# Can directors trust(ee) prescription periods to save them?

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In a case that has interesting parallels for Guernsey, the Supreme Court of England and Wales recently released a judgment in the matter of *Burnden Holdings (UK) Limited v Fielding*.

This case looks at the inability of directors to rely on limitation periods when company property is converted to their own use.

The background to the matter is pretty unassuming. Burnden Holdings (UK) Limited was a holding company with a number of trading subsidiaries operating in two areas of business:

- the supply and construction of conservatories; and
- a combined heat and power business - operated through its subsidiary Vital Limited.

The defendants were both the directors and the shareholders of Burnden.

In 2007 Scottish & Southern Electrical (SSE) offered to purchase a 30% shareholding in Vital, on condition that there was a complete separation of Vital from the existing conservatory business.

In order to separate out Vital, the defendants created an additional holding company (in which they each held the same shareholding as in Burnden) and embarked upon a series of corporate transactions. The transactions included the distribution of the shares in Vital by Burnden.

The purpose of the transactions was to place Vital's shares into the new holding company to effect a separation of the conservatory business and the heat and power business.

Following the separation, SSE purchased a 30% shareholding in the new holding company for £6million.

In 2009, Burnden went into liquidation. The liquidators of Burnden claimed that the distribution of the shares in Vital away from Burnden constituted a breach of the directors' fiduciary and statutory duties.

The limitation period for the claims brought by the liquidators in England is usually six years.

The liquidators issued proceedings six years and three days after the distribution. Therefore, unless the liquidators could rely on an exception to the rule, they were out of time and the directors had a time bar defence to those claims.

The liquidators sought to rely on a provision within the Limitation Act 1980 which states:

*"No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action …to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use)."*

The liquidators argued that:

- the directors of Burnden were the 'trustee' in this instance as they are entrusted with the stewardship of Burnden's property;
- Burnden should be treated as the beneficiary.
- whilst the shares in Vital were transferred to a new holding company, the shareholding of the new company was exactly the same as Burnden.
- Therefore, assuming that the distribution was unlawful, whilst the shares in Vital were never held directly by the directors/ shareholders, the Court was prepared

to find that the shares in Vital had been received and "*converted to their use*" by the directors.

The Supreme Court agreed with the liquidator's argument and accordingly held that the directors could not rely on the usual limitation period and no limitation period applies to the liquidators' claim if the payments are found to be unlawful.

As the Royal Court judgment in the matter of *Carlyle Capital* recently confirmed, Guernsey company law looks to English law when considering such issues and a Supreme Court judgment, whilst not binding, would be persuasive.

Additionally, in the Trusts (Guernsey) Law 2007, the exception provision follows closely the wording of that opined on by the Supreme Court.

It would therefore appear where director-owners are restructuring company holdings, it should be carried out with caution because, if any of those distributions are declared unlawful, there does not appear to be any time limit on when the company can seek their return.

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