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LIMITATION PERIODS AND CONSTRUCTIVE TRUSTS: REPLANTING HISTORIAL ROOTS

HUI CHUN PING V HUI KAU MO (2024) 27 HKCFAR 634

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In *Hui Chun Ping v Hui Kau Mo* (2024) 27 HKCFAR 634, the Hong Kong Court of Final Appeal considered whether an agent who acquired a secret profit in breach of fiduciary duty could raise a limitation defence. Lord Hoffmann NPJ decided that the claim against the agent did not fall within s 20(1)(b) of the Limitation Ordinance and was subject to a limitation period. This Note makes two comments on his reasoning. First, it argues that Lord Hoffmann's recourse to the historical roots of the limitation statute should be commended, even if his articulation of it was not without its shortcomings. Second, it critiques Lord Hoffmann's unsatisfactorily equivocal answer to whether the limitation period arose by analogy or directly under s 20(2) of the Limitation Ordinance. It suggests that it would have been desirable for him to clarify that the limitation period in *Hui* arose by analogy only.

I. Introduction

Lord Sumption once remarked that "there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees".[1] He was not wrong. Over the years, the law of limitation as applied to constructive trusts has provided fertile ground for litigation and spawned a sizeable body of jurisprudence. The reason, as Millett LJ had observed as early as 1998, was that:

> ...the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases…where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff.

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1 *Williams v Central Bank of Nigeria* [2014] AC 1189 at [7] (SC, UK) [*Williams*].

> The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.[2]

Appreciating the difference between the two senses of the constructive trustee has mattered for limitation periods: whereas the second category of constructive trustees could benefit from a limitation defence, that was not the case for constructive trustees of the first category who misapplied trust property. In Hong Kong, no limitation period would be applicable to the latter because of s 20(1) of the Limitation Ordinance, the terms of which are virtually identical to its counterparts in both the English[3] and Singaporean[4] limitation statutes. Relevantly, s 20 of the Limitation Ordinance reads:

> **20. Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action—
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> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
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> (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.
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> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Ordinance, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession…[5]

To the formidable collection of case law on the application of limitation periods to constructive trusts can be added *Hui Chun Ping v Hui Kau Mo* ("*Hui*"),[6] in which the Hong Kong Court of Final Appeal ("HKCFA") considered whether an agent who acquired a secret profit in breach of fiduciary duty could raise a limitation defence. The facts, which cut across the distinction described by Millett LJ, presented a fundamental difficulty. While the agent was undoubtedly a pre-existing fiduciary, he was not a custodial fiduciary in the sense of managing trust property and so could not be said to have misapplied the same. *Hui* therefore presented an occasion for an apex court to revisit the robustness of the distinction between 'category 1' and 'category 2' constructive trusts.

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2 *Paragon Finance Plc v DB Thakerar Co* [1999] 1 All ER 400 at 408–409 (CA, UK) [*Paragon Finance*].

3 See the English Limitation Act 1980 (c 58) (UK), s 21 [English Limitation Act].

4 See the Singaporean Limitation Act 1959 (2020 Rev Ed), s 22 [Singaporean Limitation Act].

5 Limitation Ordinance (Cap. 347), s 20.

6 *Hui Chun Ping v Hui Kau Mo* (2024) 27 HKCFAR 634 [*Hui*].

Lord Hoffmann NPJ decided that the claim against the agent was subject to a limitation period. He left much for us to ponder. This Note will focus on two features of his reasoning. The first concerns Lord Hoffmann's approach to s 20(1)(b) of the Limitation Ordinance (*ie,* s 21(1)(b) of the English Limitation Act 1980 and s 22(1)(b) of the Singaporean Limitation Act 1959). There was an attempt by Lord Hoffmann to diminish the growing judicial and academic emphasis on the distinction between a 'true trust' and a 'remedial formula', and to instead anchor his analysis in the historical roots of the limitation statute. This recourse to historical context should be commended, although, as we shall see, Lord Hoffmann's articulation of it was not without its shortcomings. The second issue relates to how Lord Hoffmann, having determined that a limitation period was applicable, then dealt with the source of this limitation period. As we shall see, Lord Hoffmann was unsatisfactorily ambiguous as to whether the limitation period arose by analogy or directly by virtue of s 20(2) of the Limitation Ordinance (*ie,* s 21(3) of the English Limitation Act 1980 and s 22(2), (3) of the Singaporean Limitation Act 1959). It is suggested that the preferable answer would have been for Lord Hoffmann to confine his response to indicating that the limitation period in *Hui* was capable of arising not directly under s 20(2), but rather by analogy only.

II. Background

In 2004, the plaintiff ("P") was approached by Hutchison Whampoa Limited ("HWL") to consult on a proposed construction project in Qingdao, China. He was recommended by the defendant ("D"), who in early 2006 — whilst acting as P's agent — secured an agreement for P with HWL, under which P would receive a fixed fee and 10% of the project's net profits ("dry shares") as remuneration for his work. But D, having allegedly convinced P that it was worthwhile to forgo the dry shares for a cash lump sum instead, then secretly took those dry shares for himself in June 2006, a fact which P came to know of by 6 November 2012. Yet, it was not until more than 6 years later (on 13 November 2018) that P sued D. P sought to amend his statement of claim to plead D's breach of fiduciary duty in gaining the dry shares. This would have enabled P to argue that D as agent held those shares on constructive trust for him as principal.

Any such amendment would have been unnecessary and thus impermissible if D could invoke a limitation defence. To circumvent this issue, P contended that the amendment should be permitted as his action fell within s 20(1)(b) of the Ordinance. Relying on *FHR European Ventures v Cedar Capital Partners LLC* ("*FHR*"),[7] in which the UK Supreme Court held that an agent receiving a bribe or secret commission through his fiduciary position would hold the same on constructive trust for his principal and be liable both *in personam* and *in rem*, P contended that the constructive trust arising in the circumstances was one to which no limitation period applies. This was because the constructive trust arising in the face of the agent's acquisition of the dry shares, as conceptualised in *FHR*, exhibited the characteristics

[7] *FHR European Ventures v Cedar Capital Partners LLC* [2015] AC 250 [*FHR*].

of a 'category 1' constructive trust in three respects. First, P asserted that the *FHR* constructive trust, which had proprietary consequences, was a real trust. Second, P argued that the rationale behind the *FHR* constructive trust (like the justification for the absence of a limitation period where the action was to recover trust property[8]) was essentially one of deemed possession. That is, the agent's receipt of the secret profit would be deemed to have been on behalf of the principal, rather than adverse to the principal by reason of an unlawful transaction. Third, P emphasised the fact that D had already become a fiduciary by the time he received the dry shares. The gist of P's argument was that all pre-existing fiduciaries such as D, by virtue of the nature and rationale of the constructive trust applicable to them, and irrespective of whether the property being misapplied was trust property, cannot avail themselves of a limitation defence.

While the amendment was initially allowed by a master, his order was reversed on appeal by a judge on the basis of limitation, this decision being upheld by the Court of Appeal and the HKCFA. In the latter court, Lord Hoffmann delivered the sole judgment and held that any claim for constructive trust would be time-barred.

III. The Decision

Although there might have been some obscurity in the facts as to whether the dry shares were really in the nature of a secret profit rather than the diversion of a business opportunity, it was common ground that this was a case involving the former. This was the basis on which Lord Hoffmann proceeded with his analysis.

A. *Section 20(1)(b)*

The starting point for Lord Hoffmann was that the constructive trust in this case emerged not from any voluntary assumption by D of a trust obligation towards P, but rather from an unlawful transaction — namely, the receipt of a secret profit. According to Lord Hoffmann, the key to understanding the applicability of s 20(1)(b) to a trust materialising in those circumstances lay in the provision's historical roots, which could be traced back to before s 8 of the English Trustee Act 1888.[9] Two types of trusts, distinguished by the manner in which they arose on the facts, were recognised for the purpose of limitation. The first type concerned those trusts which arose by the voluntary assumption of trustee-like duties, regardless of whether the individual had been formally appointed as a trustee.[10] In addition to express trusts, this category now includes constructive trusts analogous to them, such as those involving "executors and administrators, company directors, trustees *de son tort*".[11] Notwithstanding the availability of equitable doctrines such as laches and acquiescence to address unreasonably delayed claims, consensual trustees could not rely on

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8 *Halton International Inc v Guernroy Ltd* [2006] All ER (D) 302 at [22] (UK, CA).
9 *Hui*, *supra* note 6 at [12].
10 *Ibid* at [21].
11 *Ibid*.

the running of time, because "equity would…simply hold [the trustee] to account for the assets as if he had acted in accordance with his trust".[12] What s 8 of the Trustee Act 1888 strove to do was to confirm this status quo.[13]

That state of affairs, however, did not apply to what Lord Hoffmann referred to as the 'constructive trust'.[14] This was something of an overgeneralisation, as he was referring specifically to a constructive trust of the kind that was deemed to exist by a court of equity as a result of wrongdoing. This non-consensual constructive trust, so he said, was:

> ...an altogether different animal from a trust created by an agreement to hold or exercise control over property in a fiduciary capacity. It was another fiction by which equity provided a remedy against someone who had obtained property by or with knowledge of fraud or breach of fiduciary duty. If a court of equity decided that someone had obtained property in this way, it would declare that he held it on a constructive trust for the plaintiff 'as if' he had agreed to be a bare trustee of that property. The court could then order the defendant or anyone claiming under him (other than a purchaser for value in good faith and without notice of the plaintiff's claim) to transfer to him the legal title. It was in essence a proprietary claim, analogous to a common law action to recover property.[15]

Despite the fiction that a non-consensual constructive trustee was deemed to have agreed to hold the property on trust for the purpose of liability, Lord Hoffmann noted that this did not further imply a fiction that there was no wrongdoing from which time would start running.[16] Otherwise, applying the words 'an action…to recover from the trustee trust property' under s 20(1)(b) to such constructive trustees would "deprive them [of] a right to a limitation period which they had previously enjoyed".[17] Reference was made to *Taylor v Davies*,[18] where Viscount Cave remarked that:

> If this contention [that claims to recover trust property must apply to all constructive trustees] be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee, and (to use the words of Sir William Grant in [*Beckford v Wade*]) a doctrine has been introduced which may be 'fatal to the security of property.' It does not appear to their Lordships that the section has this effect. The expressions 'trust property' and 'retained by the trustee' properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others...[19]

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12 *Ibid* at [13]–[14], citing *Williams*, *supra* note 1 at [13].
13 *Ibid.*
14 *Ibid* at [16].
15 *Ibid*.
16 *Ibid* at [17].
17 *Ibid* at [18].
18 *Ibid* at [19]–[20].
19 *Taylor v Davies* [1920] AC 636 at 652–653 (PC, UK) [*Taylor*].

Lord Hoffmann also relied upon the passage from *Beckford* to which Viscount Cave referred,[20] where Sir William Grant MR commented that unrestricted time for bringing a claim was not intended to cover "every equitable question, relative to real property" on a "true construction" of the then statute of limitations.[21]

With the historical context and cases like *Beckford* and *Taylor* in mind, Lord Hoffmann then turned to P's argument that no pre-existing fiduciary should be allowed to benefit from a limitation defence. He was not persuaded that either principle or judicial or academic authority supported such a position.[22] Emphasising that fictions were always fashioned for a particular purpose, Lord Hoffmann cautioned against an overeagerness to transpose a fiction from one context to another.[23] He explained that:

> ...the purpose for which the beneficiary is held to acquire a proprietary interest in property acquired in breach of a fiduciary's duty is to prevent the latter [sic] from deriving any advantage from an increase in the value of such property or its product. It would have been sufficient to give this explanation without any deeming. But the fiction does no harm. In my opinion, however, there is no justification for reading this fiction across into the rule that time runs against a category 2 constructive trustee. The reasons for the one rule have nothing to do with the other...[24]

It was for these reasons that Lord Hoffmann concluded that P could not avail himself of s 20(1)(b). Instead, his claim was subject to a limitation period.

B. *Section 20(2)*

If s 20(1)(b) of the Ordinance could not be invoked, then could it really be said (as contended for by D) that the limitation period in s 20(2) was engaged? To this question, Lord Hoffmann gave the following nebulous answer:

> Viscount Cave, who had practised at the Chancery Bar from 1880, would probably have said that the whole of s 8 did not apply to category 2 constructive trustees. They remained entitled to limitation under the old law stated in *Beckford v Wade*. Nothing has happened since 1888 to change that position. Or if you want to be a little less antiquarian, you could say that s 20(2) was obviously intended to create a limitation period for all claims for breach of trust, express or constructive, apart from those specified in s 20(1). If that means giving the word 'trustee' a different meaning in the two subsections, so be it.[25]

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20 *Hui*, *supra* note 6 at [17].
21 *Beckford v Wade* (1805) 34 ER 34 at 37 (PC, UK).
22 *Hui*, *supra* note 6 at [27]–[34].
23 *Ibid* at [27]–[28].
24 *Ibid* at [28].
25 *Ibid* at [37].

Lord Hoffmann was thus equivocal on this point. On the one hand, his reference to what Viscount Cave would have said in relation to s 8 of the Trustees Act 1888, coupled with his historical analysis explained above, might be taken to mean that a limitation period applied by analogy. On the other hand, Lord Hoffmann could also be read as saying that the limitation period in s 20(2) applied directly. This is supported by his remark that s 20(2) could be viewed as having established "a limitation period for all claims for breach of trust, express or constructive, apart from those specified in s 20(1)", even if that meant attributing two dissimilar meanings to the word 'trustee' in s 20.[26]

IV. The Section 20(1)(B) Point

Given the obscurity with which s 20 of the Limitation Ordinance and its English and Singaporean equivalents are drafted, *Hui* is a salutary reminder that the application of limitation periods for breach of trust or fiduciary duties must depend on a proper understanding of the historical roots of the statutory enactment and on how such context maps onto the positive law.[27] There is nothing revolutionary in a historical approach, with the courts having previously resorted to it in this context.[28]

This notwithstanding, Lord Hoffmann's analysis left gaps unfilled, with much of his reasoning for the existence of "a settled understanding that constructive trustees already had such protection by analogy with claims to property at common law"[29] being focused on fictions and the particular purposes for which they are devised. This, however, adds little in terms of explanation and says nothing about why, unlike in the case of a consensually-created trusts, the fiction of deemed possession for the purpose of liability does not seem to carry over to limitation when non-consensual constructive trusts are concerned.[30]

The better answer, which was only hinted at but not explicitly canvassed by Lord Hoffmann,[31] lies in the jurisdictions of equity that prevailed before the fusion of common law and equity. Limitation statutes historically contemplated common law claims only, but statutory time-bars nevertheless applied by analogy to, for example, claims falling within what was referred to as equity's concurrent (as opposed to exclusive) jurisdiction. For claims falling within equity's concurrent jurisdiction, which we take to refer to a situation where the facts generated claims entitling a party to both legal and equitable remedies,[32] the statute applied by analogy in order to give effect to a 'no side-stepping rule' that prevented litigants from dodging

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[26] *Ibid* at [37].

[27] William Swadling, "Limitation" in Peter Birks and Arianna Pretto-Sakmann (eds), *Breach of Trusts* (Oxford: Hart Publishing, 2002) 319 at 344 [Swadling].

[28] *Taylor*, *supra* note 19 at 650; *Paragon Finance*, *supra* note 2 at 408E-F.

[29] *Hui*, *supra* note 6 at [18].

[30] *Ibid* at [15]–[17]; cf David Hayton, "No proprietary liability for bribes and other secret profits?" (2011) 25(1) Trust L Intl 3 at 12.

[31] *Hui*, *supra* note 6 at [13] and [16].

[32] Denis Browne, *Ashburner's Principles of Equity*, 2nd ed (London: Butterworth & Co, 1933) at 4–5 [Browne, *Ashburner's Principles of Equity*].

time-bars on common law responses by pursuing equitable relief.[33] The spirit of the 'no side-stepping rule' was effectively preserved in the iterations of the statute of limitations which followed, particularly the Trustee Act 1888 (in s 8) and the Limitation Act 1980 (in s 36).[34] This tacit preservation of the 'no side-stepping rule' accounts for its continued relevance notwithstanding the fusion of law and equity.

Conversely, claims to recover trust property and for breach of trust, which historically fell within the exclusive jurisdiction of equity (*ie,* claims which were recognised only in a court of equity),[35] were treated differently. No fixed limitation period on such claims existed at all.[36] But because of the potential for such a hard-and-fast rule of indefinite liability to produce overly harsh results for innocent and honest trustees involved in breaches of trust, s 8 of the Trustee Act 1888 — in addition to preserving the status quo as discussed above — also served essentially to carve out an exception for such honest trustees, and nothing more.[37]

Analysed through this historical lens, would the claim for the secret profit have been within equity's concurrent or exclusive jurisdiction? One could glean from Lord Hoffmann's judgment an appreciation that the claim would have come within the former. For one thing, Lord Hoffmann's characterisation of the non-consensual constructive trust as arising in response to what "was in essence a proprietary claim, analogous to a common law action to recover property"[38] is suggestive of an understanding that the underlying facts which gave rise to such a claim sounded in both common law and equity. This understanding is reinforced later in his judgment where, having set out the historical context, Lord Hoffmann concluded that there was a "settled understanding that constructive trustees already had such protection by analogy with claims to property at common law".[39]

Further, it is trite that bribes and secret commissions[40] may bring about "distinct remedies at common law that run in parallel with the remedies available for breach of fiduciary duty in equity",[41] which would reinforce the engagement of the concurrent jurisdiction. One such common law remedy, as between principal and agent, recognisably lies in a claim to recover the value of the bribe as (to use the archaic expression) 'money had and received'.[42] An example is *Morison v Thompson*, in which the claim brought by the purchaser-principal against its agent to recover a bribe received from the vendor was one for money had and received. There, Cockburn CJ

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33 Swadling, *supra* note 27 at 323–324; *Lockey v Lockey* (1719) Prec Ch 518, 24 ER 232; *Knox v Gye* (1871–1872) LR 5 HL 656 at 674.

34 Swadling, *supra* note 27 at 331–335.

35 Browne, *Ashburner's Principles of Equity*, *supra* note 32 at 3–4.

36 Swadling, *supra* note 27 at 321–322.

37 *Paragon Finance*, *supra* note 2 at 410D; *Williams*, *supra* note 1 at [22].

38 *Hui*, *supra* note 6 at [16].

39 *Ibid* at [18].

40 Whether one is concerned with bribes and secret commissions, or unauthorised profits more generally, there is no principled distinction in their treatment. Indeed, the effect of the Supreme Court's decision in *FHR* was to recognise that bribes and secret commissions were properly regarded 'as a subset of unauthorised profits': see *Hopcraft v Close Brothers Ltd* [2025] 3 WLR 423 at [71].

41 Jordan English, "Bribery and secret commissions: a common law-equity divide?" [2025] LMCLQ 158 at 163, citing *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 at 660.

42 *Ibid*; see also the Hon William Gummow AC, "Bribes and constructive trusts" (2015) 131 Law Q Rev 21 at 22.

appreciated that the agent, in addition to being "compelled to account in equity", owed "at the same time…a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands…to pay over the amount as money absolutely belonging to his [principal]".[43] Importantly, *Morison* was cited in *FHR* as authority to illustrate that "[t]he common law courts were meanwhile taking the same view" as the courts of equity in recognising that the fiduciary "held the commission for the benefit of his principal…in common law just as he would have done in equity".[44] That the principal may derive a proprietary claim in equity in respect of the secret profit does not detract from the existence of a corresponding common law remedy for the same, which provides a sufficient explanation for the application, by analogy, of a statutory limitation period.

Of course, this Note's central argument that the availability of a limitation defence to constructive trustees should depend on whether the claim would belong to the exclusive or concurrent jurisdiction is not without its critics. In *Cia de Seguros v Heath (REBX) Ltd*, Waller LJ rejected an argument similar to that made in this Note and determined that "the question whether equity was exercising its exclusive as opposed to its concurrent jurisdiction does *not* supply the definitive answer as to whether equity applied the statute by analogy".[45] In reaching this view, Waller LJ considered that there were examples where a limitation period had been applied by analogy even where equity was employing its exclusive jurisdiction.[46] His opinion in this regard was shaped by a passage from *Equitable Remedies*,[47] in which Spry asserted in 1997 that "a statute of limitations may be raised by analogy in defence to a claim that is brought in the exclusive jurisdiction of a court of equity, such as in proceedings for the enforcement of a trust, rather than in its auxiliary or concurrent jurisdictions".[48]

This passage was, however, stripped of important context. Because Spry took the application of a limitation period by analogy to be a feature of equity's exclusive jurisdiction, he was compelled, as a consequence, to treat the constructive trust impressed on a knowing recipient as likewise being a product of the exclusive jurisdiction.[49] Noting that the constructive trust so arising would be classified as a 'category 2',[50] the position adopted in *Equitable Remedies* seems to sit uncomfortably with the observations made in *Paragon Finance*. As Millett LJ there made clear, the 'category 2' constructive trust "arose in the exercise of [equity's] concurrent jurisdiction. That is why the statute was applied by analogy".[51] Unless Millett LJ was wrong, the view in *Cia de Seguros* should be approached with caution.

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43 *Morison v Thompson* (1874) LR 9 QBD 480 at 486; see also *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339 at 367–368 per Bowen LJ.

44 *FHR*, *supra* note 7 at [17].

45 *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2001] 1 WLR 112 at 122 (CA, UK).

46 *Ibid* at 121–122.

47 *Ibid* at 120–121.

48 Ian Spry, *Equitable Remedies,* 5th ed (Australia: Thomson Reuters, 1997) at 419–420. This passage has been retained in near-identical terms in the latest edition of the text, Ian Spry, *Equitable Remedies*, 9th ed (Australia: Thomson Reuters, 2013) at 434–435 [Spry, *Equitable Remedies* (9th ed)].

49 Spry, *Equitable Remedies* (9th ed), *supra* note 48 at 435.

50 *Williams*, *supra* note 1 at [9] (Lord Sumption) and [57]–[64] (Lord Neuberger).

51 *Paragon Finance*, *supra* note 2 at 409J–410C.

A historical approach of the sort discussed above should therefore readily supply the explanation for why the constructive trust arising in *Hui* was one which attracted a limitation period. In recent years, however, the authorities and academic commentaries have often sidelined the importance of history in favour of discussions, drawing selectively on the influential reasoning of Millett LJ in *Paragon Finance*, as to whether the constructive trust arising should be classified as a 'true trust' or 'remedial formula'.[52]

This distinction has invited the ingenious argument, based primarily on *FHR,* to bring an agent who holds bribes or secret profits as constructive trustee within the scope of 'category 1'. In *Hotel Portfolio II UK Ltd (in liquidation) v Ruhan*, for example, Newey LJ in the English Court of Appeal had called for a 'reassessment' of the analysis in *Gwembe Valley* in light of *FHR*, suggesting that 'a compelling argument' could be made that the company director who personally made an undisclosed profit was subject to a 'true trust'.[53] Without referencing Newey LJ's remark, this was precisely how P presented his case before the HKCFA. On the academic front, Televantos had argued that so long as a fiduciary "owes ongoing duties to account", he should be treated as a true trustee for limitation purposes, whether or not he assumes those duties consensually.[54]

Unfortunately, far too much emphasis has been placed on the terms 'true trust' and 'remedial formula', when the distinction was really nothing more than 'extended *obiter dictum*'.[55] The mistake is therefore in treating terms which are essentially modern placeholders as functioning elements of some test to be applied, the effect of which is to overlook the fact that they were merely extensions of the historical analysis. There is, in other words, a tendency to erroneously pluck *Paragon Finance*'s 'category 1' and 'category 2' constructive trusts from their historical roots, losing sight of the reality that the jurisdictions of equity discussed above are part and parcel of Millett LJ's exposition.[56] As Millett LJ explained:

> Before 1890 constructive trusts of the first kind were treated in the same way as express trusts and were often confusingly described as such; claims against the trustee were not barred by the passage of time. Constructive trusts of the second kind however were treated differently. They were not in reality trusts at all, but merely a remedial mechanism by which equity gave relief for fraud. The Court of Chancery, which applied the statutes of limitation by analogy was not misled by its own terminology; it gave effect to the reality of the situation by applying the statute to the fraud which gave rise to the defendant's liability…*[W]hile the first kind of constructive trust was a creature of equity's exclusive jurisdiction the second arose in the exercise of its concurrent jurisdiction. That is why the statute was applied by analogy*. (emphasis added).[57]

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[52] *Ibid* at 409.

[53] *Hotel Portfolio II UK Ltd (In Liquidation) and another v Ruhan and others* [2024] 2 All ER 903 at [39] (CA, UK).

[54] Andreas Televantos, "Trusts, limitation periods, and unauthorised gains" (2020) (4) Conv 330 at 342–343.

[55] *Williams*, *supra* note 1 at [28].

[56] See, *eg*, *Gwembe Valley Development Company Ltd and another v Koshy and others* [2003] All ER (D) 465 (Jul) at [92] (CA, UK).

[57] *Paragon Finance*, *supra* note 2 at 409J–410C.

The object of this part of the Note has been to defend the result in *Hui* through a more rigorous appeal to the historical perspective than that proffered by Lord Hoffmann himself. Since *Hui*, the UK Supreme Court has decided two appeals — *Recovery Partners GP Ltd v Rukhadze*[58] and *Stevens v Hotel Portfolio II UK Ltd (in liquidation)*[59] — which touch upon the issue covered in Lord Hoffmann's judgment. Neither decision realistically calls into question the correctness of the outcome in *Hui*. In *Rukhadze*, giving a judgment concurring with the lead judgment of Lord Briggs JSC, Lord Leggatt JSC cautioned against overlooking the fact that the constructive trust over unauthorised gains was a fiction and a remedial formula, distinct from a consensual trust. In so doing, Lord Leggatt JSC explicitly endorsed and maintained Lord Hoffmann's conceptualisation of the non-consensual constructive trust instigated by wrongdoing.[60] Although no express mention was made of Lord Hoffmann's reasoning in *Stevens v Hotel Portfolio II UK Ltd (in liquidation)*, the Supreme Court nevertheless authoritatively clarified that the distinction drawn in *Paragon Finance* was consequential only "for the running of time under the Limitation Acts", and did not impact the 'reality' of the constructive trust as an institutional trust, and vice versa.[61]

Properly understood, *Hui*, *Rukhadze* and *Stevens* are in fact complementary and collectively delineate a dividing line between the 'true trust' / 'remedial formula' dichotomy on the one hand, and the 'institutional' / 'remedial' division on the other. This trilogy of cases highlights that the classification of constructive trusts into 'category 1' and 'category 2' does not directly map onto the distinction between institutional and remedial constructive trusts. In other words, while the constructive trust of unauthorised profits is referred to as a remedial formula for the purpose of limitation, that does not render it remedial in the sense debated in the context of institutional versus remedial constructive trusts. Within the latter debate, and insofar as liability is concerned, the non-consensual constructive trust contemplated by Lord Hoffmann must be, for all intents and purposes, institutional: indeed, he unequivocally denied the suggestion that the courts are exercising a discretion in recognising the trust, as would be the case if it were properly remedial.[62] What the foregoing discussion does, more than anything, is bring into sharp focus the potential for confusion inherent in the current taxonomy between a 'true trust' and 'remedial formula' in the limitation context, especially when considered without proper regard to historical perspective.

V. The Section 20(2) Point

In practical terms, it would make no difference whether the limitation period in *Hui* was derived by analogy or directly from s 20(2) of the Ordinance: the claim would be time-barred in either case. But it was conceptually unsatisfactory for

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58 *Recovery Partners GP Ltd and another v Rukhadze and others* [2025] 2 WLR 529 (SC, UK) [*Rukhadze*].

59 *Stevens v Hotel Portfolio II UK Ltd (In Liquidation) and another* [2025] 3 WLR 293 (SC, UK) [*Stevens v Hotel Portfolio II*].

60 *Rukhadze*, *supra* note 58 at [233]–[235].

61 *Stevens v Hotel Portfolio II*, *supra* note 59 at [30].

62 *Hui*, *supra* note 6 at [33]; see also *Rukhadze*, *supra* note 58 at [23] per Lord Briggs.

Lord Hoffmann to dispose of the issue in the way that he did, given the implications for the true construction of s 20(2), to which there can only be one answer.

As noted, there are two strands to Lord Hoffmann's equivocal response. One is that P's claim to the dry shares was limitable directly through s 20(2). The difficulty with Lord Hoffmann's 'less antiquarian' suggestion is that it would (as was the case here) attract the argument that, if D could not be a trustee within s 20(1)(b), he could not then be a trustee under s 20(2).[63] Indeed, the lack of a detailed explanation by Lord Hoffmann beyond the remark "so be it" failed to seriously consider the well-established principle of statutory construction that the same word should presumably bear the same meaning within the same legislative scheme (and more so within the same provision).[64]

The preferable response — which was only signposted by Lord Hoffmann — was that the limitation period arose not from s 20(2), but rather by analogy. On its face, s 20(2) would appear to create a fixed limitation period for all trust claims which do not fall within the exceptions in s 20(1). However, when s 20 is examined against its legislative history, it should become apparent that the ostensible generality of s 20(2) ought not to be taken at face value. Being the counterpart of s 21(3) of the Limitation Act 1980, s 20(2) of the Limitation Ordinance "was in substantially the same terms as"[65] s 19(2) of the Limitation Act 1939 which, in turn, was derived from s 8(1)(b) of the Trustee Act 1888. As explored above, what s 8(1)(b) did was simply carve out an exception for honest and innocent (consensual) trustees by statutorily allowing time to run in their favour. These were the trustees that s 8(1)(b) of the Trustee Act 1888 was intended to cover. This position remained unchanged when the successor provision — s 19 of the Limitation Act 1939 — came into force, which (other than having "reversed the order of ideas") did nothing to substantially alter the state of things.[66] When the scope of s 20(2) is delineated with this historical context in mind, the comment by Lord Hoffmann that "the whole of section 8 did not apply to category 2 constructive trustees" should be readily explicable.[67] And had Lord Hoffmann limited himself to that response, his conclusion on what he termed the s 20(2) point would have been uncontroversial.

VI. Conclusion

This area of law has so often been obscured by abstract juridical analysis focused on whether the nature of the device arising is a 'true trust' as opposed to a mere 'remedial formula', absent a proper regard to the historical perspective. Despite leaving gaps to be filled, *Hui* should be commended for refocusing the application of limitation periods to constructive trusts towards an analysis anchored in the historical roots of the limitation statute. That said, the reasoning in *Hui* was found wanting in its handling of the source of the limitation period arising on the facts. Rather than

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63 *Hui*, *supra* note 6 at [36].

64 See, *eg*, *R v Islam (Samsul)* [2009] 1 AC 1076 at [23] (HL, UK).

65 *Williams*, *supra* note 1 at [25].

66 *Ibid*.

67 *Hui*, *supra* note 6 at [37].

suggesting that the limitation period applicable could have arisen directly under s 20(2), it would have been desirable for Lord Hoffmann to clarify that the limitation period simply arose by analogy. Approaching the s 20(2) point in this way would have offered greater consistency with both the central thesis of this Note and the historical scope of s 20(2).