[2003–04 Gib LR 507]

I. BENOLIEL and A. BENOLIEL v. M. F. BENOLIEL (as Trustee of the Fortuna Trust)

COURT OF APPEAL (Glidewell, P., Stuart-Smith and Otton, JJ.A.): November 9th, 2004

Trusts—constructive trusts—common intention—common intention constructive trust may arise if promise to convey interest in property made by person with power to do so—no common intention if both parties aware that promisor not owner—promise by company director to transfer company-owned property may give rise to no more than simple contract

Limitation of Actions—trust actions—constructive trust—knowing receipt—limitation for action based on knowing receipt of trust property 6 years—period not extended by s.26(1)(b) of Limitation Ordinance as no "trust" within meaning of sub-section, but only circumstances justifying other equitable relief

Civil Procedure—pleading—striking out—may strike out action as abuse of process if attempts to re-litigate issues raised in previous proceedings, even if those proceedings stayed, not decided—more appropriate to apply to lift stay

The appellants brought proceedings in the Supreme Court claiming the leasehold interest in a property and the first appellant also sought a declaration that a transfer of shares from him to the respondent was void.

The first appellant (Isaac) had been working abroad but returned to Gibraltar to join the family business. In 1991 he decided to go abroad again but changed his mind when his father, David, promised to give him a leasehold interest in property if he stayed in Gibraltar. Isaac set up business in the property in 1992. David repeated his promise on subsequent occasions between August 1993 and his death on November 25th, 1994. The property had been leased to Benoliel Holdings Ltd., a family-owned company in which David and his wife, Mazaltob (the respondent), held an equal number of voting shares, the remaining non-voting shares being held equally by their 5 children, including Isaac. On November 3rd, 1994 the lease was assigned to another family-owned company, Benoliel Properties Ltd., of which David and Mazaltob were directors.

Shortly before David's death, Mazaltob asked Isaac to go to Hassans to sign a document. He went on November 16th, 1994 and was assured on

the telephone by Mr. James Levy of Hassans, the family's business adviser, that the purpose of the document was to save estate duty on David's death, as previously discussed. In fact the document, which Isaac signed without reading, was a transfer of his 720 shares in Holdings to Mazaltob as trustee of the Fortuna Settlement, a discretionary trust. Isaac only became aware of this when informed by his lawyers in October 1996.

Isaac and his wife, Ahuva, the second appellant, commenced the present proceedings on August 28th, 2002, on the basis that since David's promise regarding the property was effectively that of Holdings, the subsequent assignment to Properties made that company a constructive trustee and thus it should be added as a defendant in the property claim. Isaac further claimed that Mazaltob had converted the shares to her own use and that the share transfer was void. He also sought leave to amend the claim to the effect that on transfer of the shares, Mazaltob, as David's successor, became a constructive trustee of them on behalf of Isaac.

The Supreme Court (Pizzarello, A.J.) gave summary judgment for Mazaltob on the property claim and refused leave to add Properties as a defendant since the proposed constructive trust claim was barred by s.4(1)(a) of the Limitation Ordinance. However, he allowed the amendment to assert that Mazaltob was a constructive trustee of the shares for Isaac.

On appeal against the judgment in relation to the property, Isaac sought to re-amend the claim to base the constructive trust of the property on promissory estoppel in order to exempt it from the limitation period and to add various allegations regarding the share transaction. He submitted that (a) David's promise to convey the property to Isaac and his reliance on that promise gave rise to a constructive trust based on their common intention and/or promissory estoppel; (b) this trust was binding on Properties because they had notice of it at the time the property was assigned to them by Holdings; (c) Isaac was induced to sign the share transfer by Mr. Levy's misrepresentation and Mazaltob became a constructive trustee of the shares on behalf of Isaac since he had gone to sign the document at Hassans at her request; (d) Mr. Levy's position as legal adviser and friend of the family raised a presumption of undue influence which, if not rebutted, enabled the setting aside of the share transaction; (e) Mr. Levy was fraudulent in that he knowingly made a false representation as to the nature of the document to be signed; (f) he was also acting as Mazaltob's agent both in exerting undue influence and making a false representation; (g) alternatively, the relationship of trust and confidence that existed between Mazaltob and Isaac gave rise to the presumption that she herself had exerted undue influence on him.

Mazaltob cross-appealed against the amendment allowing Isaac to rely on a constructive trust of the shares and alleged that the proceedings were an abuse of process because the same issues had previously been raised in an action that had been stayed for want of prosecution. She submitted in reply and on cross-appeal that (a) no constructive trust arose based on

common intention because the promise to convey the property was not made by a person entitled to make it, since the property was not owned by David but by Holdings; (b) in any case, any constructive trust which might have arisen in respect of Properties would be by virtue of its knowing receipt of trust property and as such would be subject to the ordinary six-year limitation period; (c) Mazaltob could not be a constructive trustee of the shares through the actions of Mr. Levy, since even if Isaac had been induced to enter into the share transaction by Mr. Levy's misrepresentation, this could not bind Mazaltob as he was not her agent; (d) nor was he her agent in exerting any undue influence; (e) the allegation of fraud was not based on the same or substantially the same facts as previously pleaded; (f) the claim that Mr. Levy was Mazaltob's agent was inconsistent with facts previously alleged; (g) so too was the contention that Mazaltob had exerted undue influence and moreover, these attempts to raise issues inconsistent with previous pleadings were barred by the Civil Procedure Rules, r.17.4(2); and (h) furthermore, the present proceedings should be struck out as an abuse of process because they were an attempt to re-litigate issues raised in the previous stayed proceedings.

Held, dismissing the appeal, allowing the cross-appeal and refusing permission to re-amend the particulars of claim:

(1) A constructive trust of the property based on common intention did not arise because both Isaac and David knew that David did not own it. Similarly, the claim based on promissory estoppel could not succeed since both parties knew that David was not entitled to make the promise relied on. David's promise was not the promise of Holdings, the owner of the property, since it was not permissible to blur the distinction between the two and as a company director David was not entitled to dispose of company property except for the purposes and interests of the company. The promise did not give rise to more than a simple contract, which was subject to the six-year limitation period in s.4(1)(a) of the Limitation Ordinance and thus statute barred. Even if a constructive trust had been created, this would have been a knowing receipt constructive trust that arose as a direct consequence of Properties' wrongdoing in taking the property with knowledge of Isaac's equity. This did not fall within the exception to the six-year limitation period provided by s.26(1)(b) of the Ordinance because it was not a "trust" within the meaning of this sub-section (because it only involved circumstances justifying other equitable relief). Therefore this claim would also be statute barred (para. 16; paras. 19–23; para. 31).

(2) There was no constructive trust of the shares as Mr. Levy was not Mazaltob's agent. The share transaction, if entered into as a result of Mr. Levy's misrepresentation, could only be set aside as against Mazaltob if it were shown that he was acting as agent for her. The same would apply had the transaction been affected by fraud or undue influence (paras. 26–28).

(3) Permission to amend the particulars of claim would be refused. It could not be said that the fraud allegation was based on "substantially the same facts," within the meaning of the Civil Procedure Rules, r.17.4(2), as the previous allegation of undue influence, because abuse of a position of trust and confidence was not substantially the same as dishonestly making a false statement with intent to deceive. The allegations that Mr. Levy was Mazaltob's agent and that she had exerted undue influence were inconsistent with previous pleadings and also barred by r.17.4(2). In any case, actions based on undue influence, although exempt from the limitation period, were subject to the doctrine of laches and if pleaded this defence was likely to succeed, as the claim was based on events that took place in 1994 (para. 30; paras. 32–38).

(4) The proceedings would be struck out as an abuse of process because the issues had been raised in a previous action. In such cases, no distinction was to be made between those cases in which that action had itself been struck out as an abuse of process and those in which it had merely been stayed. The proper course of action was to apply to lift the stay under the Civil Procedure Rules, r.51.19(2), rather than attempt to evade those provisions by starting fresh proceedings (paras. 46–49).

Cases cited:

(1) *Frawley* v. *Neill*, [2000] C.P. Rep. 20; (1999), 143 Sol. Jo. (L.B.) 98, applied.

(2) *J.J. Harrison (Properties) Ltd.* v. *Harrison*, [2002] 1 BCLC 162; [2002] BCC 729; [2001] EWCA Civ. 1467, applied.

(3) *Paragon Fin. plc* v. *D.B. Thakerar & Co.*, [1999] 1 All E.R. 400; (1998), 142 Sol. Jo. (L.B.) 243, applied.

(4) *Salomon* v. *A. Salomon & Co. Ltd.*, [1897] A.C. 22; [1895–9] All E.R. Rep. 33, applied.

(5) *Securum Fin. Ltd.* v. *Ashton*, [2001] 1 Ch. 291, followed.

(6) *Sweetman* v. *Shepherd*, [2000] C.P. Rep. 56; [2000] C.P.L.R. 378; (2000), 144 Sol. Jo. (L.B.) 159, applied.

Legislation construed:

Limitation Ordinance (1984 Edition), s.4: The relevant terms of this section are set out at para. 21.

s.26: The relevant terms of this section are set out at para. 22.

s.32: "Where, in the case of any action for which a period of limitation is prescribed by this Ordinance, either—

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

. . .

the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . ."

Civil Procedure Rules (S.I. 1998/3132), r.17.4(2): The relevant terms of this paragraph are set out at para. 30.

r.51.19: "(1) If any existing proceedings have not come before a judge, at a hearing or on paper, between 26 April 1999 and 25 April 2000, those proceedings shall be stayed.

(2) Any party to those proceedings may apply for the stay to be lifted."

D. Hood for the appellants;
D. Feetham for the respondent.

1 **GLIDEWELL, P.:** I have read in draft the judgment of Stuart-Smith, J.A. with which I agree in every respect. I note in particular that the last section of his judgment, which deals with the abuse of process argument, applies to both parts of the appellants' claim, and is thus relevant to both the appeal and the cross-appeal.

2 For the reasons set out in that judgment, the appeal is dismissed, the cross-appeal is allowed and leave to re-amend the particulars of claim is refused. We enter judgment for the defendant on both parts of the claimant's claim.

3 **STUART-SMITH, J.A.:**

Introduction

This is an appeal and cross-appeal against parts of an order made by Pizzarello, A.J. on March 2nd, 2004 in which—

(a) he refused the appellants leave to add Benoliel Properties Ltd. as a defendant in the proceedings on the basis that the proposed constructive trust claim in respect of a property at 3 Casemates Square, Gibraltar was not within the provisions of s.26(1)(b) of the Limitation Ordinance and was therefore statute barred. He gave summary judgment in favour of the defendant on the property claim pursuant to CPR, Part 24. This part of the order is subject to the appeal; and

(b) he allowed the appellant permission to amend the particulars of claim by relying on a constructive trust claim in respect of 720 shares in Benoliel Holdings Ltd. which were transferred to the respondent as trustee of the Fortuna Trust on November 16th, 1994. The respondent cross-appeals against this part of the order.

4 Additionally, by her notice of cross-appeal, the respondent contends that the entire action should be struck out as an abuse of the process of the court on the ground that both claims were raised in previous proceedings between the same parties, namely in action 1996 B No. 222, which had been stayed pursuant to the automatic provisions of CPR, r.51.19. The judge does not appear to have dealt with this aspect of the respondent's claim for relief.

5 The claim in these proceedings was issued on August 28th, 2002. The claim was as follows:

> "I unknowingly this [*sic*] signed 720 non-voting shares into a discretionary trust on November 16th, 1994, I was informed of this by my lawyers Triay & Triay in October 1996. I claim that the share transfer is invalid. I never received any consideration for them. The share transfer is not a gift. It bears a stamp duty of £327.
>
> I also claim the property at 3 Casemates Square was promised to me by my father. I have been trading there since 1992. Both my wife and myself relied on this promise."

6 Particulars of claim running to some six pages were settled by the appellants who signed the statement of truth. A defence was served on September 18th, 2002. An application was made on September 20th, 2002 for an order that the proceedings be struck out as disclosing no reasonable cause of action, and/or as being frivolous vexations and an abuse of the process of the court; alternatively, for summary judgment under CPR, Part 24. After various adjournments, the defendant's application came before Pizzarello, A.J. in November 2003 and he gave a reserved judgment on March 2nd, 2004.

Background facts

7 At the time of his death Mr. David Benoliel was a successful businessman who was married to the respondent. There were five children of the marriage, namely Isaac (the first appellant), Abraham, Horabuena, Samuel and Raphael. David died on November 25th, 1994.

8 At the time of his death David was interested in a number of companies and trusts:

(a) Mazal Trust, said to be worth £1,800,000, managed by Cater Allen (Channel Islands) Ltd. in Jersey, of which the first appellant is a beneficiary.

(b) Holdings, incorporated on May 5th, 1976 with 4,000 shares at £1 each, divided into 400 voting shares held at all material times equally between David and the respondent. The remaining 3,600 shares, being non-voting shares, were held equally by the children, including the first appellant, each having 720 shares. Shortly before his death, these non-voting shares were transferred to David and the respondent as trustees of the Fortuna Settlement. Holdings owned Benoliel Traders Ltd.

(c) Traders was incorporated on November 11th, 1977 with 10,000 shares of £1 each. David and the respondent held one share each and were directors. The remaining shares were owned by Holdings.

(d) Properties was incorporated on October 24th, 1994, with 2,000 shares at £1 each, divided into 10 voting shares and 1,990 non-voting shares. The voting shares were held as to 1 by Holdings, 1 by Holdings and Line Nominees jointly and 8 by the respondent. The other 1,990 shares were held by the respondent as trustee for the Fortuna Settlement. The directors were David and the respondent.

(e) The Fortuna Settlement; this appears to be a discretionary trust of which the first appellant is a discretionary beneficiary, but he claims that he has received nothing from the trust.

(f) The property was owned by Casemates Development Ltd. and leased to Holdings for 99 years from October 1st, 1979 for £33,000. The lease was assigned to Properties on November 3rd, 1994 for £100,000.

9 The facts alleged by the appellants can be derived from the amended particulars of claim, settled by Mr. Neish, Q.C., and for which permission was granted by Pizzarello, A.J.

10 **The property claim**

(a) In 1971, at the age of 18, the first appellant went to London to learn hairdressing. Thereafter he went to Canada and worked as a hairdresser. In 1978, at David's request, he returned to Gibraltar, but later that year he went back to Canada. In 1979 he went to London. David arranged for him to go to Israel to study Jewish Law, which he did between 1979 and 1987, having in the meantime married in Canada the second appellant, who is Jewish and a Canadian citizen.

(b) In 1987 the appellant returned to Gibraltar and joined the family business. It was not a success and the respondent developed opposition to him; in 1991 the appellant decided to return to Canada. David confirmed that $2,000 a month would be paid to the first appellant from the Mazal Trust while the appellants were in Canada. But David was anxious for them to remain in Gibraltar and have a future in the family business. He told the first appellant that he would give him the property as a gift in his (David's) lifetime, if the appellant agreed to stay in Gibraltar. In the course of this conversation, David acknowledged that there was opposition from the respondent and the appellant's other siblings to the first appellant's participation in the business. David expressed the hope that the shop (the property) would be the appellant's proving ground for the business.

(c) The first appellant started to carry on business at the shop in February 1992 and has continued to do so. Shortly afterwards, David fell ill. In August 1993 the respondent shocked the first appellant with the threat that once David died he would have to pay rent for the shop and the flat. The first appellant confronted David about this. Initially, David tried

to deny that he had ever promised the first appellant the property of the shop. When the first appellant argued that David knew full well that he would never have stayed in Gibraltar without that condition, David admitted that it was the respondent who was pressuring him not to give the first appellant the shop or to allow him into the business.

(d) David added that being ill, vulnerable and dependent, he was in no position to argue with the respondent as this would cause him a great deal of suffering. He said that the respondent had been putting a lot of pressure on him and that whereas when he was strong and healthy he had been able to have things his own way, he now felt completely overwhelmed. The first appellant said that he and David had an agreement. However, when he saw the anguish which his insistence brought on David, rather than place him in a position in which he would need to confront the respondent, he said to him that he had wasted more than enough time and requested that he again gave him a letter from Cater Allen as he had done in 1991, assuring him of financial support and that he would go to Canada. Upon hearing this, David told the first appellant that he (the appellant) was too old to start a new life anywhere else and assured him that he would arrange matters to keep his promise.

(e) One evening during his illness, in the presence of the whole family, David said to the first appellant that he should sit next to him because he was his first-born son. He then said that he wanted the first appellant to continue his life's work, that he was going to give him the shop and the house and that he would be able to use the family estate to help him run the shop. The first appellant's brothers disagreed with the shop being the first appellant's and the respondent vehemently disagreed with this comment, to the extent that she did not even wish the first appellant to have the shop rent-free. David winked at the first appellant and smiled, having told the respondent to keep quiet. The respondent then took the first appellant to one side and said that David was not well and that he could forget about getting whatever David was saying. The appellants relied upon David's promises and his act of part performance in giving possession of the shop at no rent, and acted to their detriment remaining in Gibraltar when they would otherwise have returned to Canada.

(f) The first appellant, alternatively both appellants, claimed to have an equitable estate as owners of the lease of the property.

11 **The shares claim**

(a) Days before David's death, but after October 23rd, 1994, the first appellant was asked by the respondent to go to Messrs. J.A. Hassan & Partners with his brother, Abraham, to sign a document. It has been previously represented to the first appellant by Mr. James Levy of Messrs. J.A. Hassan & Partners, David's legal adviser, that subject to the

respondent's life interest, the first appellant would receive a one-fifth share of David's estate, and that he should cooperate with his parents by signing a document, which they requested him to sign as such document would be necessary as part of a scheme to save estate duty on David's death. Mr. Levy was at that time the Benoliel family/business legal adviser, family friend of the Benoliels and had been a special friend of the first appellant. The first appellant therefore had complete trust in Mr. Levy, relied upon him and never considered taking independent advice.

(b) The first appellant and his brother Abraham attended Hassans and, in Mr. Levy's absence, were seen by his colleague, Mr. J. Chincotta. The first appellant, on seeing that Mr. Levy was not present, refused to sign and asked to take the document with him. Mr. Chincotta told the first appellant that he had instructions from Mr. Levy that he should sign that day without fail. Mr. Chincotta then telephoned Mr. Levy and passed him to the first appellant, who asked him whether he should sign and whether the document which he was being asked to sign was the document they had spoken about to save estate duty. Mr. Levy told the first appellant that it was. The first appellant pointed out to Mr. Levy that his brother Samuel was refusing to sign but Mr. Levy told him that this was not a problem because insanity could be pleaded. In total reliance on this the first appellant signed the document without reading it.

(c) In fact David's will made no provision for the first appellant whatsoever, either in terms of his residuary estate, or in relation to the shop which David had given to him. The representations made by Mr. Levy were false in that by a will dated October 23rd, 1994 David had made the respondent the sole beneficiary. Further, the first appellant subsequently learnt that the document which he had signed was a share transfer of 720 non-voting shares in Holdings, such transfer being registered on November 21st, 1994, four days before David's death, in favour of the respondent as trustee of the Fortuna Settlement. Further, the first appellant was not paid any consideration for the share transfer, contrary to the allegations made subsequently by or on behalf of the respondent.

(d) It is contended that the respondent converted the shares to her own use as trustee of the Fortuna Settlement, and secondly, that the share transfers were void and the first appellant retains the legal and equitable title to the shares.

12 By her notice of application, the respondent contends that the claim has no reasonable grounds of success and that the claims are statute barred and that the proceedings are an abuse of the process of the court because the same claims were raised in earlier proceedings which are now stayed for want of prosecution.

The judge's judgment

13 As to the property claim, the judge appears to have held that it was arguable that David was the *alter ego* of Holdings; that Properties became a constructive trustee of the property; nevertheless it was the type of constructive trust to which the Limitation Ordinance, s.26(1)(b) did not apply, accordingly the ordinary six-year period was applicable. The judge then referred to the fact that the period could be extended by virtue of the provisions of s.32 of the Ordinance, although fraud or mistake had not been alleged in the pleadings or the claimant's statements. In any event, he held that the very latest date for the accrual of the cause of action was either David's death, since the promise was that they should have the property in his lifetime, or alternatively, when the respondent told the second appellant that she had a document written in David's hand confirming the gift. Both these dates were more than six years before the action brought. The judge refused permission to add Properties as the defendant and made the order which is as follows:

(1) That the defendant have judgment in respect of the claimant's claim regarding the shop at 3 Casemates Square, Gibraltar.

(2) That the second claimant cease to be a party to the action.

(3) That the first claimant do duly amend the claim form and the particulars of claim.

(4) The amended claim form and the particulars of claim be served upon the defendant within 14 days and filed with consequential leave for the defendant to file an amended defence within 21 days.

The last two parts of that order relate to the share transaction.

The share transaction

14 In para. 12 of his judgment, the judge considered when the appellant first became aware that he was signing the share transfer in the circumstances alleged and concluded that it was when Messrs. Triay & Triay told him about it in their letter of September 26th, 1996. In so doing, it appears that the judge must have been relying on s.32 of the Limitation Ordinance, though he does not say so in terms. He held that there was an arguable case that on the transfer, David and his successors held the shares on trust for the appellant, on the basis that when he put into effect a plan, ostensibly to save estate duty, he intended to use the shares for his own purposes. If he told the appellants nothing about it, from a position of owning shares worth a considerable amount, the appellant was left with nothing. This was achieved with the help of the respondent and David's lawyers. He held that the shares claim was not statute barred.

The appeal and the cross-appeal

15 In this court, Mr. Hood, who appeared for the appellants, made a number of new submissions which had not previously been pleaded or canvassed before the judge. He also made an application for permission to re-amend the particulars of claim and to amend the notice of appeal. It is convenient to consider the submissions which arise, first in relation to the property and then in relation to the shares. In so doing, I shall deal with the issues that arise both on the appeal and the cross-appeal. I shall then consider the appellants' application to re-amend the particulars of claim and amend the notice of appeal. Finally, I shall deal with the cross-appeal in relation to the striking out on the ground of abuse of process.

The property claim

16 It is common ground between the parties that for the purposes of the Limitation Ordinance and its English equivalent, the authorities draw a distinction between two types of constructive trusts. The first comprises those cases in which the defendant has assumed the duties of a trustee or fiduciary, doing so by a lawful transaction which is independent of, and precedes, any breach of trust complained of (*e.g.* where a defendant seeks to keep property for himself which he has agreed to buy for the claimant). The second comprises those cases in which the so-called trust obligation arises as the direct consequence of the unlawful transaction which the claimant impugns and in which the defendant is no more than a wrongdoer, for example where a defendant receives trust property knowing it to be in breach of trust. (See the analysis in the judgment of Millett, L.J. in *Paragon Fin. plc* v. *D.B. Thakerar & Co.* (3) ([1999] 1 All E.R. at 409).) In fact the latter kind are, strictly speaking, not trusts at all, but are circumstances in which equity will grant relief. The first type is referred to as a Class 1 type and the second as a Class 2 type. It is equally common ground that s.26(1)(b) of the Ordinance applies to Class 1 constructive trusts but not to Class 2 (see *Paragon Fin.* (3) and *J.J. Harrison (Properties) Ltd.* v. *Harrison* (2)).

17 Mr. Hood submits that the judge was in error in holding that the constructive trust that arose and bound Holdings was not one to which s.26(1)(b) of the Limitation Ordinance applied. He submitted that the relationship of trustee and *cestui que trust* arose when David promised the shop to the first appellant and the latter, in reliance upon the promise, stayed in Gibraltar. This is a case of promissory estoppel or a common intention constructive trust and was accordingly one of the Class 1 type of constructive trust described by Millett, L.J., to which no limitation applies.

18 This claim was never so formulated in the particulars of claim or the amended particulars of claim. Although it was apparently adumbrated in

Mr. Neish's skeleton argument, it appears to have made so little impact on the judge, if indeed it was argued, that he did not deal with it. It is not raised in the grounds of appeal, so that Mr. Hood had to seek permission to amend the notice of appeal and to re-amend the particulars of claim, both of which applications were opposed by Mr. Feetham, who appeared for the respondent.

19 Moreover, the submission depends upon the proposition that it is reasonably arguable that the promise by David was the promise of Holdings. The learned judge appears to have thought that this was arguable. He said that the question whether David was the *alter ego* of Holdings was a matter for resolution at trial.

20 By his notice of cross-appeal, Mr. Feetham challenges this proposition, he submits that it is simply not arguable that David's promise was effectively the promise of Holdings, the owner of the property. It is not permissible to blur the distinction between David and Holdings (see *Salomon* v. *A. Salomon & Co. Ltd.* (4)). David only held an equal number of voting shares with the respondent; the non-voting shares were held as to four-fifths by the first appellant's siblings. It cannot possibly be said that David so dominated the family that the distinction between him and the companies could be ignored. It is plain that the respondent and the first appellant's siblings throughout opposed the proposal to give the property to the first appellant, and did so vigorously. The judge referred to, and apparently relied upon, a statement by the second appellant, that the respondent told her that the shop was theirs at the time that they thought of leaving. This statement did appear in the original particulars of claim. But when the particulars of claims where amended, this part was omitted. In my judgment, it is not reasonably arguable, in the face of all the evidence to the contrary, that David's promise was effectively the promise of Holdings. To my mind, this is fatal to the appellants' case on the property claim. David was clearly not entitled to dispose of the company's property as he wished. The power to dispose of the company's property, conferred on the directors by the articles of association, must be exercised for the purposes and interest of the company (see *J.J. Harrison (Properties) Ltd.* v. *Harrison* (2)). At first this was a simple contract, consisting of a promise by David to procure the owner of the property to transfer it to the first appellant in consideration of the appellants' staying in Gibraltar. The cause of action accrued at the latest on David's death and is therefore statute barred.

21 If I am wrong, the appeal still faces a further hurdle on the merits. The property is now held by Properties. Mr. Hood submits that Properties is not a *bona fide* purchaser for value without notice of the trust binding on Holdings. Although consideration was given for the transfer, Properties had notice through David, who was a director of both

companies, of the appellants' equity. He submits that such a claim is not subject to the six-year limitation period. He relies upon s.4 of the Ordinance. This provides as follows:

> "(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—
>
> (a) actions founded on simple contract or on tort;
>
> . . .
>
> (7) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment repealed by this Ordinance has heretofore been applied."

22 In my judgment, Mr. Feetham is correct when he submitted that this sub-section is concerned with remedies and not causes of action. Limitation in relation to trust property is governed by s.26 of the Ordinance, which provides:

> "(1) No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds 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 six years from the date on which the right of action accrued."

23 It is, I think, now accepted by Mr. Hood, and if it is not I would hold, that any constructive trust that might affect Properties would be a "knowing receipt" type of constructive trust, and as such is a Class 2 type within Millett, L.J.'s analysis, and accordingly s.26(1)(b) does not apply. The ordinary limitation period is therefore six years and these proceedings were begun more than six years after the transfer to Properties. There is no question of fraud in relation to this claim; and it is not clear to me why the judge referred to s.32 of the Ordinance in this context. But in any event he did not purport to consider that s.32 afforded any extension on the period.

24 For these reasons in my judgment the appeal fails and the cross-appeal on this point succeeds.

The share transaction

25 The claim in relation to the shares is put in two ways:

(1) There was misrepresentation by Mr. Levy which induced the appellant to sign the transfer. This affects the conscience of the respondent so as to give rise to a constructive trust of the shares on behalf of the first appellant.

(2) Undue influence by Mr. Levy with the result that the transaction can be set aside.

The misrepresentation claim

26 It is now common ground between the parties that any constructive trust to bind the respondent is a Class 2 type of constructive trust. Therefore the statutory limitation has run since the date of the accrual of the cause of action, which occurred on the transfer of the shares. This period can only be extended if there is fraud, so that time runs from the discovery of the fraud, that is to say when the appellants were told of the transfer by Messrs. Triay & Triay in their letter of September 26th, 1996, which was less than six years before the issue of proceedings. This appears to be what the judge held, but he does not expressly refer to s.32 of the Ordinance in relation to the share transaction. But in my judgment, the judge was in error in so holding. It is now accepted by Mr. Hood, rightly in my view, that there was no plea of fraudulent misrepresentation by Mr. Levy and no plea that, in making such representations as he did, Mr. Levy was acting as agent for the respondent. Indeed, at the hearing before the judge, Mr. Neish, Q.C. expressly stated that he was not alleging fraud. Although it appears that the first appellant made some interjection, suggesting that he wished to allege fraud, Mr. Neish did not seek to withdraw the important concession that he had made. Moreover, while it is true that in the original particulars of claim it is alleged that Mr. Levy deceived the first appellant, this is not repeated in the amended particulars of claim. In any event, in the absence of a plea of agency, an allegation of fraud on the part of Mr. Levy would not affect the respondent. In my view, the pleading at best suggested professional negligence on the part of Mr. Levy. Subject to re-amendment of the particulars of claim, in my judgment this claim is unarguable and is statute barred.

Undue influence

27 While it is true that both the original particulars of claim and the amended particulars of claim alleged the facts which are said to give rise

to undue influence exercised by Mr. Levy (see para. 11(a) above), no such claim was ever formulated in those pleadings; it was not presented to the judge, who did not deal with it; it is not raised in the notice of appeal and appears for the first time in Mr. Hood's skeleton argument, served shortly before the hearing of the appeal.

28 Mr. Hood submitted that if Mr. Levy exerted undue influence on the first appellant, that affected the transaction and enabled the court to set aside the transaction, notwithstanding that Mr. Levy was not acting as the respondent's agent. I do not accept this submission. In my judgment, although an action might be brought against Mr. Levy for damages on the ground that the transaction was affected by his undue influence, that cannot affect the respondent in the absence of a plea of agency. Such a plea is now sought to be raised in the proposed re-amended particulars of claim. A cause of action for undue influence is not subject to limitation; but is subject to the doctrine of laches. In my judgment, in the absence of amendment, the cross-appeal in relation to the share transaction must succeed.

The application to re-amend the particulars of claim

29 Mr. Hood seeks permission to re-amend the particulars of claim in the following material respects:

(a) To introduce a claim that a constructive trust was created as the result of promissory estoppel.

(b) That the misrepresentations made by Mr. Levy which induced the first appellant to sign the transfer of the shares were false to the knowledge of Mr. Levy, an allegation of fraud.

(c) That in so making the representations he was acting as agent for the respondent.

(d) That the first appellant was induced to enter into the share transaction by the undue influence of Mr. Levy.

(e) That Mr. Levy was acting as agent for the respondent in exerting undue influence.

(f) Alternatively, the first appellant was induced to enter the transaction because he reposed trust and confidence in the respondent, and she exerted undue influence upon him. This allegation is made for the first time.

30 I turn to consider these proposed amendments. The court may not add a new claim in respect of which the limitation period has run, because the effect of amendment is to date back the claim to the issue of the original proceedings. CPR, r.17.4(2) provides an exception:

> "The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

31 The claim based on promissory estoppel. This claim does, in my view, arise out of the same facts as the claim already made, within the provisions of CPR, r.17.4(2). But quite apart from extreme delay and the fact that judgment on the claim has been entered, it does not assist the appellants, since, for the reasons I have already given, the claim against Holdings on the ground of promissory estoppel is not reasonably arguable, and any claim against Properties is statute barred (see paras. 19–23 above). I would therefore refuse permission to make the amendment; I would also refuse permission to amend the notice of appeal to raise this point.

32 The allegation that the misrepresentations made by Mr. Levy were fraudulent. It is well established that a cause of action based on fraudulent misrepresentation is different from one based on an innocent or negligent misrepresentation and is not based upon the same facts, the state of mind of the representor being materially different (see *Paragon Fin.* (3)). Mr. Hood accepts that this plea is not based on the same facts as previously pleaded; but he submits that it is based on "substantially the same facts," within the meaning of CPR, r.17.4(2), because there is an allegation of undue influence which involves unconscionable conduct on the part of Mr. Levy; that, he says, is substantially the same as fraud. I cannot agree. Abuse of a position of trust and confidence is not substantially the same as dishonestly making a false statement with intent to deceive.

33 The allegation that in making the representation Mr. Levy was acting as agent for the respondent. This is quite inconsistent with what had previously been pleaded (see para. 11(a) above). It is also inconsistent with the witness statement made by Mr. Levy, which was served in opposition to the application to re-amend, in which he states that he was acting on behalf of David, Holdings and Properties but not the respondent. Re-amendment does not therefore arise out of the same or substantially the same set of facts already alleged.

34 The allegation that the appellant was induced to enter into a transaction by the undue influence of Mr. Levy. Actions based on undue influence are not subject to limitation, but the defendant can plead the defence of laches. In exercising its discretion whether to permit an amendment such as this, the court should bear in mind the prospect of a defence of laches succeeding at trial. If it is likely that such a defence will succeed, the court may well refuse the application. The modern approach to the doctrine of laches was stated by Aldous, L.J. in *Frawley* v. *Neill*

(1). The test is whether "it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right." Ward and Swinton Thomas, L.JJ. agreed.

35 If the facts alleged to constitute undue influence were alleged for the first time in the particulars of claim in these proceedings, and repeated in the amended particulars of claim, I would not consider it unconscionable for the appellant to seek to raise the claim by way of re-amendment. But the fact is that they were not raised for the first time then. They were raised in precisely similar terms in the action 1996 B No. 222 and not pursued. I shall have to deal with this in more detail when I consider the application to strike out for abuse of process; but to my mind it would be open to Mr. Levy, if proceedings were brought against him, to contend that it would be unconscionable for the appellant to pursue the allegations based on facts which took place in 1994, when nothing had been done to pursue such a claim, although the appellants had been advised by more than one set of solicitors. Moreover, as against the respondent, without a plea of agency such an allegation is not sufficient to ground a cause of action. For these reasons I would refuse permission to make this amendment.

36 That in exercising undue influence over the first appellant Mr. Levy was acting as agent for the respondent. This allegation is inconsistent with the case as previously made and is not reasonably arguable. I would not therefore permit the re-amendment.

37 Likewise, the allegation that the respondent herself exercised undue influence over the appellant to obtain his signature to the share transfer is not only made for the first time in 10 years but is inconsistent with the fact hereto alleged. It is therefore not reasonably arguable.

38 For these reasons I would refuse permission for the proposed re-amendments of the particulars of claim.

Abuse of process

39 In proceeding 1996 B No. 222, against, amongst others, the respondent, the first appellant sought the following relief:

(1) An order that such reasonable provision as this Honourable Court thinks fit, be made out of the net estate of the deceased for the maintenance of the plaintiff.

(2) Such further or other relief as shall be just.

40 In his affidavit in support of the claim, in addition to matters that are solely relevant to the claim under the Inheritance (Provisions for Family and Dependants) Ordinance, the first appellant set out, almost word for word, the same allegations in relation to the property and the share

transactions claim as were made subsequently in the present proceedings. Paragraph 9.3 of that affidavit was as follows:

> "I submit that I have a claim in equity and under the Inheritance (Provisions for Family and Dependants) Ordinance on my father's estate either for capital payments in equity or for maintenance under the statute, and seek such order as the Court shall see fit".

41 The proceedings were served, in some cases out of the jurisdiction, on the first appellant's siblings, and appearances entered indicating an intention to defend. No particulars of claim were served and the proceedings were stayed under the provisions of CPR, r.51.19(1). No application has ever been made to remove the stay under r.51.19(2).

42 Mr. Feetham submits that the present proceedings are an abuse of the process of the court because they are an attempt to re-litigate the same issues which were or could have been subject to earlier proceedings, without applying to lift the stay; he further submits that if the first appellant applied to lift the stay it would be refused because of the inexcusable and inordinate delay. The judge did not deal with this submission.

43 The proper approach of the court in cases where an application is made pursuant to CPR, r.3.4 to strike out proceedings as an abuse of the process of the court on the basis that it is an attempt to re-litigate issues raised in previous proceedings has been considered in two recent decisions of the English Court of Appeal. In *Sweetman* v. *Shepherd* (6), Kennedy, L.J. giving the judgment of the court consisting of himself and May, L.J. said ([2000] C.P. Rep. 56, at paras. 8–9):

> "8. General Approach
>
> Leaving aside for the moment the possibility of conditions—a possibility which can only arise if the appeal succeeds—it seems to us that there are two basic, but potentially related, legal propositions which arise for consideration in this case, namely:
>
> (1) that in general a party should not be allowed to re-litigate issues which have already been decided by a court of competent jurisdiction:
>
> (2) that where a matter becomes the subject of litigation parties to that litigation must bring forward their whole case (*Henderson v Henderson* [1843] 3 Hare 100).
>
> . . .
>
> 9. Re-litigation
>
> It is not necessarily but may be an abuse of the process for a party to seek to re-litigate an issue which has been decided against him in

earlier litigation to which he was a party. The authorities indicate that everything depends on the circumstances."

44 In *Securum Fin. Ltd.* v. *Ashton* (5), a bank's proceedings against a debtor for repayment of a loan, and against two guarantors of the loan, a husband and wife who had granted the bank a legal charge over their property, were struck out for want of prosecution. A year later the plaintiff, as the bank's assignee, brought a second action against the defendant guarantors claiming to enforce the bank's rights to payment under the legal charge and to enforce its security by orders of possession and sale of the mortgage property. On the defendant's application to strike out the claim as an abuse of process, the Court of Appeal, consisting of Chadwick, L.J. and Rattee, J., held that the claim to payment involved re-litigating an issue raised in the earlier proceedings and as such was an abuse of process, but that the claims to enforce the security under the legal charge, which were not (and did not need to be) raised in the earlier proceedings, could not be so categorized.

45 Chadwick, L.J. said ([2001] 1 Ch. 291, at para. 34):

"From my part, I think that the time has come for this court to hold that the 'change of culture' which has taken place in the last three years—and, in particular, the advent of the Civil Procedure Rules—has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have 'a second bite at the cherry' outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the *Arbuthnot Latham* case [1998] 1 WLR 1426, 1436–1437:

> 'The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris* [1981] 1 WLR 1389. The position is the same as it is under the first limb of *Birkett v James.* In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.'"

46 Mr. Hood submits that there is a distinction between a case such as the *Securum Fin.* (5) case where the previous proceedings have been struck out as themselves an abuse of process on the grounds of delay and prejudice and a case such as the present where the previous action is merely stayed under the automatic provisions of CPR, Part 51. No case has been put before the court where the previous proceedings have been stayed as opposed to struck out. Mr. Hood submits therefore that no consideration has been given to the question of inordinate and inexcusable delay or prejudice and therefore the proceedings should not be struck out.

47 But in my judgment the considerations are the same. The court must have regard, when considering the overriding objective, to dealing with the case expeditiously and fairly and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases (see CPR, r.1.1). It is clearly the purpose of CPR, r.51.19 that stale claims which are not prosecuted should be stayed and only allowed to proceed if application is made to lift the stay. It is not a proper use of the court's resources or dealing justly with the case to allow the provisions of r.51.19 to be evaded by starting fresh proceedings. If the claims are viable the proper course is to apply to lift the stay. The defendant can then, if so advised, apply to strike out the action for want of prosecution and abuse of process. On such an application consideration can be given to any excuses for the delay, to balance of prejudice and whether the delay is such as in any event it is no longer possible to have a fair trial.

48 Mr. Hood submitted that the focus of the previous proceedings was on provision out of the estate under the Inheritance (Provisions for Family and Dependants) Ordinance, and not the property and share transaction claims. But these claims are relevant to the inheritance provision claim in as much as if they were valid, they would affect any entitlement to such provision. Moreover, as Mr. Hood was inclined to accept, a claim by a 44 year old son to provision out of the estate does not at first sight seem a very robust one. There was nothing to stop the appellant from making the claims for the property and in respect of the shares the focus of the application, and the relief sought was wide enough to embrace such claims.

49 In my judgment, the proper course in a case such as this is for the subsequent proceedings to be struck out as an abuse of process, leaving it to the claimant, in an appropriate case, to apply to lift the stay. I say in an appropriate case because in my judgment this is not an appropriate case. The property claim, quite apart from any question of limitation, is bound to founder on the basis that the promise was not made by Holdings (see para. 20 above). Without amendment, which it is now too late to make,

the claim on the share transaction based on misrepresentation by Mr. Levy is bound to fail in the absence of a plea of fraud and agency which is inconsistent with the case so far presented. The case on undue influence is equally bound to fail in the absence of a plea of agency and any amendment would not be permitted having regard to the likely defence of laches. For these reasons in my judgment the present proceedings should be struck out as an abuse of the process of the court. Accordingly I would dismiss the appeal and allow the cross-appeal.

50 **OTTON, J.A.** concurred.

Ruling accordingly.