

## Limitation Period Against Constructive Trustees

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### Abstract

This commentary examines the Hong Kong Court of Final Appeal's recent decision in *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32 (*Hui Chun Ping*), which addresses the application of limitation periods to constructive trusts. The case scrutinises the scope of section 20 of the Limitation Ordinance, which parallels section 19 of the UK Limitation Act 1939, subsequently re-enacted as section 21 of the Limitation Act 1980. Specifically, it investigates whether this section encompasses claims against constructive trustees and assesses the nature of constructive trusts in situations where fiduciaries receive bribes or commissions. Lord Hoffmann NPJ's judgment, which underscores an institutional rather than a consensual interpretation of constructive trusts, contributes to the ongoing legal discourse in both Hong Kong and English law. This commentary juxtaposes Lord Hoffmann's reasoning with established principles from landmark cases such as *Attorney-General for Hong Kong v Reid* and *FHR European Ventures LLP v Cedar Capital Partners LLC*, providing a nuanced perspective on the interplay between fiduciary duties and equitable remedies.

### I Case Facts

In 2004, Hutchison Whampoa (HW) planned a construction project in Qingdao and engaged Hui Chun Ping as a consultant based on a recommendation from Hui Kau Mo, who was employed by HW in some capacity. The plaintiff, Hui Chun Ping, was to receive remuneration through a cash payment and a 10% interest in the project's profits, referred to as 'dry shares'.<sup>1</sup> The plaintiff later alleged that the defendant persuaded him to accept RMB 40 million in lieu of the dry shares and was authorised to finalise this arrangement with HW.<sup>2</sup>

On 13 November 2018, the plaintiff initiated legal proceedings against the defendant, alleging that by 29 June 2006, the defendant had secretly acquired the dry shares for himself, breaching his fiduciary duty. On 12 April 2021, the plaintiff sought to amend the Statement of Claim to include these allegations.<sup>3</sup> Although the Master initially permitted all proposed amendments, Deputy High Court Judge H Au-Yeung set aside this decision, ruling that the claim, which allegedly arose in 2006, was statute-barred by section 20(2) of the Limitation Ordinance.<sup>4</sup> The plaintiff had known of the alleged breach by 6 November 2012, rendering the 2018 claim too late. The Court of Appeal upheld this decision.<sup>5</sup>

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<sup>1</sup> *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32, [5].

<sup>2</sup> *Ibid* [6].

<sup>3</sup> *Ibid*.

<sup>4</sup> *Hui Chun Ping v Hui Kau Mo* [2022] HKCU 3965, [101]-[102].

<sup>5</sup> *Hui Chun Ping v Hui Kau Mo* [2024] HKCA 194, [93]-[94].

The case raised several legal issues: whether the application of a limitation period was excluded by section 20(1)(b) of the Limitation Ordinance, whether the defendant could rely on the six-year limitation period under section 20(2), whether the plaintiff could pursue a claim for accounts and inquiries if the constructive trust claim was barred, and whether the plaintiff could claim ‘equitable compensation’ for breach of fiduciary duty despite the constructive trust claim being barred.<sup>6</sup> The Court of Appeal ruled against the plaintiff on all four points and certified them as being of great general or public importance, granting leave to appeal. The Court of Final Appeal affirmed the Court of Appeal’s decision and dismissed the appeal, concluding that the plaintiff’s claims were indeed time-barred and that none of the alternative claims could proceed.<sup>7</sup>

## **II Reflections on the Decision of the Hong Kong Court of Final Appeal**

Lord Hoffmann NPJ delivered the judgment of the Court of Final Appeal (CFA), and his statements hold significance in two key respects. First, he elucidated that the application of section 20 of the Limitation Ordinance is strictly confined to express consensual trustees. Secondly, he refuted the notion of a consensual nature in constructive trusts imposed on fiduciaries who receive bribes or commissions in breach of their fiduciary duties. In this section, I will reflect on these two aspects, highlighting the advantages and disadvantages inherent in Lord Hoffmann NPJ’s reasoning. This analysis has broader implications for both Hong Kong and English law. The Limitation Ordinance of Hong Kong is intricately linked to the historical evolution of limitation law in the United Kingdom, reflecting the foundational influence of English legal principles on Hong Kong’s legal system. Specifically, section 20 of the Limitation Ordinance mirrors section 19 of the UK Limitation Act 1939, which has been re-enacted as section 21 of the Limitation Act 1980.<sup>8</sup> This lineage underscores Hong Kong’s reliance on established UK law, particularly in areas where local statutes were crafted to align with English legal standards. Now, I will proceed with the first reflection: the scope of application of section 20 of the Limitation Ordinance.

### **A Section 20 of the Limitation Ordinance**

Before engaging in substantial analysis, it is necessary to set out the wording of section 20. Only the first two subsections are relevant for the present case:

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—(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.

(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.

(3) No beneficiary as against whom there would be a good defence under this Ordinance shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary

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<sup>6</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [9].

<sup>7</sup> *Ibid* [40].

<sup>8</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [12].

than he could have obtained if he had brought the action and this Ordinance had been pleaded in defence.

The plaintiff asserted that their claim to recover the dry shares falls within the ambit of section 20(1)(b). Specifically, given the defendant's breach of fiduciary duties to the plaintiff, the defendant is required to hold the shares on a constructive trust for the plaintiff. Accordingly, the action brought by the plaintiff could be considered an action to 'recover from the trustee trust property'.<sup>9</sup> Focusing on the plaintiff's assertion, Lord Hoffmann NPJ concentrated his reasoning on the question of whether this section is applicable to constructive trustees. His answer to this question is in the negative, attributable to two grounds. The first ground lies in the essence of the plaintiff's claim against the defendant concerning the defendant's unauthorised acquisition of the dry shares.<sup>10</sup> The second ground pertains to maintaining the consistent application of precedents related to this issue, reflecting the principle of *stare decisis*.<sup>11</sup> Adherence to precedents is highly valued in British Commonwealth jurisdictions, which emphasise the coherence of the application of legal rules and principles.

Lord Hoffmann NPJ explored the first ground from two perspectives. Initially, he examined the meaning of section 19 of the UK Limitation Act 1939 (1939 Act), considering section 20 of the Limitation Ordinance as being 'intended to have the same meaning as [section 19 of] the 1939 Act'.<sup>12</sup> According to Lord Hoffmann NPJ, elucidating the relationship between the 1939 Act and the Limitation Ordinance of Hong Kong is essential for interpreting the applicability of section 20 of the Limitation Ordinance, particularly in cases involving constructive trusts and breaches of fiduciary duties. In another Hong Kong Court of Final Appeal case, *Peconic Industrial Development Ltd v Lau Kwok Fai*<sup>13</sup> (*Peconic Industrial Development Ltd*), where Lord Hoffmann also sat as a Non-Permanent Judge, he observed the following:

The language of [section 20], like most of the Ordinance, *is taken word for word from the UK Limitation Act 1939. It was obviously intended to have the same meaning.* One therefore has to ask whether Danny Lau would have been a constructive trustee within the meaning of the corresponding section of the 1939 Act ([section 19]). On a literal reading he would, because a stranger to a trust who dishonestly assists in its breach is traditionally described as a constructive trustee. For the purposes of limitation, however, there are two kinds of constructive trustees. The distinction between them has been explained by judges on numerous occasions, from Sir William Grant in *Beckford v Wade* (1805) 17 Ves Jun 87, 95-96 to Mr Richard Sheldon QC (sitting as a deputy High Court judge) in *Cattley v Pollard* [2007] Ch 353, 360-376. First, there are persons who, without any express trust, have assumed fiduciary obligations in relation to the trust property; for example as purchaser on behalf of another, trustee de son tort, company director or agent holding the property for a trustee. I shall call them fiduciaries. *They are treated in the same way as express trustees and no limitation period applies to their fraudulent breaches of trust.* Then there are strangers to the trust who have not assumed any prior fiduciary liability but make themselves liable by dishonest acts of interference. I shall call them non-fiduciaries. They are also called constructive trustees but this, as Ungood-Thomas J said in *Selangor United Rubber Estates Ltd v Cradock* (No 3) [1968] 1 WLR 1555, 1582 is a fiction: '*nothing more than a formula for equitable relief*'. They are not constructive trustees within the meaning of the law of limitation.<sup>14</sup>

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<sup>9</sup> *Limitation Ordinance (Cap 347) 1965 (HK)* s 20(1)(b).

<sup>10</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [16].

<sup>11</sup> *Ibid* [17]-[23].

<sup>12</sup> *Ibid* [12].

<sup>13</sup> *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCU 284.

<sup>14</sup> *Ibid* [19] (emphasis added).

Lord Hoffmann NPJ's reasoning in the cited paragraph from *Peconic Industrial Development Ltd* was reiterated by him in the current case of *Hui Chun Ping*. Consistent with this reasoning, he argued that, in the context of English law, although a limitation period was introduced by section 8 of the Trustee Act 1888 for the purpose of protecting trustees from innocent breaches of trust,<sup>15</sup> the limitation rule was intended solely to regulate trusts 'created by an agreement to hold or exercise control over property in a fiduciary capacity'.<sup>16</sup> Accordingly, constructive trusts fall outside the ambit of section 19 of the 1939 Act. Building on this analysis, Lord Hoffmann NPJ elucidated the essence of the constructive trust claim in the context of the defendant acquiring dry shares by breaching their fiduciary duties. He stated that the constructive trust claim is, in substance, a fiction created by equity merely for the purpose of providing a 'remedy against someone who had obtained property by or with knowledge of fraud or breach of fiduciary duties'.<sup>17</sup> This claim, therefore, 'was in essence a proprietary claim, analogous to a common law action to recover property'.<sup>18</sup> In this light, the common law limitation period for actions to recover property should be equally applicable to constructive trust claims.

With respect to the second ground—adherence to precedents—Lord Hoffmann NPJ focused his analysis on two Privy Council cases: *Beckford v Wade* (*Beckford*) and *Taylor v Davies* (*Taylor*).<sup>19</sup> Both cases address the question of whether the limitation period applies to constructive trustees. Lord Hoffmann NPJ concluded that the limitation period is inapplicable to constructive trustees, basing his conclusion on specific paragraphs from the judgments in *Beckford* and *Taylor* respectively. In *Beckford*, the following statement made by Sir William Grant MR was emphasised by Lord Hoffmann NPJ:

The question then is, what the true construction of the Act is in this particular: whether it meant only actual and express trusts, as between Cestui que trusts and trustees properly so called, upon which length of time ought to have no effect: or whether it intended to leave open to perpetual litigation every equitable question, relative to real property. *If it did so intend, it was ill calculated for obtaining its professed purpose of quieting possessions, and of preventing many vexatious and expensive suits at Law and in Equity, of which the preamble complains.* ... When the Act speaks of one man being seised or possessed to the use of, or in trust for, another, I can hardly conceive, that it means any other than an actual direct trust; not such possible, eventual trust, as may, in

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<sup>15</sup> In the Hong Kong Court of Final Appeal case, *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCU 284, Lord Hoffmann NPJ stated (at [20]) that 'This distinction [between express trustees and constructive trustees] was drawn at a time when there was no statutory basis for the limitation of equitable remedies. Common law periods were, in appropriate cases, applied by analogy and trustees were unable to raise a limitation defence even for an innocent breach of trust. This last rule was felt to be too harsh and the law was changed by [section 8] of the Trustee Act 1888, which was subsequently replaced by [section 19] of the 1939 Act. This confined the rule to fraudulent breaches of trust and cases in which the trustee held the trust property or its proceeds or had converted them to his use'.

<sup>16</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [16].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* See also *Hui Chun Ping v Hui Kau Mo* (n 5) [46].

<sup>19</sup> UK courts reference and examine Privy Council decisions owing to their historical importance, the authoritative expertise of the judges, and the valuable jurisprudential insights they provide. Historically, the Privy Council served as the highest appellate court for numerous Commonwealth countries and territories, establishing foundational legal principles that continue to be persuasive. The judges, often distinguished UK Supreme Court justices, impart significant weight to these rulings. Furthermore, the Privy Council addresses complex and novel legal issues from various jurisdictions, offering broader perspectives that enhance UK legal reasoning, particularly in cases where domestic precedent is lacking.

case certain facts are established in evidence, be declared by a Court of Equity against a person, who claims to be, and who prima facie is, the true owner of the estate.<sup>20</sup>

In *Taylor*, Viscount Cave, delivering the judgment of the Privy Council, endorsed Sir William Grant MR's reasoning in the aforementioned paragraph from *Beckford*. This endorsement is reflected in the following statement made by Viscount Cave in his judgment, which was emphasised by Lord Hoffmann NPJ in the current case of *Hui Chun Ping*:

[Section 47, sub-section 1], it is said, defines a trustee as including 'a trustee whose trust arises by construction or implication of law', and, accordingly, the exclusion from [section 47, sub-section 2] of a claim to recover 'trust property or the proceeds thereof still retained by the trustee' must apply to property in the hands of a constructive trustee or of any person claiming under him otherwise than by purchase for value without notice. *If this contention 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 the case above cited) 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. In other words, *they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction*.<sup>21</sup>

Both Sir William Grant MR in *Beckford* and Viscount Cave in *Taylor* emphasised the distinction between express consensual trusts and constructive trusts. They contended that the limitation period applicable to express consensual trusts should not be extended to constructive trusts. Such an extension, they argued, would unduly exacerbate the position of constructive trustees — a situation that would not arise if the Limitation Act did not intervene.<sup>22</sup> Citing *Beckford* and *Taylor* with approval in his decision, Lord Hoffmann NPJ endorsed this reasoning. In rejecting the plaintiff's argument that the six-year limitation period does not apply to constructive trusts, Lord Hoffmann NPJ focused his analysis exclusively on the aforementioned two grounds. He did not elaborate in detail on the rationale underpinning section 20 of the Limitation Ordinance. This may have been influenced by the manner in which the plaintiff presented their argument. However, clarification of the rationale could complement Lord Hoffmann NPJ's reasoning, thereby fortifying the conclusion he reached.

It is not difficult to discern that section 20 of the Limitation Ordinance serves the function of striking a balance between protecting beneficiaries' rights and providing finality in legal disputes among trust parties. Historically, prior to the enactment of the Trustee Act 1888 in the UK, there was no established limitation period for actions pertaining to breaches of trust. Courts of equity would frequently deny relief by invoking doctrines such as laches or acquiescence.<sup>23</sup> The introduction of the Trustee Act 1888 marked a pivotal moment in legal history, establishing specific limitation periods for breaches of trust. This legislative reform aimed to enhance certainty and predictability for both trustees and beneficiaries, thereby fostering a more robust framework

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<sup>20</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [17] (emphasis added).

<sup>21</sup> *Ibid* [10] (emphasis added).

<sup>22</sup> *Ibid* [17], [20]. In the Court of Appeal's decision in *Hui Chun Ping v Hui Kau Mo* [2024] HKCA 194, Hon Kwan VP, Au JA and Chow JA (at [93]) stated that 'I reject the plaintiff's contention that the proprietary constructive trust in this instance should come within category 1 [express consensual trust] and that no limitation period is applicable by virtue of section 20(1)(b). The *Paragon* case and *Williams v Central Bank of Nigeria* have established that this provision is to be given a narrow interpretation. This being a category 2 trust [constructive trust], it has been held that the limitation statute *did not have the effect of taking away the previous right of trustees of category 2 to rely on limitation defence*'. (emphasis added)

<sup>23</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [13].

for trust management. In a parallel manner, the Limitation Ordinance in Hong Kong provides much-needed clarity within its jurisdictional framework for trust law. By incorporating provisions from the UK Limitation Act, the Ordinance ensures a consistent application of limitation periods for trust-related claims, thereby aligning local practices with established English legal principles. This connection between the two legal systems not only highlights the historical ties between Hong Kong and the UK but also illustrates how Hong Kong has judiciously inherited and adapted these English legal principles to suit its distinctive legal landscape.

Specifically, section 20 is tailored to address the unique nature of trust relationships and the fiduciary duties that trustees owe to beneficiaries. The absence of a limitation period for the two scenarios under subsection 1 reflects the legislature's recognition of the gravity and particular circumstances of these breaches. First, section 20(1)(a) excludes any period of limitation for actions involving 'fraud or fraudulent breach of trust to which the trustee was a party or privy'. This provision is designed to address the inherent difficulty in detecting fraud and the serious breach of trust it represents. Fraudulent actions by a trustee undermine the very foundation of the trust relationship, which is built on the trust and confidence that a settlor reposes in the trustee. The legislature recognises that fraud can be concealed for many years, and it would be unjust to bar a beneficiary's claim merely because the fraud was not discovered within a standard limitation period. By removing the limitation period for fraud, the law ensures that trustees cannot benefit from their deceitful conduct and that beneficiaries have the opportunity to seek redress regardless of when the fraud is uncovered. Secondly, section 20(1)(b) applies to actions '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'. The rationale here is to prevent trustees from wrongfully retaining or misappropriating trust property and subsequently avoiding liability due to the passage of time. The exclusion of a limitation period in this context ensures that trustees cannot exploit procedural technicalities to retain property that rightfully belongs to the beneficiaries.<sup>24</sup> It reinforces the notion that trust property must always be used solely for the furtherance of beneficiaries' interests or for the execution of the trust's purpose,<sup>25</sup> and that any wrongful conversion by the trustee will not be protected by a limitation defence.

The drafting of section 20(2) further enhances these provisions by establishing a general six-year limitation period for other types of breaches of trust by the trustee. This ensures that, while beneficiaries are afforded ample opportunity to bring claims, a reasonable time limit is also imposed to provide certainty and stability for trustees in the management of trust property. This dual approach demonstrates an understanding that, while certain breaches — particularly those involving fraud or misappropriation — warrant an indefinite period to bring claims, other breaches should be subject to standard limitation rules to prevent indefinite uncertainty and potential abuse of the legal process. It strikes a balance between the need to protect beneficiaries from egregious breaches of trust, especially those involving fraud and misappropriation, and the necessity of providing a framework for the timely resolution of other trust-related disputes. This nuanced approach ensures that trust law respects the unique relationship between trustees and beneficiaries, offering special protection to beneficiaries who are structurally vulnerable, while also granting trustees the certainty and predictability required for the proper discharge of their duties.

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<sup>24</sup> Section 20(1)(b) of the Limitation Ordinance corresponds to section 21(1)(b) of the UK Limitation Act 1980. For scholarly analysis of section 21(1)(b) of the UK Limitation Act 1980, see, eg, JE Penner, *The Law of Trusts* (Oxford University Press, 10<sup>th</sup> ed, 2016) [11.206]; James Glister and James Lee, *Hanbury and Martin Modern Equity* (Sweet & Maxwell, 22<sup>nd</sup> ed, 2021) [24-042]-[24-043].

<sup>25</sup> *Tao Sob Hgun v HSBC International Trustee Ltd* [2019] HKCU 1880, [167]; *Equity Trust (Jersey) Ltd v Halabi* (2023) 2 WLR 133, [256]; *Cowan v Scargill* [1985] Ch 270, 272.

Section 20, along with other provisions of the Limitation Ordinance, does not clarify whether its application extends to both express consensual trusts and constructive trusts. In considering the substance of the plaintiff's claims regarding constructive trusts and the necessity of adhering to precedents, Lord Hoffmann NPJ opined that constructive trusts fall outside the ambit of section 20 of the Limitation Ordinance, as elucidated in his judgement in *Hui Chun Ping*:

Viscount Cave, who had practised at the Chancery Bar from 1880, *would probably have said that* the whole of section 8 did not apply to category 2 constructive trustees. They remained entitled to limitation under the old law as stated in *Beckford v Wade*.<sup>26</sup>

Setting the above aside, if one considers the rationale behind section 20, the inconsistency between applying section 20 to constructive trustees and the section's underlying purpose becomes apparent. Constructive trust is a legal fiction devised by the court of equity to rectify the defendant's acquisition of dry shares, which occurred without the plaintiff's authorisation. This legal fiction is rooted in equity's objective of preventing the defendant from profiting from their misconduct. It bears no relation to the unique fiduciary relationship between trustees and beneficiaries that section 20 aims to address. In other words, the dual objectives of providing special protection to beneficiaries who are inherently vulnerable, while ensuring trustees have the certainty and predictability necessary for the effective execution of their duties, are not applicable in the context of a constructive trust in the present case.

## **B The Nature of the Constructive Trust**

The second point requiring elucidation in Lord Hoffmann NPJ's decision pertains to his rejection of the purported consensual nature of constructive trusts imposed in instances where the defendant acquires dry shares in breach of their fiduciary duties. While Lord Hoffmann NPJ concurred with the rationale for imposing a constructive trust on the defendant, he diverged from the plaintiff's contention that the constructive trust in this scenario is consensual in nature. The plaintiff asserted that when the defendant covertly acquired the dry shares, he held them on a constructive trust for the plaintiff, akin to agreeing to act as a bare trustee for those shares. Following this logic, the plaintiff argued that their claim could be characterised as a recovery of trust property from a trustee, as delineated under section 20(1)(b); consequently, section 20(1)(b) could be invoked to exclude the application of the limitation period for their constructive trust claim.<sup>27</sup> Lord Hoffmann NPJ regarded this 'consensual' argument as drawing support from the Privy Council's decision in *Attorney-General for Hong Kong v Reid (Reid)* and the English Supreme Court's decision in *FHR European Ventures v Cedar Capital Partners LLC (Cedar)*.<sup>28</sup> According to Lord Hoffmann NPJ, the assertion that 'a fiduciary [being] deemed to have agreed to hold property acquired in breach of duty on trust for his principal'<sup>29</sup> could be derived from Lord Templeman's reasoning in *Reid*.<sup>30</sup> However, Lord Hoffmann NPJ deemed this reasoning to be erroneous both in principle and in authority.<sup>31</sup>

Lord Hoffmann NPJ's analysis that constructive trusts in the present case should not be interpreted as consensual in nature is commendable. His analysis aligns with the orthodox understanding of 'consensual' within the broader context of private law. However, Lord Hoffmann NPJ's critique of the 'consensual' reasoning purportedly derived from the decision in

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<sup>26</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [37] (emphasis added).

<sup>27</sup> *Ibid* [11], [24].

<sup>28</sup> *Ibid* [25]-[26].

<sup>29</sup> *Ibid* [26].

<sup>30</sup> *Ibid* [25].

<sup>31</sup> *Ibid* [27].

*Reid* is open to debate. Lord Hoffmann NPJ grounded his critique on two principal arguments. First, he referenced Lord Templeman's assertion in *Reid*:

As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done.<sup>32</sup>

He construed this statement as implying that the fiduciary was deemed to have agreed to hold the bribe on a constructive trust. This interpretation, however, presents difficulties. Regardless of how far one might stretch the interpretation, there is no tenable ground to support the notion that this statement itself implies the element of 'being deemed to have agreed to hold the bribe on a constructive trust'. The first part of Lord Templeman's statement, 'As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty', merely indicates the manner in which the bribe received by the fiduciary ought to be handled — specifically, that the bribe should not be retained by the wrongdoing fiduciary, but should instead be 'paid or transferred'<sup>33</sup> to the innocent party who has suffered from the breach of duty. The second part of Lord Templeman's statement, 'Equity considers as done that which ought to have been done', is an equitable maxim that underscores the principle that equity seeks to achieve fairness by treating obligations and duties as if they have been fulfilled, even when they have not been formally executed. As clarified by judges and scholars in various contexts, equitable maxims are distinct from legal rules or doctrines; they do not offer specific directives for courts or parties. Instead, they serve as overarching principles that guide judicial decision-making and underpin the rationale for various decisions.<sup>34</sup> Context is essential to understanding the role of this maxim in Lord Templeman's statement. To provide the full context, the specific paragraph from which this statement is derived is presented here:

*When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity, however, which acts in personam, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as the first respondent received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.*<sup>35</sup>

Considering the statement within the context of the entire paragraph, the concluding sentence elucidates the maxim referred to by Lord Templeman: 'As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured'. Equity regards the bribe as beneficially owned by the injured party who suffers from the fiduciary's

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<sup>32</sup> Ibid [25]; *Attorney-General for Hong Kong v Reid* (1994) 1 AC 324, 331.

<sup>33</sup> *Attorney-General for Hong Kong v Reid* (n 32) 331.

<sup>34</sup> See, eg, *HR Trustees Ltd v Wembley plc (in liquidation)* [2011] EWHC 2974, [53]; *Tinsley v Milligan* (1994) 1 AC 340, 362; Simon Gardner, 'Two Maxims of Equity' (1995) 54 *Cambridge Law Journal* 60, 60; Henry E Smith, 'Equity as Meta-Law' (2021) 130 *Yale Law Journal* 1050, 1113–14.

<sup>35</sup> *Attorney-General for Hong Kong v Reid* (n 32) 331 (emphasis added).



breach of duty. The constructive trust serves as the mechanism employed by equity to grant the beneficial interest in the bribe to the injured party, thereby preventing fiduciaries from profiting from their misconduct. In this context, the maxim ‘Equity considers as done that which ought to have been done’ aligns with the imposition of a constructive trust on the bribe received by the errant fiduciary. When reconsidering the entire paragraph, it becomes evident that only the statements ‘When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient’ and ‘it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty’ are articulated by Lord Templeman in the paragraph. There is no assertion suggesting that the false fiduciary is deemed to have agreed to hold the bribe on a constructive trust for the injured person. Nor can such a statement be found in the remainder of the judgment delivered by Lord Templeman.

The second ground upon which Lord Hoffmann NPJ relied is the fact that Lord Neuberger of Abbotsbury PSC, in the English Supreme Court decision of *Cedar*, endorsed Lord Templeman’s reasoning in *Reid*. Lord Hoffmann NPJ noted that similar statements regarding the false fiduciary being deemed to have agreed to hold the bribe on a constructive trust for the injured person were also made by Lord Neuberger of Abbotsbury in the *Cedar* decision. Lord Hoffmann NPJ cited paragraphs 7, 21, and 42-50 of the *Cedar* judgment to support his observation. To assess the reasonableness and tenability of Lord Hoffmann NPJ’s critique, it is essential to examine these paragraphs closely. A closer scrutiny of these passages gives rise to six interrelated observations.

First, when an agent gains a benefit through a breach of their fiduciary duty, the remedy provided by equity is ‘primarily restitutionary or restorative, rather than compensatory’.<sup>36</sup> Secondly, if an agent accepts bribes or secret commissions, they should hold these on trust for their principal, rather than merely having an equitable duty to account for them to their principal.<sup>37</sup> Thirdly, bribery is a reprehensible practice, necessitating a stringent legal response to claims against agents who receive bribes or commissions.<sup>38</sup> Fourthly, obliging the wrongdoing agent to hold the bribes or commissions on trust for their principal does not unduly disadvantage the agent’s unsecured creditors, as the proceeds from bribes or commissions constitute property that should not have been part of the agent’s estate in the first place.<sup>39</sup> Fifthly, the constructive trust approach has gained widespread acceptance in various common law jurisdictions, including Australia, New Zealand, and Singapore. It is desirable for common law jurisdictions to learn from one another to harmonise the development of common law globally.<sup>40</sup> Sixthly, the precedents set by *Lister & Co v Stubbs*, *Metropolitan Bank v Heiron*, and *Tyrrell v Bank of London* are either inherently flawed or factually distinguishable, thus justifying a departure from them.<sup>41</sup>

When read and interpreted collectively, the six observations indicate that the imposition of a constructive trust in this context arises from the agent’s receipt of bribes or commissions in violation of their fiduciary duties to their principals. The constructive trust analysis, as expounded by Lord Neuberger of Abbotsbury PSC, is not primarily based on the notion of consent by the defaulting agent. Rather, it is firmly rooted in the principles of equity and the fiduciary’s duty of undivided loyalty. Specifically, Lord Neuberger of Abbotsbury PSC elaborates on the following points:

The following three principles are not in doubt, and they are taken from the classic summary of the law in the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18. First, an agent owes a fiduciary duty to his principal because he is ‘someone who has

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<sup>36</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, [7].

<sup>37</sup> *Ibid* [21].

<sup>38</sup> *Ibid* [42].

<sup>39</sup> *Ibid* [43]-[44].

<sup>40</sup> *Ibid* [45].

<sup>41</sup> *Ibid* [47]-[50].

undertaken to act for or on behalf of [his principal] in a particular matter in circumstances which give rise to a relationship of trust and confidence'. Secondly, as a result, an agent 'must not make a profit out of his trust' and 'must not place himself in a position in which his duty and his interest may conflict'—and, as Lord Upjohn pointed out in *Phipps v Boardman* [1967] 2 AC 46, 123, the former proposition is 'part of the [latter] wider rule'. Thirdly, 'a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other'. Because of the importance which equity attaches to fiduciary duties, such 'informed consent' is only effective if it is given after 'full disclosure', to quote Jessel MR in *Dunne v English* (1874) LR 18 Eq 524, 533.<sup>42</sup>

In line with the previously cited paragraph, the imposition of a constructive trust serves to ensure that the fiduciary does not benefit from their breach of duties. This approach is not founded on any consensual framework. Upon examining Lord Hoffmann NPJ's critique, it becomes evident that his interpretation extends the reasoning in *Reid* and *Cedar* beyond what the judgments themselves, either implicitly or explicitly, state. While the decisions in *Reid* and *Cedar* do acknowledge that the imposition of a constructive trust is a suitable response to an agent's unauthorised receipt of bribes or commissions, they do so within the context of fiduciary obligations and equitable principles that prevent fiduciaries from profiting from their breaches. They do not imply that the agent holds the bribes or commissions on a constructive trust for the principal as if they had agreed to act as a bare trustee of those properties.

Characterising the constructive trust as consensual represents an argument advanced by the plaintiff to support their assertion that section 20 of the Limitation Ordinance could be interpreted as applicable to constructive trusts. Lord Hoffmann NPJ's rejection of this argument is commendable, as it is inconsistent with the orthodox understanding of 'consensual' within the broader context of private law.<sup>43</sup> In *Re Walter J Schmidt & Co, Ex p Feuerbach*, Judge Learned Hand stated, 'When the law adopts a fiction, it is, or at least it should be, for some purpose of justice'.<sup>44</sup> The objective of 'justice' can be satisfied in the present case by recognising that the imposition of a constructive trust serves to prevent the defendant from benefiting from their wrongful conduct. There is neither a theoretical nor a practical necessity to interpret the defendant as having agreed to hold the dry shares on constructive trust for the plaintiff.

It is indisputable that the question of whether a constructive trust should be imposed on defaulting fiduciaries who receive bribes or commissions in the course of their duties has no unequivocally correct or incorrect answer. As Lord Neuberger of Abbotsbury PSC acknowledged in the judgment of *Cedar*:

Each of the formulations set out in paras 30 and 31 above [i.e. formulations are for and against the rule that constructive trusts apply to all benefits received by an agent in breach of his fiduciary duty to his principal] have their supporters and detractors. In the end, it is not

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<sup>42</sup> Ibid [5].

<sup>43</sup> In the context of private law, the term 'consensual' refers to the principle that legal relationships are founded upon the consent of the parties involved. This principle underscores the necessity for parties to explicitly or implicitly agree to the terms governing their obligations and rights. Consent in private law is pivotal in fostering predictability and security in transactions, ensuring that parties can depend on one another to fulfil their commitments. For scholarly discussions on this aspect, see, eg, Zhong Xing Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 39(1) *Legal Studies* 98, 102, 113; Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116(6) *Columbia Law Review* 1395, 1458–59. In light of this understanding, characterising a constructive trust as consensual in the present case undermines the aforementioned principle, as such trusts typically arise not from consent but from circumstances necessitating equitable relief to rectify a wrongdoing.

<sup>44</sup> *Re Walter J Schmidt & Co, Ex p Feuerbach* (1923) 298 F 314, 316.

possible to identify any plainly right or plainly wrong answer to the issue of the extent of the rule, as a matter of pure legal authority. There can clearly be different views as to what requirements have to be satisfied before a proprietary interest is created.<sup>45</sup>

In contemporary case law, the prevailing authorities predominantly endorse the constructive trust analysis. In the case of *Hui Chun Ping*, Lord Hoffmann NPJ supported the imposition of a constructive trust upon the wrongdoing defendant. However, he contended that such imposition does not involve any discretionary exercise by the courts. He explicitly rejected Professor Graham Virgo's assertion that judicial discretion is essential to the existence of the relevant constructive trust.<sup>46</sup> In contrast, Lord Hoffmann asserted that the constructive trust in this context is merely a judicial application of legal principles to the factual circumstances.<sup>47</sup> This analysis underscores Lord Hoffmann NPJ's perspective that the constructive trust in question is institutional in nature. This view aligns with Lord Neuberger of Abbotsbury PSC's recognition in *Cedar* that the concept of a remedial constructive trust is not considered part of English law.<sup>48</sup> In the institutional sense, a constructive trust arises as a consequence of fiduciaries breaching their duties by receiving bribes or commissions. The court's imposition of a constructive trust is a response to the nature of the duties breached by the fiduciaries. This perspective aligns comfortably with William Swadling's assertion that a constructive trust is essentially a court order requiring the defendant either to pay a sum of money to the claimant or to convey a particular right to the claimant.<sup>49</sup> It is the latter — a court order requiring the defendant to convey a particular right to the claimant — that aligns with Hoffmann NPJ's analysis of the constructive trust in the present case.

### III Conclusion

The Hong Kong Court of Final Appeal's decision in *Hui Chun Ping* is a significant development in the jurisprudence of constructive trusts and limitation periods. Lord Hoffmann NPJ's judgment clarifies that section 20 of the Limitation Ordinance is confined to express consensual trusts and does not extend to constructive trusts arising from fiduciary breaches. This interpretation reinforces the institutional nature of constructive trusts, which arise automatically from the fiduciary's breach of duty and not from any deemed agreement. This view is consistent with the reasoning in *Reid* and *Cedar*, which advocate for a stringent approach towards fiduciaries who receive bribes or secret commissions. However, Lord Hoffmann's interpretation that Lord Templeman's reasoning in *Reid* implied a consent by the fiduciary to hold the bribe on trust is debatable. The statement 'Equity considers as done that which ought to have been done' reflects the application of equitable principles without implying a consensual framework. The constructive trust ensures that the injured party receives the beneficial interest in the bribe, aligning with equity's goal of preventing fiduciaries from profiting from their breaches.

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<sup>45</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 36) [32].

<sup>46</sup> *Hui Chun Ping v Hui Kau Mo* (n 1) [32]-[33].

<sup>47</sup> *Ibid* [33].

<sup>48</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 36) [47].

<sup>49</sup> William Swadling, 'The Fiction of the Constructive Trust' (2011) 64(1) *Current Legal Problems* 399, 405-07.