

STUDENT COMPANION

CONTRACT

Marcus Roberts

Cramaso LLP v Ogilvie-Grant, Earl of Seafield
[2014] UKSC 9

The UK Supreme Court had to deal with the situation of a representation negligently made to a person (Mr Erskine) who subsequently became the agent of an entity (Cramaso LLP) that was not in existence at the time that the representation was made. The question facing the Court was whether Cramaso could sue for damages suffered when it entered into a contract on the strength of that false representation.

Mr Erskine entered into negotiations with the respondents for the lease of a grouse moor owned by the Earl. During these negotiations he expressed concern that the commercial shooting planned would leave an inadequate breeding population on the moor. The owners sent an email to Mr Erskine purporting to give information about the grouse counts carried out on the moor earlier in year before and the estimated grouse population extrapolated from these counts. However, these counts were not representative of the moor as a whole and as a result the estimated grouse population was well in excess of the actual population. It was held at trial that this representation had been negligently made. After Mr Erskine had received this email he decided to enter into the lease and he informed the landowners that he intended to use a new limited liability partnership to take the tenancy. Discussions continued between the parties, Cramaso was incorporated and the lease was signed. Only after the tenancy was entered into did Mr Erskine realise that the grouse numbers were lower than he had been led to believe.

The arguments in the lower courts had been upon negligent misstatement principles — did the owners owe a duty of care to the lessee when the statement was made? The case was held to be one where A makes a statement to B and that statement is subsequently relied upon by C. Does A owe a duty of care to C? Does it matter that C was not yet in existence when the statement was made? On these arguments, the appellant was unsuccessful both at trial and on appeal to the Inner House of the Court of Session.

At the Supreme Court, the argument shifted in the oral submissions to whether or not the lessee had entered into the contract on the basis of a continuing representation made by the respondents. Was the lessee able to recover

damages as a party to a contract induced to enter into it by a negligent misrepresentation made by the other party to the contract (at [6])?

First, the Supreme Court accepted that a representation may be continuing insofar as it continues to produce a misapprehension in the mind of the representee that continues until the date at which the contract is concluded. This was an affirmation of law stretching back to at *Smith v Kay* (1859) 7 HL Cas 750. Because a representation can continue to influence the decision making of the representee, the representor has a continuing responsibility for its accuracy.

Thus the case would have been straightforward if the representee (Mr Erskine) had in fact entered into the contract. Did the fact that he incorporated Cramaso to enter into the contract after he received the misrepresentation make any difference? No authority was cited where the representee was not the contracting party, but the Supreme Court thought that guidance could be gained from the House of Lords' decision in *Briess v Wolley* [1954] AC 333. There, the fraudulent representor was made the agent of one of the contracting parties after the representation was made. The principal was held liable for this continuing misrepresentation of its agent. The Supreme Court held that "the same principle should also apply in the converse situation, where the representation is made to (rather than by) the agent prior to the commencement of his agency" (at [27]). Mr Erskine may have become the agent of Cramaso after the representation was made, but the landowners did not disclaim what had been said by them before in the course of the discussion. "Neither party drew a line under the previous discussion ... in order to begin afresh" (at [30]). The landowners were still responsible for the statement's accuracy and the statement remained operative in the mind of Mr Erskine and induced Cramaso to enter into the contract. The respondents were therefore liable for damages for negligent misrepresentation inducing contract.

It does not appear that the courts in New Zealand have faced a similar situation, but it is likely that the UK Supreme Court's approach in *Cramaso* would be followed.

COMPANY LAW

Marcus Roberts

Schuler v Grant & Khov
[2014] NZCA 91

Schuler v Grant & Khov [2014] NZCA 91 was a fairly straightforward application of the law relating to directors' duties. How-

ever the Court of Appeal used the opportunity to reiterate aspects of ss 131 and 301 of the Companies Act 1993.

This case was an appeal by Mr Schuler, the sole director and shareholder of a liquidated company, Independent Livestock Agents Ltd (IL Agents), who had been ordered to pay over \$70,000 and interest under s 301 of the Companies Act to the liquidators of IL Agents. Potter J (*Grant & Khov v Independent Livestock 2010 Ltd* [2012] NZHC 3458) had held that IL Agents had contracted a debt to Mr and Mrs Mudge through selling stock on their behalf. Mr Schuler had then dishonestly misrepresented the reasons for repaying this debt and had continued to trade until IL Agents was unable to meet the debt due to the Mudges. On appeal, counsel for Mr Schuler conceded that he could not attack the factual findings of Potter J and instead submitted that she was wrong in the conclusions she drew from those findings. As the Court of Appeal concluded, that was a hard submission to argue since "the legal conclusions drawn from [the factual findings] are inevitable" (at [21]).

Mr Schuler argued that IL Agents had held the money owed on trust for the Mudges. Therefore, the money was not the property of IL Agents and s 301, which refers to money or property of the company, was not applicable. The Court of Appeal rejected that argument as s 301 provided an alternative ground of relief where a director has been guilty of negligence, default or breach of trust in relation to the company. In any event, whether the money was trust moneys or a debt was of no relevance to an application for relief under s 301 from a breach of s 131 (director's duty to act in good faith and in the best interests of the company); in either case IL Agents was obliged to pay it to the Mudges.

The Court did note that s 301 does not create a cause of action in itself. Instead "it provides a procedural mechanism through which the Court can order relief for breaches of duty" (at [34]). This could potentially have been a challenge to the liquidators' pleading but counsel for Mr Schuler did not pursue it in argument.

Moving onto whether or not there had been a breach of s 131, the Court reiterated that the "duties directors owe to the company may, in particular cases, require the directors to consider the interests of creditors" (at [36]). The Court agreed with Cooke J's dicta in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) at 250 that this protection to creditors is restricted but is justified by the concept that limited liability is a privilege and the courts should be alive to the mischief of "irresponsible structural

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engineering". Cooke J held that the question to be asked is an objective one: whether the directors "should have appreciated" or "ought to have known" that the payment in question was likely to cause loss to creditors or threatened the continued existence of the company".

In this case, there was little trouble in finding that Mr Schuler had breached s 131. He deliberately misrepresented the reasons for non-payment and used the funds available to satisfy the debt due to the Mudges to the ongoing business of IL Agents so that they were no longer available to the Mudges at the date of liquidation (at [39]). Further, Mr Schuler had deliberately misled and forestalled the Mudges in pursuing recovery of their debt over an extended period. This course of conduct was clearly in breach of the duties that he owed IL Agents.

Finally, the attempt by Mr Schuler's counsel to argue that ss 131 and 301 only applied to negligence and not to dishonesty was given short shrift by the Court. This was obviously "inconsistent" and s 301(2) provides that s 301 has effect even though the director's conduct may also be an offense.

FAMILY LAW

John Caldwell

Thompson v Thompson
[2014] NZCA 117

The classification and valuation of goodwill attached to businesses and professional practices can frequently arise in relationship property disputes. This case concerned a dispute over a payment of \$8 million that had been made to the husband as a result of a covenant which had been entered into to protect the goodwill of a business sold after the parties' separation and to impose significant restraints upon the husband. The wife essentially contended that the payment was for business goodwill, and therefore relationship property; the husband argued it was a payment attributable to his personal skills and attributes, and therefore separate property.

The Family Court Judge had concluded that the payment was separate property under s 9(4)(a) of the Property (Relationships) Act 1976 (ie that it was property acquired by the husband while he was "not living together as husband and wife"), and that there was no basis upon which to treat any portion of the payment as relationship property. This finding was challenged on appeal to the High Court. Andrews J did agree that the payment was the separate property of the husband, but her Honour exercised the discretion under s 9(4) to treat *part* of the payment as relationship property, concluding that there was some connection between the payment and the efforts made during the marriage. Her Honour, however, felt there was insufficient evidence to allow her to apportion the pay-

ment with confidence. The Judge held that if the parties failed to reach agreement on apportionment, additional evidence would be required at a further hearing. There was an appeal by the husband and cross-appeal by the wife against her Honour's findings.

There was no dispute over the background facts. The parties had married in 1971, and separated in August 2002. The husband worked in the health foods/dietary supplements industry and had established a very successful company structure, with a holding company HFI having been incorporated in 1989. In 1994 the husband and wife sold their respective shareholdings in HFI to the MLT Trust. Four years after the parties' separation, the trustees of the MLT trust sold the business and assets of HFI and two other associated entities to the Next Group for the purchase price of \$72.3 million. That price, which comprised separate amounts of for "Assets" and "Goodwill and IP Assets", was agreed to be a very good one; and a crucial prerequisite in achieving it had been the fact that the sale and purchase agreement was conditional upon the husband entering into the covenant in question (whereby the husband received the \$8 million payment million, and in turn agreed to extensive restraints — including a personal restraint of trade — transitional services, and a commitment to acquire a 20 per cent shareholding in Next for \$12 million).

In a judgment delivered by Stevens J, the Court of Appeal concluded that the substantial price paid by Next had included the entirety of the goodwill attached to the business (business goodwill being defined as the "future economic benefits arising from assets not capable of being individually identified and separately recognised" and the "undifferentiated and aggregate residual value in the business purchased in a transaction" (at [43])). Distinguishing the earlier judgment of the Court of Appeal in *Z v Z (No 1)* [1989] 3 NZLR 413, the Court believed that the \$72.3 million paid in this actual transaction — as opposed to a purely hypothetical transaction in *Z v Z* — had not secured any part of the husband's personal goodwill and attributes. These had been secured and realised quite separately through the covenant, and the Court of Appeal accordingly agreed with the High Court that the payment was to be classified as the husband's separate property.

The Court of Appeal, however, disagreed with Andrew J's finding that the payment had been partially designed to reward the husband for his past performance as a director. Rather, the Court concluded the payment was purely forward-looking in nature, and was designed to preclude the husband from embarking on new, different entrepreneurial ventures in the future. In the Court of Appeal's view, there was accordingly no basis for invoking the discretion under s 9(4) so as to treat part of the \$8 million as relationship property. Consistently with the reasoning in *Z v Z* the Court of Appeal also affirmed that any enhanced earning capacity the husband

may have had as a result of a marriage or relationship did not amount to "property", and the Court further declared that enhanced earning capacity could not be called in aid to justify the discretion under s 9(4).

The Court of Appeal Judges did acknowledge that their findings might give rise to concern that elements of business goodwill could be reflected and concealed in payments for restraint of trade. The Court, however, was of the view that any such risk was mitigated by the Court's ability to identify and set aside sham transactions. In this particular case it had been accepted by all parties that the covenant and payment was a genuine, good faith transaction made in good faith; but what is virtually certain is that the Court of Appeal's other findings are likely to be tested by the wife in the Supreme Court.

EVIDENCE

Bernard Robertson

Lichtwark v R
[2014] NZCA 112

In this case, the Court of Appeal excluded expert evidence that the defence sought to introduce on the ground that "the reliability and probative value of the evidence were low having regard to its inherent uncertainties" (at [30]). It therefore failed the test under s 25 of the Evidence Act 2006 of being "substantially helpful" which creates a higher threshold than simple probativeness" (at [27]). On analysis it seems, however, that the reason the evidence was not "substantially helpful" was that it was given in an unhelpful fashion.

Some abstract issues are also raised by the Court's comments. First, it is unclear what was meant here by the word "reliability" in addition to low probative value. The word "reliable" has numerous possible meanings. It would be better not to use it but to be precise about the defects of the evidence.

Second, it was the defence which sought to introduce this evidence. The defence (usually) only has to raise a reasonable doubt. Evidence of low probative value can raise a reasonable doubt. Traditionally, courts have been cautious before excluding defence evidence but since the passage of the 2006 Act seem to have become bolder.

Third, all evidence has to pass not only the s 7 test of relevance and probative value but also the s 8 test of not prejudicing the proceedings or needlessly prolonging the proceedings. Section 8 contains a caution that the defence must be allowed to offer an effective defence. As with so much of the 2006 Act, it is not clear what s 25 adds to ss 7 and 8. Does it mean that expert evidence must reach some higher level of probative value before one even considers issues like

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complexity and multiplication of issues, or does it mean that some factors additional to those in s 8 are considered? And if the latter, what issues?

Lichtwark was accused of possessing materials and equipment for manufacturing methamphetamine. The charge was that he had done this while residing at a house with others from late September to early December 2011. A three year old girl also resided at the house for some of that period and analysis of her hair revealed traces of methamphetamine. Analysis was performed of hair close to the root (ie recently grown) and also of hair some 12 cm from the scalp. The proposed expert witness said that most adults' hair was expected to grow between 0.9 and 1.4 cm per month: for practical purposes, one centimetre a month. Children's hair was thought to show greater variability but probably grew faster than adults' hair. The only way to be precise about any individual's rate of growth would be to measure it.

The defence case was that the manufacture of methamphetamine had been carried out by other persons in the household. The defence wished to introduce the detailed hair analysis to show that manufacture commenced before the defendant moved in. The defence expert in his brief of evidence stated that "on balance of probabilities" the 12 cm growth would amount to a minimum of six months' growth. At voir dire, however, he said that it could represent a range of time between three and a half and eight months. This was the evidence which the Court of Appeal said was of low reliability and probative value. It added that it did not consider that by "balance of probabilities", the expert meant the same thing as the term meant in the law of evidence. There are a number of terms which scientists and lawyers use differently, such as "consistent". It is submitted however that it is not clear that "balance of probabilities" is one of them. Nor is it clear from the judgment why the Court thought that the expert was not using it to mean "more likely than not".

The real problem is that the expert gave his evidence in an unhelpful fashion and neither counsel nor the Court noticed this. An expert should not state a conclusion about a past event because the expert does not have all the relevant evidence. Experts should state only the strength of the evidence that they are giving. They should do this by considering how probable the evidence is under the competing hypotheses. This is the standard way in which the ESR gives DNA evidence, for example.

Thus the expert should have been asked "how probable is this evidence (ie the contamination at the 12 cm point) if the girl was exposed to methamphetamine six months ago?" and "how probable is the evidence if the exposure commenced two and a half months ago?"

The expert stressed the lack of data as to that child's hair growth. This is a red herring which has distracted courts on numerous

occasions. The job of a criminal court is to make judgments as to past events in conditions of uncertainty. It seems quite reasonable, from the evidence that he gave, that if the expert had asked himself, or been asked, the correct questions, he would have said that it was highly likely that contamination would be found at the 12 cm point if there had been exposure for six months and highly unlikely if there had been exposure for only two and a half months. As it is the ratio that determines the strength of the evidence, not the figures themselves, he could have given an estimate based on his experience that the evidence was, say, ten times more probable if the exposure had begun at least six months ago than if it had begun less than three months ago. This is a low figure compared to say DNA evidence. The effect of gathering more data might well be to change the ratio but that is true of all evidence. There is also the risk of multiplication of issues: for example, the girl might have been exposed to methamphetamine at a house she regularly visited. Whatever the figure, it seems clear that the available evidence on this point strengthened the defence case as against the prosecution case and that would have been clearer to the Court if it had been expressed in the logical fashion. At the least, if the evidence had been expressed in this form, the Court would have been able to make a more informed decision as to whether the criterion in s 25 was met.

RESOURCE MANAGEMENT

Ceri Warnock

Environmental Defence Society Inc v Marlborough District Council (the "King Salmon" case)
[2014] NZSC 38

In plan-change applications, will an analysis based on the "overall judgment" approach be consistent with the legislative framework of the Resource Management Act 1991 (RMA) in general, and the New Zealand Coastal Policy Statement (NZCPS) in particular? This was the issue addressed by the Supreme Court and answered in the negative in the "King Salmon" case.

The case concerned an application to change the prohibited activity status of salmon farming in the Marlborough Sounds Resource Management Plan to discretionary, in relation to eight sites. Given the national significance of the proposal and the degree of public interest, the matter was called in. The Board of Inquiry granted plan changes in relation to four of the sites. EDS appealed the decision in relation to one site: Papatua.

The Board found that Papatua was an outstanding natural landscape; the salmon farm would create significant adverse effects; and allowing the application, would prevent policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement (NZCPS) from being

complied with (at [5]). Nevertheless, the Board granted the plan change following an "overall judgment" approach to sustainable management of the resource. The matter was unsuccessfully appealed to the High Court ([2013] NZHC 1992) and then appealed directly to the Supreme Court.

The majority in the Supreme Court (Elias CJ, McGrath, Glazebrook and Arnold JJ) found that the NZCPS set an environmental "bottom line". Planning instruments can reflect particular value choices (at [90]). If a policy statement chooses absolute protection of an outstanding natural landscape that is perfectly legitimate, as preservation and protection is an important feature of sustainable management (at [24(d)]). This value choice must be "given effect to" in regional plans (s 67(3)(a)). "Give effect to" is a strong directive creating a firm obligation to "implement" (at [77]); it acts to "constrain decision makers" (at [91]) and it was wrong in law to relegate this clear direction to just one of a number of relevant matters included in a final "overall judgment" analysis.

There were other, contextual indicators in s 58 and the wider RMA that supported the evaluation that the NZCPS might contain policies that were not discretionary but had to be implemented (at [117]–[125]). For example, the NZCPS was created following an elaborate consultative and participatory process; it can set national "priorities" (s 58); and given the role of the Minister, it may be considered an instrument of Ministerial direction (compare dissent at [183]–[185] where William Young J states that there is a specific mechanism to achieve preservation of the coastal environment: restricted coastal activities (s 58(e)) and the Minister had not chosen to use this tool (NZCPS Policy 29)).

Further, the majority stated that the "overall judgment" approach was unsatisfactory because it cuts across the elaborate processes that created the NZCPS, creates uncertainty, and undermines the strategic, region-wide approach that the NZCPS requires regional councils to take to planning (at [136]–[140]). In addressing the inter-relationship between s 67(3) and the need to "give effect" to the NZCPS, and the requirement in s 66(1) to make plan changes "in accordance with" Part 2, the majority stated that the NZCPS had already been created in accordance with Part 2 and there was no need for the Board to layer another Part 2 analysis on top (at [85]). Section 5 was not "an operative provision" in these circumstances (at [151]) and a reliance on s 5 should only be necessary if there is an allegation that the policy statement is unlawful, incomplete, or uncertain and reference to the wider provisions of the statement do not resolve this uncertainty (at [88]).

The manner in which provisions of the NZCPS will be "given effect" to will of course be influenced by their specificity. In this case, the direction was clear. Policies 13(1)(a) and (b) 15(a) and (b) of the NZCPS require decision-makers to "avoid" adverse

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effect in areas of outstanding natural landscapes. In the context of the NZCPS and s 5(2)(c) of the RMA, "avoid" means "not allow" (at [96]). While protection was only from "inappropriate" development, questions of inappropriateness will be affected by context and in the present context should be assessed by "reference to what is sought to be protected" not by reference to whether the site would be appropriate for the activity (see NZCPS objective 2, policies 13 and 15 and RMA s 6(a),(b),(f)) (at [101]).

The majority decision overturns an approach to decision-making in resource management law that has persisted since *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70. The majority accepted that Grieg J was correct in *NZ Rail* to refer to the "open textured" nature of s 5, which rendered it unsuitable to classic statutory interpretation. However, the same could not be said of plans. Many were highly specific and set clear obligations for decision-makers. In the event of any apparent internal conflict (as was argued to be the case with the NZCPS but rejected by the majority), plans need to be interpreted carefully and the interpreter should closely scrutinise the words used in the plan itself to resolve the conflict. For example, the direction to "avoid" will place a firmer obligation on a decision-maker than to "take account of" (at [129]) (cf dissent at [198] where William Young J states that policy statements should not be construed with the rigour of statutory interpretation).

The full ramifications of this decision are not yet clear, but it has the potential to impact upon and alter the entire practice of resource management.

EQUITY

Juliet Chevalier-Watts

Levin v West City Construction Ltd
[2014] NZCA 98

This case concerned the assignment of a bond as a method of payment for services provided by West City Construction Ltd to St George Developments Ltd; the latter went into liquidation in January 2008. The issue is whether the assignment occurred as an oral agreement in November 2005. Under s 293(3)(a) of the Companies Act 1993 includes "conveying or transferring the company's property." This transaction is voidable in certain circumstances (s 292(2)) and an assignment that transfers a chose in action can be such a transaction. The object of a voidable transaction is to give effect to the *pari passu* principle, where creditors of the same class share in the company's fund for distribution on a *pro rata* basis (*Farrell v Fences & Kerbs* [2013] NZCA 91, [2013] 3 NZLR 82 at [65]).

For there to be an oral agreement, there must be an intention to assign and clear words are required to show that intention:

"To yearn is not to transfer" (*Re Vandervell's Trusts (No 2)* [1974] 1 Ch 269 at 294). If the intention of the assignor that the contractual right is to become the property of the assignee, then equity requires that the assignor does all that is necessary to implement that intention. In the instant case, there was vagueness about when the bond was to be assigned. The High Court thought it more likely than not the bond was assigned in November 2005, however the Court of Appeal could find no evidence that the parties intended to be bound by an agreement to assign on that date. This evidence included putting the agreement in a "bottom drawer", indicating an intention to shelve the agreement for the time being; the lack of evidence of the Council being informed of the alleged assignment, which would have been expected if it were to be binding; and West City continuing to submit invoices for further work done, suggesting that they were hoping to be paid in the usual way, as opposed to being promised a payment by an assignment.

In particular, the vagueness about when the bond was to be assigned, for instance, on completion of the work, or once the Council agreed that the work had been completed satisfactorily undermined the notion of the validity of the alleged oral agreement. Lack of such critical details would not have made it possible to order specific performance of this "agreement" and suggests that all that occurred in November 2005 was only an agreement in principle; there were matters still to be resolved before the parties could be bound.

The evidence before the Court does not show an intention to assign or enter in to agreement to assign that would have bound the parties in November 2005, thus the Court of Appeal's decision differed from that of the lower court, thus allowing the appeal.

Williams v Central Bank of Nigeria
[2014] UKSC 10

The facts of this case are described by Lord Sumption as being exotic, although only some are relevant to the present appeal. Dr Williams claimed to have been the victim of a fraud instigated by the Nigerian State Security Services in 1986. Dr Williams stated that he was induced in to serving as a guarantor of a bogus transaction for imports in to Nigeria.

He paid over \$6.5 million to Reuban Gale, an English solicitor, in connection with the transaction, to be held on trust for Dr Williams on the basis that it should not be released until certain funds had been made available to him in Nigeria.

It was stated that Mr Gale then paid a substantial portion of that money to the Central Bank of Nigeria in London, and kept the remainder personally. Dr Williams asserted that Mr Gale acted in fraudulent breach of trust because he asserted that Mr Gale knew that the other funds would not be

available to Dr Williams in Nigeria. He was given permission to serve proceedings on the Central Bank of Nigeria in Nigeria.

The issue was whether s 21(1)(a) of the (United Kingdom) Limitation Act 1980 disapplied the statutory limitation period with regard to claims by a beneficiary against an accessory to a fraudulent breach of a trust:

21 Time limit for actions in respect of trust property.

(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

Of particular interest to the Court was whether a stranger who knowingly assists in a breach of trust, or knowingly receives trust property as a result of a breach of trust, is a trustee within the meaning of s 21(1)(a).

Lord Sumption, with whom Lord Hughes and Lord Neuberger agreed, posited two types of trustee. Firstly, persons who have lawfully assumed fiduciary obligations in relation to trust property, but without formal appointment. These may include trustees *de son tort* who have assumed the role of trustee. These individuals intend to act as trustees and are true trustees. Secondly, there are individuals, such as company directors, who by virtue of their position, are fiduciaries with similar obligations. These individuals may have dishonestly assisted in the breach of a trust, or knowingly received funds in a breach of trust, and may be required to account as if they were fiduciaries or trustees, but they are not true trustees. Such cases may be referred to as ancillary liability. This point was crucial in determining the application of the Act because the s 21(1)(a) will apply to a true trustee but not with regard to ancillary liability. An individual acting under ancillary liability does not have trust property lawfully vested in him, unlike a true trustee, and therefore will only be a wrongdoer, and not a true trustee, although he will still be liable to account. Limitation does not apply in favour of a true trustee as the date of any breach is irrelevant, the court simply enforces the trust against the trustee.

As a result, the majority of the Court (with Lord Mance dissenting and Lord Clarke dissenting in part) held that s 21(1)(a) is limited to actions against a true trustee. It does not apply to actions against third parties such as knowing recipients of trust property, the latter being the kind alleged against the Bank. The claims were barred by limitation and the appeal was allowed. This decision provides certainty regarding the limitation of claims pertaining to liability for dishonest assistance and knowing receipt and explains the conceptual distinctions between true trustees and those with ancillary liability. □