 per David Parker.

⁷³ See generally A McGee *Limitation Periods* (6th ed, Thomson Reuters, London, 2010) at [1.035].

The question of justification for the exception must also be posed in the context of the benefits to be gained from certainty and simplicity in a limitation statute. The statute ought to be clear, predictable and fair. An unduly complex statute can lack coherence. Worse, it "can present a trap for the unwary and renders the law largely unintelligible to lay people".⁷⁴ So, although there may be special cases that necessitate deviation from the general limitation regime in the interests of fairness, these should be minimised and explicitly stated.⁷⁵

This then begs the question whether fraudulent conduct by trustees justifies either a broad exception from the statutory limitation period, or, in the case of the 2010 Act, a looser standard than that which presently applies in respect of other fraudulent conduct. Various jurisdictions have taken different approaches to this question. For example, New South Wales imposes a 12-year limitation period (as opposed to the standard six years) where the claim is based on fraudulent breach of trust.⁷⁶ By contrast, the Ontario Law Reform Commission recommended a limitation period of three years running from the point at which the beneficiary "becomes fully aware" of the breach.⁷⁷ Differently again, the Law Commission of England and Wales proposed that its standard recommended primary limitation period should apply to fraudulent breaches of trust, subject to the general exception for fraudulent concealment.⁷⁸ There seems to be agreement, at least amongst law reform agencies, that in the case of fraudulent breaches of trust, once the beneficiary is aware that they have a claim against the trustee, there is no reason why that beneficiary should not be required to bring that claim promptly. The differences occur around the edges on questions of: whether there should be an ultimate limitation period regardless of knowledge; whether there must be actual or constructive knowledge; and whether

⁷⁴ Law Commission of England and Wales, above n 58, at [1.2].

⁷⁵ See the discussion in *Miscellaneous Paper*, above n 19, at [3]–[5].

⁷⁶ Limitation Act 1969 (NSW), s 47. As recommended by the New South Wales Law Reform Commission *Report of the Law Reform Commission Being the First Report on the Limitation of Actions* (LRC3, October 1967) at [230].

⁷⁷ Ontario Law Reform Commission, above n 69, at 60. The same recommendation was made by the Law Reform Commission of British Columbia, above n 69, at 50–51, and was enacted in s 6(1) of the Limitation Act, RSBC 1996, c 266. Saskatchewan has also adopted this approach: The Limitations Act, SS 2004, c L-16.1, s 12.

⁷⁸ Law Commission of England and Wales, above n 59, at [4.95]–[4.101]. The Commission's recommendations were initially accepted in principle, however the government subsequently opted not to take the reforms forward: see Law Commission of England and Wales "Limitation of Actions" <www.lawcommission.justice.gov.uk>.

there must fraudulent concealment of the facts giving rise to the cause of action. These are the same issues that are at stake in New Zealand's approach under the 2010 Act.

B Assessing the Approach in the 2010 Act

The following sections consider each of the three new requirements imposed by the 2010 Act on a claimant beneficiary for claims arising out of fraudulent breaches of trust. It is first interesting to note, however, the paucity of explanation in the parliamentary materials as to why the changes to the exception were made. This lack of explanation gives credence to one of the central propositions in this paper: that issues arising in respect of trusts were neglected in the drafting and design of the 2010 Act.

The explanatory note to the Bill explains that ss 21(1)(a) and s 28⁷⁹ of the 1950 Act "provide for exceptions or modifications to limitation periods in cases of fraud".⁸⁰ It then continues, noting:⁸¹

The current law (sections 21(1)(a) and 28 of the 1950 Act) provides for exceptions or modifications to limitation periods in cases of fraud. *Clause 46* [of the Bill] *similarly* ensures that a claim's longstop period or Part 3 period does not apply if, because of the fraud by or on behalf of the defendant, at the close of the start date of that period the claimant neither knew nor ought reasonably to have known all or any of specified key facts that the claimant must know in order to make the claim.

This then represents that s 21(1)(a) of the 1950 Act imposed a causation requirement. As already noted, this is incorrect. The exception in s 21(1)(a) exists simply by virtue of the fraudulent conduct. Therefore, the explanatory note fails to recognise the substantial changes being introduced in respect of fraudulent breaches of trust.

The Departmental Report from the Ministry of Justice, in response to a submission advocating for the retention of s 21(1)(a) in the same terms as in the 1950

⁷⁹ The general fraud provision under the 1950 Act: "Postponement of limitation period in case of fraud or mistake".

⁸⁰ Limitation Bill 2009 (33-1) (explanatory note) at 14.

⁸¹ At 14 (emphasis added).

Act,⁸² acknowledges that there is a change in the law from the position under the 1950 Act insofar as the late knowledge period will apply. The Report notes that as "[m]any trusts ... last for decades ... defendants would otherwise face indefinite liability".⁸³ This singular statement, representing only one side of the inherent policy tension in limitation statutes – to balance the claimant's right to justice and the defendant's right not to be burdened by stale claims – is the sole justification in any of the publically available parliamentary materials given for the changes to the fraudulent breach of trust exception. The Report makes no recognition of the causation requirement imposed in s 48.

There is therefore little indication as to exactly why a broad exception for fraudulent breaches of trust was not carried over into the 2010 Act. The only explanation is that the general fraud exception was seen as sufficiently wide, albeit this stated with no apparent analysis.⁸⁴

1 Causation

As noted earlier, the 2010 Act imposes a causation requirement. Rather than the exception operating in respect of the mere existence of a fraudulent breach of trust as in the 1950 Act, the 2010 Act requires the claimant beneficiary to establish that his or her lack of knowledge was "because of" the fraudulent breach of trust. As Corry has explained, the justification is that the defendant trustee "will generally have operated secretly from the claimant" and that "[u]ntil the secrecy is exposed or the claimant becomes aware of the breach of trust the claimant is in no position to make a claim."⁸⁵ However, in many cases, whether or not the trustee has acted secretly will be immaterial to the fraudulent act on which the beneficiary's claim is based. As noted by the Law Commission in its review of the law of trusts in New Zealand, there

⁸² See James Macfarlane "Supplementary Submission to the Justice and Electoral Committee on the Limitation Bill 2009" (16 September 2009).

⁸³ Ministry Of Justice *Limitation Bill: Departmental Report* (October 2009) at 30.

⁸⁴ See Peter Blanchard "Limitation Bill: Note for Meeting on Monday 25 August 2008" (obtained under Official Information Act 1982 request to the New Zealand Law Commission) at [9]. See also Beck, above n 34, at 340.

⁸⁵ Corry, above n 53, at [48.6].

are sound reasons why a trustee may not keep a beneficiary informed in the ordinary course, or even why a trustee may legitimately operate "secretly":⁸⁶

A settlor may, for good reasons, wish to ensure that certain kinds of information are not disclosed to certain beneficiaries. It is also possible that disclosure of information that may seem uncontroversial may nevertheless damage the interests of someone who is neither settlor, nor trustee, nor beneficiary. Disclosing certain information to a beneficiary might give the beneficiary a commercial advantage that he or she would not otherwise have; for example, access to information that is commercially valuable to the beneficiary in a different capacity.

This emphasises the "special degree" of reliance or confidence the beneficiary has in the trustee, and it is this reliance that will in many cases cause the beneficiary's lack of knowledge, rather than the fraudulent conduct itself.

Thus, at the very least, this causation requirement misrepresents the policy justifications for the exception. By definition, the beneficiary reposes trust and confidence in the trustee to manage the beneficiary's property in the beneficiary's best interests, and it is the failure to honestly act in what the trustee considers the beneficiary's best interests that gives rise to a fraudulent breach of trust.⁸⁷ The beneficiary is not required to exercise any oversight in respect of the trustee's actions. Indeed, as highlighted above, in some circumstances the whole reason the settlor has used the trust vehicle is so that they cannot. So, to say that the fraudulent breach of trust must have caused the lack of knowledge is illogical in achieving the policy behind the exception. It is the very fact of the fraudulent conduct in the context of the trustee–beneficiary relationship that justifies the exception. Consequently, there is a clear risk that some cases that might otherwise have been deemed appropriately to fall within the fraudulent breach of trust exception from a policy perspective, may fail to meet the causation requirement imposed by the 2010 Act. The following example illustrates the way in which such a situation may occur.

John and Jane's marriage ends. As part of the divorce arrangements, two discretionary trusts are created for the benefit of the child of the marriage, Thomas. John is trustee and beneficiary of one (Trust 1), and Jane is trustee and beneficiary of

⁸⁶ Law Commission *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts Fourth Issues Paper* (NZLC IP26, 2011) at [2.2].

⁸⁷ *Armitage v Nurse*, above n 2, at 251 and 261.

the other (Trust 2). Thomas is a beneficiary of both. The trust deed of Trust 1 provides that the trust fund and net income of the trust should provide for the private secondary school education of Thomas. The trust deed of the Trust 2 provides that the trust fund and net income of the trust should provide for any tertiary education Thomas chooses to undertake, and for the general welfare of Thomas. The funds in Trust 1 are applied consistent with the requirements of the trust deed. Additionally, Jane periodically exercises discretion in favour of Thomas when required to fulfil the relevant welfare obligations of Trust 2. However, Thomas, upon graduating from secondary school, decides to travel and spends the next 10 years travelling and working in Europe. The same year as Thomas leaves, Jane's business faces financial trouble, and she uses most of the funds from Trust 2 to invest in the business, knowing it to be unlikely to net a favourable return, and therefore contrary to the interests of Thomas. The business folds shortly afterwards, and Trust 2's investment is lost. Despite Jane's dishonest conduct on the investment front, the investment is recorded in the trust accounts. Thomas was entitled to view these accounts at any time. Upon returning, almost a decade after the Trust's investment was lost, Thomas decides to study at university. However, it transpires that, as a result of the bad investment, there are insufficient funds to pay for his tertiary education. Under the 1950 Act, Thomas would be able to claim against Jane for equitable compensation arising out of her fraudulent breach of trust. Under the 2010 Act, however, Thomas's claim would be time barred because his lack of knowledge was not *because of* Jane's fraudulent breach of trust, but merely as a result of the confidence Thomas reposed, and was entitled to repose, in Jane.

The example makes it clear that the exception is drawn too narrowly in the 2010 Act. This will have the effect of frustrating the policy behind having such an exception in the first place; it risks allowing a trustee to protect its fraudulent conduct where the trustee does not actively conceal that conduct. More than that, it actually encourages dishonest trustees to take a risk and engage in fraudulent conduct openly, in full knowledge that when the beneficiary gains knowledge of the fraudulent conduct their claim may well be statute-barred. This is manifestly inconsistent with one of the stated aims of the 2010 Act, the late knowledge period having been introduced with the general purpose of addressing difficulties arising in situations

where the limitation period could end before the potential claimant knew enough to encourage them to bring their claim.

2 *Late knowledge*

While the general purpose of the late knowledge period was to ameliorate the issue of a claim becoming barred before a claimant knew enough to pursue it, its effect on beneficiaries who are victims of fraudulent conduct by their trustees is actually to introduce a condition. It requires that, upon gaining knowledge of certain specified facts giving rise to a claim, the beneficiary is required to bring the claim within three years. This section first considers the desirability of this statutory late knowledge period under the 2010 Act by contrast with the doctrine of laches, which operated to ameliorate indefinite liability under the 1950 Act. Secondly, an anomaly arising out of the 2010 Act's treatment of beneficiaries under discretionary trusts is flagged as it risks undermining the effectiveness of the policy underlying the imposition of the late knowledge period.

As with the doctrine of laches, the late knowledge period operates to prevent prejudice to defendants in situations where the claimant knew of the facts giving rise to the cause of action, but did not bring the claim within a reasonable time. The late knowledge period is capable of acknowledging that there may be good reason why time should not run as it would ordinarily. Indeed, as noted earlier, this is a core feature of the 2010 Act. Equally the late knowledge period provides that once that knowledge is acquired, the claimant should be compelled to bring the claim with due haste.

The late knowledge period is arguably preferable to the doctrine of laches. Whereas the doctrine of laches is uncertain because of its discretionary nature, both claimants and defendants benefit, under the late knowledge period, from the imposition of a fixed period of time in which the claimant must bring the claim.⁸⁸ It is true that establishing the date at which the claimant acquired the requisite knowledge may be difficult to determine, but the three-year late knowledge period still provides a much more accurate yardstick than the equitable doctrine.

⁸⁸ See Gary Scanlan "Limitation periods and actions against company directors" (2004) 25 Co Law 175 at 180.

Therefore, because the doctrine of laches applied to claims under the broad 1950 Act exception, and because practically, the late knowledge period fulfils a similar role to the equitable doctrine in the 2010 Act, the imposition of the late knowledge period is not problematic. Indeed, due to the level of certainty established in its operation, over and above the doctrine of laches, the statutory late knowledge period is arguably to be preferred.⁸⁹

(a) The discretionary trust anomaly

The 2010 Act's treatment of discretionary trusts, however, introduces an anomaly.⁹⁰ As noted by the Law Commission in its review of the law of trusts, the discretionary trust is the favoured form of express trust in New Zealand.⁹¹ Under the 2010 Act, a claim's start date in respect of a beneficiary under a discretionary trust is the moment at which the beneficiary "becomes entitled to trust income or property because of the trustees' discretion being exercised in the beneficiary's favour".⁹² This does not preclude the discretionary beneficiary from bringing a claim before that discretion is exercised.⁹³ The position of discretionary beneficiaries was not covered in the original version of the Bill,⁹⁴ but was addressed upon the urging of one submitter who was concerned that the Bill left the position of discretionary beneficiaries unclear.⁹⁵ In support of the approach now prevailing in the Act, the Select Committee noted:⁹⁶

A discretionary beneficiary has no interest in the trust until the trustee exercises their discretion in favour of the beneficiary. Until this occurs, a beneficiary has no interest

⁸⁹ See generally Prime and Scanlan, above n 6; Scanlan, above n 88; and Scanlan, above n 43.

⁹⁰ Discretionary trusts also caused significant difficulties under the 1950 Act and its equivalents in other jurisdictions. See the discussion in Hayton, Matthews and Mitchell, above n 54, at [96.18]–[96.23] and David Hayton, Justice of the Caribbean Court of Justice "Some Crucial Aspects of Section 21 Limitation Act 1980" (The ACTAPS Annual Lecture, 2009), referring to three important cases in this regard: *Armitage v Nurse*, above n 2; *Johns v Johns* [2004] 3 NZLR 202 (CA); and *Lemos v Coutts (Cayman) Ltd* (2006) 9 ITELR 616 (CA).

⁹¹ Law Commission *Review of the Law of Trusts in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [1.15].

⁹² Limitation Act 2010, s 16(1)(e) in respect of money claims and s 38(1)(b) in respect of Part 3 claims.

⁹³ Corry, above n 53, at [16.1.5].

⁹⁴ Limitation Bill 2009 (33-1), cls 15 and 36.

⁹⁵ Andrew Butler "Submission to the Justice and Electoral Committee on the Limitation Bill 2009" (10 September 2009) at [13].

⁹⁶ Limitation Bill 2009 (33-2) (select committee report) at 6.

able to be damaged by a breach of a trust. While a discretionary beneficiary can, at any time, compel the proper administration of a trust, time should not run against them for a money claim in respect of a discretionary interest until the trustee has exercised their discretion in the beneficiary's favour.

The effect of this, however, is that while a beneficiary under a fixed trust will be subject to the standard limitation period for a breach of trust, or the late knowledge period, the discretionary beneficiary who has not had discretion exercised in his or her favour, although having full knowledge of the facts giving rise to the claim, is not bound to bring the claim until that discretion has so been exercised. This creates a significant gulf in the rights of trustees and beneficiaries under a discretionary trust, as against those under a fixed trust. This vastly different treatment raises questions as to whether the approach to discretionary beneficiaries under the 2010 Act is appropriate, and is another illustration of the lack of consideration given in the drafting of the 2010 Act to the way in which trust claims should be dealt with.

A full analysis of the competing policy objectives relating to when time should start running in respect of claims by a beneficiary under a discretionary trust is beyond the scope of this paper. It suffices for present purposes to note that the difference in treatment between different classes of beneficiary creates an element of unfairness in the face of the general aim of statutes of limitation to be clear, predictable and fair. This does not mean that the late knowledge period should not apply. Rather, it strongly supports reconsideration of the treatment of beneficiaries of discretionary trusts under the Act.

3 *Constructive knowledge*

The provision for late knowledge periods in the 2010 Act sees the adoption of a constructive knowledge standard: the relevant late knowledge period begins to run at the point at which the claimant beneficiary gains, *or ought to have gained*, knowledge of certain specified facts.⁹⁷ The general provision dealing with fraud and mistake under the 1950 Act also applied a constructive knowledge standard.⁹⁸ Under that provision, the period of limitation did not begin to run "until the plaintiff ...

⁹⁷ See ss 14(1)(a)–(e) and 48(1)(a)–(e).

⁹⁸ Of course, under that Act, the fraudulent breach of trust exception was dealt with separately.

discovered the fraud ... or *could with reasonable diligence* have discovered it".⁹⁹ The Limitation Act 1980 (UK) has the same requirement.¹⁰⁰ In determining the standard of constructive knowledge applicable in respect of the general fraud provision in the 2010 Act, and by extension, now applicable to defrauded beneficiaries, it is therefore useful to consider the standard that "reasonable diligence" under the 1950 Act was held to represent.

The meaning of the term "reasonable diligence" in the United Kingdom's equivalent general fraud and mistake provision was considered in *Peco Arts Inc v Hazlitt Gallery Ltd (Peco Arts)*.¹⁰¹ That case concerned a claim for the return of the purchase price of a painting on the basis of mistake of fact when the painting was discovered to be a reproduction 12 years after purchase. In holding that the limitation period did not apply, Webster J held that "reasonable diligence [in the context] means ... the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to the circumstances, including the circumstances of the purchase".¹⁰² Webster J also clarified that "the precise meaning to be given" to the phrase "reasonable diligence", "must vary with the particular context in which [the phrase is] applied".¹⁰³ This introduces the elements of "ordinary" or "reasonable" prudence in the specific context. Citing *Peco Arts*, *Halsbury's Laws of England* notes that:¹⁰⁴

... it must be shown that there has been something to put [the claimant] on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts.

The *Laws of New Zealand* notes:¹⁰⁵

The standard of diligence which the defrauded person needs to prove is high. This is so, *except where he is entitled to rely on the other person*. In order to prove that a person might have discovered a fraud with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by

⁹⁹ Limitation Act 1950, s 28.

¹⁰⁰ Limitation Act 1980 (UK), s 32(1).

¹⁰¹ *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 1 WLR 1315.

¹⁰² At 1323.

¹⁰³ At 1322–1323.

¹⁰⁴ *Halsbury's Laws of England* (5th ed, 2008) vol 68 Limitation Periods at [1223].

¹⁰⁵ *Laws of New Zealand* Limitations of Civil Proceedings at [306] referring to *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC), as cited in *Amaltal Corporation v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [152].

pursuing an enquiry in some collateral matter, *it must be shown that there has been something to put him on enquiry in respect of the matter itself*, and that if enquiry had been made it would have led to the discovery of the real facts.

Therefore, a claimant beneficiary must have acted with reasonable prudence in the context of the trustee–beneficiary relationship. Adopting this approach, the standard of proof required to establish constructive knowledge on the part of the claimant beneficiary should be particularly high. This is because in this situation, the beneficiary "relies on the trustee almost as a friend" and "should not be required to be on guard against him".¹⁰⁶ In other words, the beneficiary is "entitled to rely" on the trustee.¹⁰⁷

In light of the fact that the claimant beneficiary is entitled to, and in certain circumstances must, occupy a completely passive role in terms of the trust management, the appropriate standard of constructive knowledge would be to require wilful blindness on the part of the beneficiary: a very low standard of diligence. To impose any expectation that the beneficiary would undertake any sort of proactive inquiry into trustee actions, in principle, would expect too much. Such considerations led the Law Reform Commission of British Columbia to recommend that:¹⁰⁸

Time should not run against a beneficiary with respect to an action ... based on any fraud or fraudulent breach of trust to which the trustee was party or privy ... [U]ntil the beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action would be based, the onus of proof of which should rest on the trustee.

Provided that a very low standard of diligence is required of the claimant beneficiary in establishing constructive knowledge, this should suffice, and it would be unnecessary to go the step further and adopt the recommendation of the Law Reform Commission of British Columbia. If something alerts even the passive beneficiary to fraudulent conduct giving rise to a claim, there is no reason why the beneficiary should not then be required to investigate. Under the 2010 Act, however,

¹⁰⁶ Ontario Law Reform Commission, above n 69, at 60, cited in Law Reform Commission of British Columbia, above n 69, at 50

¹⁰⁷ *Laws of New Zealand*, above n 105, at [306].

¹⁰⁸ Law Reform Commission of British Columbia, above n 69, at 50, enacted in s 6(1) of the Limitation Act, RSBC 1996, c 266.

the exception for fraudulent breaches of trust has been conflated with fraud arising in other contexts, such as tort or contract claims where the claimant is not entitled to rely on the other party but instead is expected to guard his or her own best interests. Under those claims, the defrauded party is expected to prove a high standard of diligence,¹⁰⁹ and there is a risk that this higher standard of diligence will be applied in all situations of fraud, including application to defrauded beneficiaries. As such, although a form of constructive knowledge is appropriate for trust claims based on fraudulent conduct, the fraudulent breach of trust exception needs to be disaggregated from the general fraud provision to indicate to the courts that a different standard of diligence is to be required.

V CONCLUSION

The rules of limitation relating to breaches of trust and claims in respect of trust property are complex and have historically caused substantial difficulties across common law jurisdictions. The Limitation Act 2010 failed to address these issues, and in many respects, the drafting in the Act has compounded the problems. This paper has focused particularly on the new difficulties that arise as a result of the way in which fraudulent breaches of trust are dealt with under the 2010 Act. In harmonising fraudulent breaches of trust with other fraudulent conduct, certain new statutory requirements were imposed upon defrauded beneficiaries: the introduction of a late knowledge period, with a constructive knowledge standard, and a causation requirement. Taken together, in light of the relevant policy considerations, it has been demonstrated that these new requirements are inappropriate and undesirable.

While the imposition of a late knowledge requirement is unproblematic in itself, as it merely replaces the equitable doctrine of laches, there is a risk that the higher standard of diligence establishing constructive knowledge required of contract and tort claimants will now similarly be required of beneficiaries. The risk arises out of the fact that all fraudulent conduct is lumped together in the 2010 Act. Further, the vastly different treatment accorded to beneficiaries of discretionary trusts compared to beneficiaries of fixed trusts, in terms of both the standard limitation period and the

¹⁰⁹ *Laws of New Zealand*, above n 105, at [306].

late knowledge period, calls into question the fairness among beneficiaries achieved by the 2010 Act.

Even more concerning is the causation requirement – that the beneficiary's lack of knowledge must be as a result of the fraudulent conduct. As opposed to preventing the trustee from protecting fraudulent conduct, the way in which the exception operates in the 2010 Act actually encourages trustees to engage in fraudulent conduct in the open, which is a risk that trustees may well be prepared to take given the lack of attention many beneficiaries practically do, and in many cases are entitled to, pay to the management of trust assets. Given that the very nature of the relationship permits, and in some circumstances requires, the beneficiary to occupy such a passive role, the limitation period applying to dishonest conduct by the trustee should reflect this.

One solution for the specific issues arising out of the fraudulent breach of trust exception could be to realign that exception with the exception for actions in respect of property possessed by the trustee or converted to the trustee's own use, somewhat reflecting the drafting of the 1950 Act. This would drop the causation requirement and separate the constructive knowledge standard applicable to fraudulent breaches of trust from that applicable to other civil claims. This, however, would be a mere Band-Aid, insufficient to address the myriad of problems arising in this area. The specific example of the way in which fraudulent breaches of trust are dealt with under the 2010 Act is illustrative of a more widespread problem searching for a more fundamental solution. While breaches of trust generally are dealt with as one of many general civil claims, albeit with its exceptions, the specific policy considerations applicable to breaches of trust do not adhere well to such a "one size fits all" approach. Instead, it may be more appropriate to siphon off claims by beneficiaries against their trustees into a separate category of vulnerable claimants, in much the same way as the 2010 Act has dealt with claims for abuse of a minor.

Whatever the appropriate solution may be, given the very significant implications that may arise, the many difficulties surrounding the way in which trust claims are dealt with in the 2010 Act need to be addressed before the legislation begins to have an undesirable effect in practice.

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VI WORD COUNT

The text of this paper (excluding title page, abstract, citations and bibliography, but including substantive footnotes) comprises 7,982 words.