Neutral Citation Number: [2021] EWCA Civ 1097

Case No: A3/2021/0068

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES IN LEEDS
HIS HONOUR JUDGE SAFFMAN
[2020] EWHC 2809 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before:

LADY JUSTICE ASPLIN DBE
LADY JUSTICE NICOLA DAVIES DBE
and
SIR TIMOTHY LLOYD

- -

Between:

DIXON COLES & GILL (a former firm)	**Appellant**
- and -	
(1) THE RT REV. NICHOLAS BAINES, BISHOP OF LEEDS	
(2) LEEDS DIOCESAN BOARD OF FINANCE	**Respondents**

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- -

Thomas Dumont QC (instructed by **Browne Jacobson LLP**) for the **Appellant**
David Halpern QC (instructed by **Lupton Fawcett LLP**) for the **Respondents**

Hearing date: 8 July 2021

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Approved Judgment

Sir Timothy Lloyd:

Introduction

1. This appeal is from an order of His Honour Judge Saffman sitting in the High Court in Leeds, made on 1 December 2020. The proceedings are brought by former clients against solicitors who acted for them in the past. One of the partners stole money held in the firm's client account on behalf of the claimants. The other two partners were entirely innocent of, and in no way implicated in, the frauds. Some of the losses sued for arose from transactions more than six years before the commencement of the proceedings. The issue on the appeal is whether the innocent partners, who are otherwise undoubtedly liable for the clients' losses, can rely on a limitation defence in respect of those transactions, under section 21 of the Limitation Act 1980. The judge held that they could not, on the basis that they were to be regarded as party or privy to the dishonest partner's fraudulent breaches of trust, but he gave permission to appeal. His judgment can be found at [2020] EWHC 2809 (Ch). Other issues were argued before him; the passage relevant to this issue is paragraphs 124 to 144.

2. Having had the benefit of fuller argument than was before the judge, it seems to me that the judge was wrong on this point. For the reasons which I set out below, I have come to the conclusion that the innocent partners in the present case are able to rely on a six-year limitation period, and I would therefore allow the appeal.

The essential facts

3. Dixon Coles & Gill was a long-established and well-respected firm of solicitors in Wakefield. In 2015 there were three partners in the firm: Mrs Linda Box, Mr Julian Gill and Mrs Julia Wilding. Among the firm's clients had been the Diocese of Wakefield which, following a reorganisation, was absorbed into the Diocese of Leeds. Mrs Box had been the diocesan registrar for many years up to 2005 when she became the Chancellor of the diocese of Southwell and Nottingham. In general it is not necessary in this judgment to distinguish between the dioceses of Wakefield and of Leeds and I will use the label the Diocese to refer to whichever is relevant or to both, as the case may be, and to both the Bishop and the Diocesan Board of Finance of each diocese.

4. The firm acted for the Diocese in many conveyancing transactions over the years, and for other clients. On Christmas Eve 2015 Mr Gill discovered that Mrs Box had made unauthorised payments from the firm's client account. It turned out that she had been doing so for years, and had misappropriated sums into millions of pounds held on behalf of the Diocese and other clients. She was expelled from the partnership in January 2016, and was reported to the police and to the Solicitors' Regulatory Authority. She pleaded guilty to offences of dishonesty and was sentenced to a term of imprisonment and struck off as a solicitor.

5. The firm was obliged to close in January 2016, and the remaining partners, Mr Gill and Mrs Wilding, face claims by the Diocese and by other clients who seek compensation for the loss of the misapplied funds. I will refer to the partnership as it stood at any material time as "the Firm", and to Mr Gill and Mrs Wilding, the surviving partners after Mrs Box's expulsion, as DCG.

6. In these proceedings the Diocese claims against DCG and Mrs Box an account (on the basis of wilful default) of the Firm's dealings with all moneys, investments and assets possessed or received by the Firm or by Mrs Box as trustees for the Diocese, and other related remedies. The Firm is alleged to be liable for Mrs Box's wrongs under sections 10 or 11 (or both) of the Partnership Act 1890, the wrongs having been committed in the ordinary course of the business of the Firm and with the Firm's apparent authority deriving from Mrs Box's position as a partner in the Firm.

7. The Claim Form was issued on 25 September 2018. In their Defence DCG plead that the Diocese's claims against them are statute-barred insofar as they arose more than six years before the issue of the Claim Form.

8. In October 2019 the Diocese applied for summary judgment against DCG for an order for an account and other relief. That application came on for hearing before HH Judge Saffman, together with another application concerning an issue not material to this appeal. He gave judgment on 28 October 2020 and by his order dated 1 December 2020 he ordered an account against DCG, with the transactions to which the limitation issue is relevant to be included in the account.

9. Four conveyancing transactions are affected by the issue on this appeal, concerning properties referred to as Headfield School, Ackworth Glebe, St Peter's Car Park, and 2 Kirkgate Lane, South Hiendley. The judge discussed these at paragraphs 155 to 162 in the context of the Diocese's claim for an interim payment. The sums received by the Firm in respect of these seem to have amounted to some £942,000, though about £150,000 of that is accepted to have been received by the Diocese. There are or may be issues about quantum, depending on the details of what happened to the money, but otherwise DCG are liable for these sums subject to the limitation defence.

The nature of the claim

10. The essential basis of the Diocese's claim is that each of the three partners in the Firm was a trustee of the money held in the client account, and each is therefore liable as trustee to account for what has happened to the money held in that account on behalf of the Diocese. Mrs Box was guilty of fraudulent breaches of trust in taking the money for her own benefit. DCG are liable for breach of trust even though it is accepted that they themselves were innocent, not having any knowledge of or involvement in the frauds. The trusteeship arose in the context of the partnership, but the Defendants are sued as trustees, rather than as partners as such. The trusts affecting the money in the client account arose because of the partnership context, and the same considerations would apply to any partnership which holds money on behalf of clients. Much of the argument before us, as before the judge, concerned partnership law, and that is certainly part of the context, but it is to be borne in mind that the claim is against trustees, alleging breach of trust on their part. The breach of trust was fraudulent on the part of Mrs Box and was innocent, but still a breach of trust, on the part of DCG. It is not necessary for the Diocese to allege that Mrs Box was fraudulent in order to make either her or DCG liable for the breaches of trust. Fraud has to come in on the pleadings in order to defeat a claim to rely on the Limitation Act, and potentially to rely on fraudulent concealment so as to delay the start of the six-year period if it does apply.

Partnership law

11. Although the Defendants are sued as trustees rather than as partners, it is necessary to consider the relevant provisions of the Partnership Act 1890 because of the way in which the case was argued. These are as follows:

> "9. Every partner in a firm is liable jointly with the other partners … for all debts and obligations of the firm incurred while he is a partner.
>
> 10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.
>
> 11. In the following cases; namely—
>
> (a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and
>
> (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;
>
> the firm is liable to make good the loss.
>
> 12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.
>
> 13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:
>
> Provided as follows:—
>
> (1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and
>
> (2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."

12. The relevant transactions were within the ordinary course of the business of the Firm, so there would be no doubt about the liability of the Firm in principle to make good

the loss under section 11, and DCG would be liable jointly and severally for the appropriate sums under section 12.

13. Lord Millett explained the structure and effect of these provisions in his speech in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at paragraph 110:

> "Section 9 is not concerned with the liability of the firm at all but with the liability of the individual partners. It provides that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he was a partner. Section 12 makes every partner jointly and severally liable for loss for which the firm was liable under sections 10 and 11 while he was a partner in the firm. Where section 10 makes the firm vicariously liable for loss caused by a partner's wrongdoing, therefore, section 12 makes the liability the joint and several liability of the individual partners. Sections 11 and 13 are not concerned with wrongdoing or with vicarious liability but with the original liability of the firm to account for receipts. … Section 11 deals with money which is properly received by the firm in the ordinary course of its business and is afterwards misappropriated by one of the partners. The firm is not vicariously liable for the misappropriation; it is liable to account for the money it received, and cannot plead the partner's wrongdoing as an excuse for its failure to do so. Section 13 deals with money which is misappropriated by a trustee who happens to be a partner and who in breach of trust or fiduciary duty afterwards pays it to his firm or otherwise improperly employs it in the partnership business. The innocent partners are not vicariously liable for the misappropriation, which will have occurred outside the ordinary course of the firm's business. But they are liable to restore the money if the requirements of the general law of knowing receipt are satisfied."

14. That case concerned the liability of innocent partners for the fraudulent acts of a partner, but it did not raise any limitation issue. Lord Millett reviewed the development of vicarious liability of partners before the 1890 Act at paragraphs 103 to 108, pointing out at paragraph 107 the policy basis of such liability, as Lord Nicholls had done at paragraphs 21 and 22.

15. The 1890 Act says nothing about limitation of claims. In general, partners in a firm are of course entitled to rely on the Limitation Act 1980 to resist liability for wrongs done more than a given period (normally six years) before the start of proceedings against them.

Limitation in relation to claims against trustees

16. Because the Diocese's claims are made against DCG as trustees of the money in the Firm's client account, section 21 of the 1980 Act is relevant:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by him and converted to his use. …
>
> (3) Subject to the preceding provisions of this section, 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 Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

17. Those provisions predate the Partnership Act in their origin by two years, having been introduced by section 8 of the Trustee Act 1888. This applied provisions as to limitation to actions against trustees for the first time, but subject to the exceptions now found in section 21(1). Its opening words which correspond to section 21(1) were as follows:

> "8(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply …"

18. Accordingly, the Diocese's claim against DCG is subject to a six-year limit under subsection 21(3) unless they were "party or privy" to Mrs Box's relevant breaches of trust. Mrs Box herself is of course liable without limit of time as party, indeed *the* party, to the fraudulent breaches of trust. Although it is not suggested that either Mr Gill or Mrs Wilding was other than entirely innocent in relation to the frauds and breaches of trust, it is argued that the effect of the Partnership Act, or the partnership relationship, is to make each of them privy to her frauds and fraudulent breaches of trust.

The judge's judgment

19. The judge recorded Mr Halpern Q.C.'s submission, for the Diocese, that the Partnership Act fixes DCG with liability as being party or privy to Mrs Box's frauds notwithstanding their personal innocence (paragraph 129), and later (paragraph 135) that they are deemed to be party or privy by reason of their partnership status. He accepted this argument and expressed his conclusion at paragraph 137:

> "I do not see a realistic basis for arguing that Mr Gill and Mrs Wilding are not party or privy to the fraud where the

> Partnership Act fixes them with a direct liability in respect of Mrs Box's fraud. I accept that in one very obvious sense they are not party or privy because they knew nothing about the fraud but the fact is that the Partnership Act deems them to have been party or privy in the context of actions undertaken by the errant partner in the ordinary course of business or within the scope of apparent authority - as the conveyancing transactions quite obviously were."

20. His decision is therefore based entirely on the proposition that the 1890 Act not only makes the innocent partners liable for the dishonest partner's acts (as it clearly does by sections 11 and 12) but also makes them party or privy to those acts. The 1890 Act does not say so. Neither the judge nor Mr Halpern relied on any particular wording in the 1890 Act as having this effect, so the question is whether, and if so how, it does so and, if it does not, whether the same effect is achieved in any other way.

Discussion

21. We were shown a number of cases decided in the course of the nineteenth century, of which two considered the effect of section 8 of the Trustee Act 1888. It is necessary, when reading cases in this area, to bear in mind that, until the 1888 Act, there was no limitation period for claims against trustees for breach of trust, and also that until 1939 there was no statutory provision under which the running of time could be postponed on account of fraudulent concealment by the defendant. The common law knew of no such possibility and it was only developed in equity, coming to apply generally as a result of the Judicature Act 1873, section 24: see *Gibbs v Gould* (1882) 9 QBD 59, in particular Brett LJ at 71-72. In relation to claims against partners, therefore, the courts might give attention, on the issue of fraudulent concealment, to whether acts of concealment on the part of a dishonest partner could be relied on against innocent partners as well. That is not the same as the issue that arose under section 8 of the 1888 Act.

22. The first case in which section 8 arose for consideration was *Moore v Knight* [1891] Ch 547. That case was concerned with the liability of partners in a solicitors' firm for embezzlement of client money by an employee of the firm. Once the true position became known, after many years, the client sued the surviving partners, who relied on limitation, and in particular section 8. Stirling J noted that the second exception in the section might well apply, since the money had been received by the members of the firm and converted to the use of the firm, but he did not decide the case on that footing. Instead he based his decision on the concealment of the fraud, following *Blair v Bromley* (1847) 2 Ph 354. Interest had been paid to the client all along as if the fund had been invested as it should have been. That payment of interest was the act of the partnership, so that the partners were all affected by the implicit representation that the funds had been invested as they should have been, thereby concealing the fraud, even though they were innocent of the fraud. It was not argued that the first exception to section 8 applied, and this is therefore of no assistance on the application of the phrase "party or privy".

23. That phrase was directly in issue in the next case, *Thorne v Heard*, in the Court of Appeal [1894] 1 Ch 599 and in the House of Lords [1895] AC 495. The judge did not refer to this case and we were told that it had not been cited to him. It was not a case

of partnership, but it was necessary to consider the meaning of "party or privy" as well as to consider concealment. A first mortgagee, Heard, had sold property under the power of sale and had retained a solicitor, Searle, to act in relation to the sale. Searle received the proceeds of sale, satisfied the first mortgage debt, but retained the balance, falsely representing to the first mortgagee that he had the authority of the second mortgagee, Thorne, to receive the balance. He paid interest to Thorne as if Thorne's mortgage was still subsisting, thereby concealing his theft of the money. The truth came out when Searle became bankrupt. Thorne then sued Heard for the balance of the proceeds, asserting that Heard had acted in breach of trust in allowing Searle to retain the proceeds. That was a breach of trust, but it was innocent, not fraudulent, and had occurred much more than six years before the start of the proceedings. Accordingly Thorne relied on section 8(1), claiming that Heard was liable for the fraud of Searle, he having been Heard's agent, and claiming that accordingly Heard was party or privy to Searle's fraud as principal.

24. The first judgment in the Court of Appeal was given by Lindley LJ. He addressed first the question when the right of action accrued. He said that the fraud first occurred when Searle misappropriated the money, and it was concealed by Searle continuing to pay Thorne the interest that would have been due to him. He held (at p.603) that the fraud and its concealment could not be treated as perpetrated or concealed by Heard. He distinguished both *Blair v Bromley* and *Moore v Knight*, where the fraud and its concealment, though committed by one partner (or, in *Moore v Knight*, by an employee), was imputable to the firm, so that the firm was held to have concealed the fraud, even though not guilty of it in the first place (p.604). He noted that the 1888 Act had not affected the principles on which the time when a cause of action accrues is to be determined. Accordingly, he held that the right of action accrued more than six years before the start of the proceedings, and he went on to consider the section.

25. On this he said, at p.606:

> "Counsel for the Appellant contended that the facts of this case brought it within the first exception; but I am clearly of opinion that they do not. It is only by a misuse of language that a person who in fact knows absolutely nothing of the fraudulent conduct of another, and who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is, liable in law for frauds which he has not committed; but to say that he is party or privy to them is quite another matter, and is only true when he has personally in some way participated in them. The Defendants were, in my judgment, in no sense whatever either fraudulent themselves or parties or privies to the fraud of Searle."

26. Kay LJ dealt with the argument under the section first, on which he said this, at p.608:

> "Of course the Defendants are liable unless the statute to which I have referred protects them. It has been argued that they were party or privy to Searle's fraud. Even if it could be said that they were liable for his fraud, it is another thing to say that they were party or privy to it. I think that those words in the statute indicate moral complicity, which is not suggested in this case."

27. A.L. Smith LJ also considered the section before coming to the question of concealment. He said this at p.613:

> "These exceptions are framed to meet the cases of trustees who have been either guilty of fraud, or who are holding, by themselves or their agent, or have converted to their own use, the trust property; in other words, who are themselves fraudulent, or are appropriating or have appropriated the trust property to themselves.
>
> As to the first exception, it is clear to me that the Defendants have not been party or privy to the fraud of Searle. A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has in fact been committed by another for his own benefit."

28. Later, at p.615 he posed this rhetorical question:

> "Why are the Defendants not to be allowed to rely on what the statute permits them to set up and rely on, if they have not been guilty of some fraud themselves, or of some fraud for which they are responsible?"

to which he said he could see no answer.

29. He dealt separately with the issue of concealment, and the argument that Searle's fraudulent concealment was Heard's fraud also, in relation to which *Blair v Bromley* was relied on for Thorne. Like the other members of the court, he rejected this on the ground that Searle's fraud was not that of Heard.

30. In the House of Lords, Lord Herschell LC disposed of the argument about concealment first, and then turned to section 8. On this he said, at p.503:

> "My Lords, the only remaining question is, Did the statute apply? It is contended that it did not, because of the exception contained in the 1st sub-section to section 8: 'Except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy.' My Lords, it seems to me to be impossible seriously to say that the respondents were 'party or privy' to the fraud in this case. The fraud was a fraud committed by Searle entirely subsequent to the transaction in which they had any interest or any concern, and they neither knew of it, nor assented to it, nor received any benefit from it, nor took part in it in any sort of way. Under these circumstances, I am at a loss to see how it can be said that they were 'party or privy' to it."

31. Lord Macnaghten agreed, at pp.504-5:

> "By a recent and I think very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely

> on any Statute of Limitations as fully as anybody may do who not a trustee, provided his conduct has been free from any taint of fraud, and provided he had not derived and is not in a position to derive any personal benefit from the transaction impeached as a breach of trust."

32. Lord Davey referred to the concept of fraud imputable to the person who invokes the aid of the Statute of Limitations, but did so in the context of concealment (p.506). On the section he agreed with the other members of the Appellate Committee and with the judges in the courts below (p.505).

33. That case therefore draws a clear distinction between being liable for another's wrongs, without which the issue would not arise, and being party or privy to those wrongs so as to exclude the limitation defence that would otherwise be available if the proceedings are brought more than six years after the cause of action arose: see Lindley LJ at p.606 and Kay LJ at p.608.

34. As regards the meaning of "party or privy", the case provides authoritative guidance, in the references by the various judges to whether the defendant had participated in the fraud, or had any knowledge of the fraud, or had assented to or ratified it in any way, or received any benefit from it, or had any moral complicity or any responsibility for it so as to be tainted by it.

35. Mr Halpern relied on a number of earlier cases on an inferential basis, submitting that what was said in each case allows us to deduce what would have been said if the case had arisen after 1888.

36. He showed us *Blair v Bromley*, which I have already mentioned because of the references made to it in *Moore v Knight* and *Thorne v Heard*. It was a decision of Lord Cottenham LC on appeal from Wigram V-C. In that case two solicitors, A and B, had carried on business in partnership together until 1834, when the partnership was dissolved and A continued the business on his own. He became bankrupt in 1841 and it was then discovered that money which had been paid to the firm in 1829 for investment had instead been appropriated by A to his own use, he having in the meantime paid sums equal to the interest that would have been due, so as to conceal the misappropriation. The client sued B to make him liable. He was held liable even if he had neither knowledge nor means of knowledge of the fraud, it having been committed in the course of the ordinary business of the partnership. That case is all to do with the liability of one partner for another's acts, and on concealment, and not at all to do with "party or privy". Mr Halpern submitted that it had been treated in later cases as relevant to what makes someone "privy", but it is clear that the case was not in any way concerned with that issue, since that concept did not form any part of the law at that time, and an action based on breach of trust could not be met by a plea of limitation. It was relied on in later cases, but on the question of concealment, including in *Gibbs v Guild* as an example of the application of the equitable approach to concealment.

37. In *Hughes v Twisden* (1886) 55 LJ Ch 481, one partner in a firm of solicitors committed a fraud on a client by using deeds held on behalf of the client as security for a loan for his own benefit, the funds, so far as appeared, not passing through the firm's accounts. The fraudulent partner eventually absconded and the client sued the

remaining partners. North J held them not liable on the basis that the transaction was not within the ordinary course of the business of the partnership and (to use a phrase derived from the then 4th edition of Lindley LJ's book on Partnership) "not imputable to the partnership". A different view might now be taken as to the scope of the ordinary course of the business, in which case vicarious liability would arise under the 1890 Act, but no question of "party or privy" did or could arise, so I do not find this case to be of any assistance.

38. So far as is known, the present case is the first in which it has been suggested that the 1890 Act operates to make innocent partners party or privy to the frauds of another partner. It is perhaps surprising that the point has not arisen for decision in the 130 years since the two nineteenth century Acts were passed. The point is touched on in Lewin on Trusts, 20th edition at paragraph 50-009:

> "An action against an innocent trustee liable for the fraud of his co-trustee, though not a party or privy to it, is not within section 21(1)(a) and accordingly can be barred by lapse of time. The same applies where the fraud is that of the trustee's solicitor or other agent [citing *Thorne v Heard*]. But an action against a trustee based on the fraud of the trustee's employee [citing *Moore v Knight*] or partner [citing *Blair v Bromley* and *Moore v Knight*] seems to be within the section."

39. However, as I have shown, neither *Blair v Bromley* nor *Moore v Knight* supports the proposition that a fraudulent trustee's partner is to be treated as party or privy to the fraud even though in fact entirely innocent. So far as I am aware, no other textbook ventures a view on the point.

40. HH Judge Saffman was influenced by the passage in Lewin, despite recognising that the cases cited did not justify it, in reaching his conclusion that innocent partners are to be treated as party or privy to fraudulent breaches of trust committed by their dishonest partner, so that they cannot rely on a limitation period at all. He accepted the submission of Mr Halpern that the partnership relationship makes partners not merely liable for fraudulent acts in breach of trust of their dishonest partners, acting within the ordinary course of the business of the partnership, but liable as party or privy so as to be within the first exception in section 21(1). Before us, Mr Halpern's argument was that an otherwise innocent person should be regarded as party or privy to a fraudulent breach of trust committed by another person first if he or she was in some sense responsible for the wrongful act and secondly if he or she is a partner of the dishonest person and the wrong was committed in the ordinary course of the partnership business. He supported that proposition as a matter of policy on the basis that as between two innocent parties – the innocent partners and the innocent client – it is right that the risk should be borne by the partners rather than by the client.

41. Of course, the liability of the innocent partners is established by the Partnership Act itself, reflecting the policy to which Mr Halpern referred. But this is qualified by limitation defences generally, and in the case of fraud by section 21 of the 1980 Act. The innocent partners thus have the benefit of the policy which lies behind the Limitation Act, that claims should be brought within a given time and potential defendants should not, in general, be at risk of being sued for ever. The fraudulent party, and others implicated in the fraud as party or privy, are not entitled to that

protection, and even an innocent party may find that time is, in effect, extended under the 1980 Act. However, in general terms, the innocent client has the benefit of the innocent partners' liability under the 1890 Act but needs to pursue that liability by proceedings brought within six years, having regard to section 21, though of course also with the benefit of the provisions of section 32 as regards concealment of the cause of action.

42. As to Mr Halpern's first submission, as to the relevance of "responsibility" for the fraudulent acts, depending on what is meant by responsibility and on the facts proved, it may be that the facts of a given case would bring it within the ambit of the observations in *Thorne v Heard* as to what makes a trustee privy to another's acts. However, it is not and could not be suggested that DCG were responsible in any way for Mrs Box's frauds.

43. So his case depends on his second proposition, that all partners, even if entirely innocent, are privy to their dishonest partner's frauds merely by reason of the partnership relationship. No provision in the 1890 Act was identified before us as having that effect. Nor can it be deduced from any of the authorities cited to us.

Conclusion

44. Given that the purpose of section 8 of the 1888 Act was, for the first time, to allow a trustee who had committed an innocent breach of trust to rely on a limitation defence, it would seem surprising if such a defence was not to be available in the not uncommon situation where a fraud is committed in the ordinary course of a partnership business, by abstracting money held on behalf clients in respect of which all the partners are trustees, but only one partner is guilty of the fraud and the other or others are entirely innocent. It would be all the more surprising to find that this was the effect of the Partnership Act, passed only two years later, which says nothing at all on the point, or that the partnership relationship had that effect despite the silence of the 1890 Act on the point.

45. In my judgment, that is not the law. There is nothing in the 1890 Act on which Mr Halpern can rely to show that DCG are to be treated as party or privy to Mrs Box's fraudulent breaches of trust, and there is nothing in the authorities which supports that proposition. *Thorne v Heard*, though not directly in point because it did not concern a partnership, is authority against Mr Halpern because of the emphasis laid on the distinction between making a party liable for another's wrongs (as the 1890 Act does) and making him party or privy to those wrongs. A co-trustee is not to be treated as party or privy to another trustee's fraudulent breaches of trust unless facts are alleged and proved which show the co-trustee to have been implicated in the frauds in some way, meeting the tests indicated in *Thorne v Heard*. It follows that DCG are not within the scope of section 21(1)(a) and they are entitled to rely on the six-year limitation period as a defence.

46. That is the basis on which I would allow the appeal and set aside the order for an account against DCG insofar as it relates to the four properties in question, which are identified as items (5) to (8) in paragraph 2 of the judge's order under appeal.

Lady Justice Nicola Davies:

47. I agree.

Lady Justice Asplin:

48. I agree that the appeal should be allowed for all of the reasons given by Sir Timothy Lloyd. As he points out, it would be surprising if the defence of limitation afforded by section 21(1)(a) Limitation Act 1980 were not available to an entirely innocent partner merely as a result of being liable for the fraud of a fellow partner committed in the ordinary course of partnership business. There is nothing in the Partnership Act 1890 to suggest that a partner, as a result of the partnership relationship, is to be deemed to be "party or privy" to the fraudulent breaches of trust of his fellow partner.