Limitations in the law of express trusts

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This paper is a comprehensive analysis of the law of lapse of time as it impacts upon actions by cestuis que trust *against their trustees. Both statutory and equitable rules are examined. There follows an analysis of the recent decision of the High Court of Australia in* Orr v Ford, *which the author argues was deficient in certain respects. The final part of the paper is a consideration of proposals for statutory reform in the area.*

I INTRODUCTION

In 1932, in the preface to his book *Limitation of Actions in Equity*,[1] John Brunyate had cause to comment that, "... [t]he limitation of actions in equity, whether by statute or under the equitable rules of laches and acquiescence, is one of the corners of English law which still remain a little obscure ...".[2]

The High Court of Australia, in its decision in *Orr* v *Ford*,[3] recently dealt with the law as to the limitation of a suit for a declaration that a trust obligation existed over a piece of land.[4] This decision, which will be examined in the fourth section of this paper, confirms that the obscurity noted by Brunyate in 1932 still exists today, for it demonstrates that this is an area surrounded by confusion. *Orr* v *Ford* also demonstrates however, that the law as to the limitation of actions in equity, despite this obscurity and confusion, is of relevance and importance today.

This paper will examine the law as to the limitation of actions to enforce a trust against a trustee, or for a declaration that a trust obligation exists. The objective is to show that much of the confusion which surrounds the question of limitation of these suits can be avoided if underlying equitable principles are adhered to.

As the quotation from Brunyate suggests, limitations of actions in equity do not derive solely from statute; there are two other sources of limitation defences in equity. The first of these is the doctrine of laches, under which the rules of laches and acquiescence may bar suits at equity. Secondly, the courts may bar a suit at equity if an analogous suit at law is barred by statute.[5] Trusts law being exclusively equitable and

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1 J Brunyate *Limitation of Actions in Equity* (Stevens & Sons Ltd, London, 1932).

2 Above n 1, p iii.

3 (1988-1989) 167 CLR 316.

4 Other issues were also raised in this case, which are not relevant for present purposes. See below, text accompanying notes 78-79.

5 See above n 1, 1-22.

there being, therefore, no analogous suits at law, this paper will concentrate on statutory limitation defences, and on the doctrine of laches.

In New Zealand, the Limitation Act 1950 supplies the majority of the statutory limitation defences at present in force.[6] This Act, so far as it applies to actions by *cestuis que trust* against their trustees, or alleged trustees, will be discussed in the third part of this paper.

Laches is "... an old French word for slacknesse or negligence or not doing ...".[7] When used in its equitable context, laches is a word of confusingly varied application, as many academic and judicial commentators have acknowledged.[8] In this paper, the approach set out by Brunyate[9] will be respectfully adopted as correct. On this approach it is necessary to distinguish between laches "in the wide sense", and laches "in the narrow sense".[10] Laches in the wide sense is a generic term, encompassing "... all the rules under which lapse of time before a suit is brought can operate as a defence ...".[11] In this paper, to avoid confusion, the phrase "the law of the effect of lapse of time" will be adopted to describe laches in Brunyate's wide sense.[12] Laches in the narrow sense is a subset within this wider concept.

There are two sets of rules under which lapse of time may operate as a defence to a suit in equity, and hence which comprise the law as to the effect of lapse of time; the first is the rules of laches (Brunyate's laches in the narrow sense), the second is the rules of acquiescence. There is a conceptual difference between these two sets of rules; in the former, lapse of time operates as a defence of itself,[13] in the latter, lapse of time forms only one element of the defence.[14]

Brunyate enumerates a number of rules of laches.[15] This paper however, will only examine those rules which may be relevant to suits by *cestuis que trust* against their trustees, or alleged trustees. These are:[16]

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6 Although there are some statutory limitation defences contained in specific statutes, none of these is relevant for present purposes. A list of these specific statutory defences can be found in the New Zealand Law Commission's report *Limitation Defences in Civil Proceedings* (1988) NZLC R6, at 224-225.

7 *Partridge* v *Partridge* [1894] 1 Ch 351, 360.

8 See for example, J Brunyate, above n 1, 188; *Orr* v *Ford*, above n 3, 338, per Deane J; Meagher, Gummow & Lehane *Equity - Doctrines and Remedies* (2 ed, Butterworths, Sydney, 1984) 763; JC Starke QC "Laches, acquiescence and delay" (1990) 64 ALJ 103, 104.

9 J Brunyate, above n 1.

10 Above n 1, 188.

11 Above n 10.

12 A phrase somewhat similar to this can be found in Brunyate, above n 1, 189.

13 Above n 1, 189.

14 Above n 13.

15 Above n 1, 190-192.

16 Above n 15.

1 "During the lapse of time witnesses may have died, written evidence have been lost, or some other event have occurred to prejudice the defendant's case ...";

2 "Lapse of time is in itself evidence that there was no cause of action, for a man is not likely to sleep upon his claims if they are well founded ...";

3 "Where a plaintiff has the right to elect between two courses he cannot justly be allowed to wait so as to see which course will be the most profitable, for then he will be gambling on a certainty at the expense of another ..."; and

4 "After a sufficient time it becomes impossible to remedy an injury for a new equilibrium is established, to disturb which rather creates new injury than remedies the old ..."

Unfortunately the term "acquiescence" is also one that has historically admitted of a number of senses and is consequently confusing.[17] The strictly correct definition of acquiescence is the standing by of a person possessed of rights in the knowledge that another is infringing or is about to infringe those rights. Equity treats that standing by as an assent to the infringement if it can be said to have induced the infringer to act or to continue to act.[18]

The term acquiescence is also used, however, to refer to a set of equitable defences by which rights may be forfeited "... where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time ...".[19] It is in this sense that the term acquiescence will be used in this paper. Lapse of time may form an element in these defences, and, to the extent that it does, the rules of acquiescence will comprise part of the law of the effect of lapse of time.

The rules of acquiescence are:

1 *Estoppel by acquiescence*: Brunyate identifies five requirements of this rule which must be proved by the defendant. These are:[20]

(1) That [the defendant] made a mistake as to the facts on which [the plaintiff's] claim is based;

(2) That [the defendant] did some act on faith of that mistake;

(3) That [the plaintiff] knew of the existence of his own right which is inconsistent with [the defendant's] right;

(4) That [the plaintiff] knew that [the defendant] was acting under a mistake as to his legal rights; and

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17 See for example, *Orr* v *Ford*, above n 3, 337, per Deane J.

18 See *Orr* v *Ford*, above n 3, 337, per Deane J; *Halsbury's Laws of England* (4 ed, Butterworths, London, 1980) vol 16, Equity, para 1473, p 994.

19 *Halsbury's Laws of England*, above n 18.

20 Above n 1, 202.

(5) That [the plaintiff] encouraged [the defendant] in his action by abstaining from asserting his legal right ...

2 *Contract, licence or waiver*:[21] These defences will operate by way of acquiescence if, for example, the plaintiff's delay in prosecuting their rights has, to the knowledge of the plaintiff, created in the defendant an expectation of contractual rights being created by the defendant's actions.[22] A licence can similarly be created by estoppel, and if the expectation created by the plaintiff's delay is that the plaintiff has waived their rights then the plaintiff may be estopped from denying they have waived their rights.

3 *Election*:[23] In this case, a plaintiff who has had to choose between two mutually exclusive courses will be prevented from changing course once one has been elected. An election by acquiescence may be held to exist if the plaintiff's delay is either evidence that an election has occurred or a component of an estoppel.[24]

4 *Release*:[25] Generally, "... (w)hen a person has a vested right of action against another a promise not to enforce that right of action does not ... extinguish the right unless it is given for valuable consideration or in an instrument under seal ...".[26] An important exception to this rule however, is in the case of a *cestui que trust* who has a right of action against their trustee. A *cestui que trust* may release their trustee by acquiescence if their delay has amounted to a release, or if the delay estops the *cestui que trust* from denying that they have released the trustee.[27]

Not all of the rules of laches and acquiescence set out above will be applicable in every action by *cestuis que trust* against their trustee or alleged trustee; considerations of principle in particular cases may mean some or all of these rules are inapplicable, or require modification.

In Part II of this paper, Brunyate's analysis of the rules of laches and acquiescence applicable to suits to enforce a trust or for a declaration that a trust obligation exists in relation to certain property, will be examined with reference to the principles underlying the particular suit.

Part III will discuss the extent to which these rules are modified by the Limitation Act 1950. A comprehensive picture of the law of the effect of lapse of time in relation

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21 See generally, above n 1, 204-217.
22 See *Ramsden* v *Dyson* (1865) LR 1 HL 129, 170. In this paper the plural pronoun is used purposely.
23 See generally, above n 1, 217-209.
24 Above n 1, 219.
25 See generally, above n 12, 199-200.
26 Above n 1, 199.
27 Above n 1, 240.

to suits by *cestuis que trust* against their trustees, or alleged trustees, will thus be built up.

The High Court of Australia's decision in *Orr* v *Ford* will be discussed in Part IV. It will become evident from this discussion that some reform of the law in this area is desirable for the sake of certainty. This paper will thus conclude with an explanation and evaluation of some options for reform.

II THE LAW OF THE EFFECT OF LAPSE OF TIME IN RELATION TO SUITS BY *CESTUIS QUE TRUST* AGAINST THEIR TRUSTEES

Suits by *cestuis que trust* against their trustees can be divided into three general categories.[28] Conceptual differences between these categories will demand that the rules relating to lapse of time differ in respect of each. These three categories are:

(i) Suits in which the *cestui que trust* seeks to recover trust property which is still in the hands of the trustee;

(ii) Suits in which the *cestui que trust* seeks a declaration that a trust obligation exists in relation to certain property and the trustee denies the existence of the trust;

(iii) Suits in which the trustee has committed a breach of an admitted trust, by which trust property has been lost, and the *cestui que trust* seeks to hold the trustee liable for the breach.

Each of these categories will be examined in turn.

A Suits in which the cestui que trust *seeks to recover trust property which is still in the hands of the trustee*

In this case, Brunyate says, "... [a] trustee who is in possession of property which he admits to be trust property cannot plead the laches of the *cestui que trust* in a suit to enforce the trust in respect of that property ...".[29] *Mills* v *Drewitt*[30] may be cited in support of this proposition. In that case the testator bequeathed his personal estate to his executors on trust and directed them to make investments sufficient to produce £40

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28 Above n 1, 234-235.

29 Above n 1, 234. This rule is subject to one exception, in the case of suits against trustees to set aside sales of trust property made by the trustees to themselves. Brunyate says that in this case, while there is no rule of acquiescence that lapse of time may be evidence that the sale has been confirmed, Equity does provide that the sale can only be avoided within a reasonable time, above n 1, 244. See also *Turner* v *Trelawney* (1884) 12 Sim 49; 59 ER 1049.

30 (1855) 20 Beav 632; 52 ER 748. See also *in re Ashwell's Will* (1859) Johns 112; 70 ER 360.

per year to be paid to his wife. Investments were duly made, but over time the income they produced was diminished. Between the years 1822 and 1853, a sum less than £40 was paid to the widow. After her death in 1853, the widow's personal representative sought a declaration that the widow was, under the will, entitled to a full and clear annuity of £40, and further sought to have the arrears made good out of the trust fund. The trustee argued that the widow's acquiescence in the payment of the lesser sum for some 25 years, precluded her from claiming more. Sir John Romilly MR upheld the widow's interpretation of the trust, and rejected a defence based on lapse of time, saying:[31]

> ... if I am right in the view I take of this case, this fund, or a part of this fund, ought to have been paid to the widow during her life, and it is now hers, though she did not claim it during her life ...

The rationale for the inapplicability of the doctrine of laches to these claims therefore appears to be the equitable proprietary nature of a *cestui que trust's* interest in the trust, whereby the *cestui que trust* can be regarded as the beneficial owner of their interest in the trust fund. On this principle, it is incoherent to allow delay on the part of a *cestui que trust* to defeat an interest of this nature. Strictly speaking of course, the beneficiary's remedy, "... historically and practically, is in the form of an action against the trustee; a right in personam ...",[32] and the beneficiary has no legal entitlement to the trust property. It is however in keeping with traditional equitable practice, which is to prevent the law from operating to benefit the trustee,[33] that the trustee should not be allowed to rely on lapse of time to defeat an undeniable trust interest.

Brunyate does not specify whether the rules of acquiescence can apply to the *cestui que trust's* claim to enforce an admitted trust.[34] It is submitted however, that on the policy argued above in relation to the rules of laches, they should not. Given the trustee's knowledge of the *cestui que trust's* interest in the trust, it will never be possible for the *cestui que trust's* delay to create in the trustee an expectation or mistaken belief sufficient to estop the *cestui que trust* from enforcing the trust.[35] Similarly, the nature of the *cestui que trust's* interest, and a desire to prevent benefit from accruing to the trustee, make arguments that the *cestui que trust's* delay may be

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31 *Mills* v *Drewitt*, above n 30, 750 (ER).

32 H Hanbury, R Maudsley, J Martin *Modern Equity* (12 ed, London, Stevens, 1985) 18.

33 Above n 1, 235.

34 Above n 1, 234.

35 The majority of the High Court of Australia in *Orr* v *Ford*, above n 3, 330, would disagree for they "... see no reason why an estoppel arising from delay should not be available in answer to a claim by a beneficiary to an ascertained interest in specific property ...". *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, is cited as authority for this proposition. In that case the defendants were estopped from denying that there was a valid and enforceable agreement for a lease in respect of certain property. It is submitted with respect that the nature of a trustee's obligation to their *cestui que trust* provides a sufficient reason why such an estoppel cannot exist in the case of an express trust.

sufficient to found an inference of a prior release or election by the *cestui que trust* untenable.

B Suits in which the cestui que trust *seeks a declaration that a trust obligation exists in relation to certain property and the trustee denies the existence of the trust*

If the existence of an equitable proprietary interest in the beneficiary is in doubt, the considerations of principle and equity which arose in category A as a result of allowing the trustee to invoke the beneficiary's delay to bar relief, may not arise. Indeed, inequity may arise if the trustee is not allowed to rely on the beneficiary's delay. Accordingly, Brunyate says of this category, that the trustee "... can plead that the delay of the *cestui que trust* has caused him to lose his evidence, and the *cestui que trust* may then be barred by his laches ...".[36]

In *Attorney-General* v *The Fishmonger's Company*[37] the Attorney-General claimed that property which had been treated as the absolute property of the defendants for 400 years, had in fact been bequeathed to them as trustees for charitable purposes. Lord Cottenham LC held that the history of the property seemed to confirm the defendant's argument that they held the property absolutely pursuant to a complicated series of transactions designed to circumvent restrictions on the amount of property the defendant could own. This, coupled with the 400 years' delay, served to answer the Attorney-General's claim:[38]

> ... If there be no doubt as to the origin and existence of a trust, principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. One of the principal reasons for admitting limitation of suits is the difficulty of ascertaining the facts necessary to make it a safe exercise of judicial power ...

Once again it is not clear whether the rules under which lapse of time operates by way of acquiescence are applicable. Claims by a trustee of election or release require a previous admission that there was a trust obligation. It has already been argued that it would be contrary to policy to allow these defences to operate by way of acquiescence in those circumstances. The remaining rules of acquiescence all involve estoppel. In order to raise these defences, the trustee will have to show they did not know of the alleged trust obligation, for otherwise the trustee cannot have formed a mistaken belief or

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36 Above n 1, 235.

37 (1841) 5 My & Cr 17; 41 ER 278.

38 Above n 37, 278 (ER) per Lord Cottenham LC. See also *Bright* v *Legerton* 2 De G F & J 606; 45 ER 755, 759.

expectation about their rights sufficient to found an estoppel. If the trustee were unaware of the trust obligation it is likely that the essential requirement that a certain intention to create a trust be manifested by the settlor would not be fulfilled, and no trust would exist.[39]

One case which involved the rare situation of an alleged trustee who was unaware of the trust obligation which was claimed to affect the property was *Hourigan* v *The Trustees Executors and Agency Co Ltd and Ors.*[40] That case involved a provision in the testator's will, by which he bequeathed the residue of his estate to his wife, with a direction that it should be used for the education and maintenance of their two sons. The wife treated the property as her's absolutely, and made periodic payments for the support of the sons, one of whom died at an early age. The plaintiff, a solicitor, was the surviving son. In 1895 he had prepared, and persuaded the testator's executor to sign, a transfer of the property to his mother absolutely. The wife died in 1917. In 1932 the trustees of her will issued an originating summons to have a number of questions, including the proper construction of the residual provisions of the testator's will, determined. Mann J of the Supreme Court of Victoria held that the wife had taken the residue on trust to be used at her discretion in the education and maintenance of the sons.

The plaintiff subsequently commenced proceedings against the wife's executors and others. Macfarlane J held that the plaintiff was entitled to some, but not all, of the residue. The plaintiff appealed and the wife's executors cross appealed. The High Court gave leave to the executors to appeal the original judgment of Mann J, and accordingly this became a disputed alleged trust case. The majority of the High Court, Rich and Dixon JJ (Starke J dissenting), held that on the proper construction of the testator's will, the wife took the residue absolutely, subject to a charge that she was to use it to maintain and educate her sons.

Both the majority judgments however, contain *obiter dicta* to the effect that, even if there had been a trust, the plaintiff would have been barred by his acquiescence:[41]

> ... If a party in a position to claim an equitable right which is not undisputed lies by and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his own affairs that it would be unfair to him and to others claiming under him to tear up the transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any ...

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39 Above n 32, 93.

40 (1934) 51 CLR 619 (HC of Australia).

41 Above n 40, 629, per Rich J. See also Dixon J, at p 651, who considered that the plaintiff's conduct would have been "equivalent to a waiver" of his remedy.

These defences, by which lapse of time and other circumstances raise an estoppel, may therefore be raised in the case of a disputed allegation of a trust obligation, if the trustee believed themself to be absolutely entitled to the property, and nevertheless a trust can be proved.

C Suits in which the trustee has committed a breach of an admitted trust, by which trust property has been lost, and the cestui que trust *seeks to hold the trustee liable for the breach*

In this case Brunyate observes that there is no general duty on the *cestui que trust* to be diligent, and that accordingly mere lapse of time will not itself bar the suit of a *cestui que trust*.[42]

This proposition is demonstrated by *In Re Cross; Harston* v *Tenison*.[43] The defendant was the executor of the estate of Hannah Cross, who had been trustee of certain trusts, but, on being found to have breached the trusts, had been removed from office. The action was brought by the new trustee to recover from the defendant the remaining amount, plus interest, of the breach of trust, some funds having been recovered in another action. The Court of Appeal, in a judgment delivered by Baggallay LJ, treated this as a case of a *cestui que trust* suing their trustee. In answer to the defendant's claim that the action was barred by reason of the plaintiff's delay of some 19 years, his Lordship considered it "... sufficient to state the recognised doctrine of equity that as between the trustee and the *cestui que trust* no time will operate as a bar to the equitable claim of the latter in respect of a breach of trust ...".[44]

Brunyate qualifies this general proposition, saying, "... [i]f however, there are other circumstances which, taken with the lapse of time, make it unjust for the Court to grant relief against the trustee, it will not grant the relief ...".[45] A similar qualification is to be found in the judgment of Baggallay LJ in *In Re Cross*, who goes on to say that "... the doctrine, that where there is an express trust delay in seeking relief in respect of breach of it is not material, does not apply to a case in which there has been acquiescence or gross laches on the part of the *cestuis que trust* ...".[46]

Brunyate considers that there are three grounds upon which the *cestui que trust* can be denied relief. These are:[47]

(1) Where the suit is based on a breach of trust in the improper investment of the trust property, that the *cestui que trust* by his conduct has authorised the investment; the fact that the *cestui que trust* has stood by for a long time while the property is invested in breach of the trust will be strong evidence that he has authorised the investment.

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42 Above n 1, 235.
43 (1882) 20 Ch D 109.
44 Above n 43, 121.
45 Above n 1, 235.
46 Above n 43, 121.
47 Above n 1, 235.

(2) When the suit is based upon a past breach of trust, that the conduct of the *cestui que trust* has amounted to a release of the trustee from liability, or that the *cestui que trust* is estopped from denying that he has released the trustee.

(3) That the unreasonable delay of the *cestui que trust* has prejudiced the trustee, either by making it harder for him to prove his case or by causing him to lose his remedies against third parties.

As can be seen, in the first two of these cases, lapse of time operates by way of acquiescence.

It is necessary to qualify the rather broad proposition set out in the first case, as Brunyate recognised,[48] for the trustee "... cannot be permitted to escape from the liability incident to [his] duty [to observe the trust] by simply informing the *cestui que trust* that he has committed or intends to commit a breach of it ...".[49] If the trust is clear, the trustee cannot impose upon the *cestui que trust* the duties of management of the trust and observance of its terms that the trustee has undertaken.[50] On the other hand, if the trust involves some discretion or is doubtful, then "... the trustee, by informing the *cestui que trust* of the course he intends to take, can throw on him the duty of making his objections promptly ...".[51] The modern trustee's ability to apply to the Court for directions under section 66 of the Trustee Act 1956 may however render the trustee unable instead simply to inform the *cestui que trust* of their proposed course of action in this situation.

The second case is the exception mentioned above to the general rule that a release is not valid unless supported by consideration or contained in a deed.[52] Although the *cestui que trust's* delay may be evidence of a release by acquiescence, there must, however, also be sufficient other evidence of an intention to release.[53] This is probably because of the exceptional nature of this defence. Thus in *In Re Jackson*[54] the *cestui que trust's* delay could not, without more, be evidence of an intention to release the defendant from liability.[55] Further, Brunyate stresses that "... a release cannot be valid unless given with full knowledge of the preceding circumstances and of its effect ...".[56]

The third case in which a *cestui que trust* may be barred from obtaining relief from the trustee for the trustee's breach of trust is one of laches. In the cases involving

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48 Above n 1, 239.
49 *Life Association of Scotland* v *Siddal* (1861) 3 De G F & J 58; 45 ER 800, 806, per Turner LJ.
50 Above n 1, 239.
51 Above n 1, 239.
52 See above, text accompanied by notes 25-57.
53 Above n 1, 240.
54 *In re Jackson*; *Wilson* v *Donald* (1881) 44 LT 467.
55 Above n 54, 486.
56 Above n 1, 241.

acquiescence, lapse of time forms only one element in the defence,[57] so mere lapse of time will not have barred the *cestui que trust's* suit.[58] In the rules of laches however, lapse of time operates by definition as a defence in itself,[59] and it is difficult therefore to see how more than "mere lapse of time" is involved. The answer would appear to lie in the added requirements, in the breach of trust case, that the *cestui que trust's* delay must be unreasonable[60] and that the *cestui que trust* must have known of the facts throughout the period of the delay.[61]

In its more general application there is no requirement of unreasonable delay in this "delay causing prejudice" rule of laches; so long as the plaintiff's delay has prejudiced the defendant, the plaintiff will be barred. The requirement of unreasonable delay in the breach of trust case is in keeping with the basic principle that there is no general duty on the *cestui que trust* to be diligent.[62]

The knowledge requirement presents a little more difficulty, for "... [i]n order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily, ... necessary that there should be sufficient knowledge of the facts constituting the title to relief ...".[63] The exception to this proposition is that if there is a special duty on the plaintiff to be prompt, "wilful blindness" to the facts when a right of action is suspected will disentitle the plaintiff to rely on their ignorance of the facts to rebut a defence of laches.[64] The effect of this knowledge requirement is then that in the case of a *cestui que trust* suing their trustee for breach of trust there can never be a special duty of promptness imposed on the *cestui que trust*. This too is in accordance with the basic principle which underlies this category of suits.[65]

It is submitted that it is the extra requirements of unreasonable delay and knowledge throughout the period of delay which accounts for the label "gross" being attached to the "delay causing prejudice" rule of laches in this breach of trust case.[66] As will be seen, the term "gross" laches has caused some considerable confusion.[67] In this light, however, it is both understandable and can be seen to accord with principle.

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57 See above, text accompanying notes 13-14.

58 It is a requirement in this category of suits that mere lapse of time should not bar the *cestui que trust's* suit. See above, text accompanying note 45.

59 See above, text accompanying notes 13-14.

60 Above n 1, 243.

61 Above n 1, 243.

62 See above, text accompanying note 42.

63 *Linsay Petroleum Co* v *Hurd & Ors* (1874) LR 5 PC 221, 241. See also *O'Connor* v *Hart* [1983] NZLR 280, 293, (CA); *Life Association of Scotland* v *Siddal*, above n 49; *Baburin* v *Baburin (No 2)* [1991] 2 Qd R 240, 257.

64 Above n 1, 255.

65 See above, text accompanying note 42.

66 See above, quotation accompanying note 46, for example.

67 See the discussion of *Orr* v *Ford*, below, Part IV.

III THE IMPACT OF THE LIMITATION ACT 1950 ON THE LAW OF THE EFFECT OF LAPSE OF TIME

This paper has so far considered the law of the effect of lapse of time unaffected by statutory limitation defences. It is now necessary to examine the major statutory modification of this law, section 21 of the Limitation Act 1950.

Section 21 provides:

> (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 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 Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

One other provision from the 1950 Act is immediately relevant. This is section 31, which provides:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

It will be convenient to consider the effect of these provisions on each of the categories identified in Part II above.

A *Suits in which the* cestui que trust *seeks to recover trust property which is still in the hands of the trustee*

Section 21(1)(b) provides that, where the trustee is in possession of the trust property or proceeds thereof, or has previously received it and converted it to their own

use, no statutory limitation period will apply in an action by the *cestui que trust* to recover the property from the trustee.[68]

Since section 31 preserves the possibility of relief being refused under any equitable jurisdiction, the law of the effect of lapse of time outlined above can still apply. We have already seen that under that law, no lapse of time can bar the *cestui que trust's* suit in this case. The position in respect of these suits is, accordingly, unaltered by the Limitation Act 1950.[69]

B *Suits in which the* cestui que trust *seeks a declaration that a trust obligation exists in relation to certain property and the trustee denies the existence of the trust*

It is submitted that section 21 does not cover these cases. Section 21 presumes that a trust has been established or admitted, which is by definition not true of these cases. Suits in which a declaration is sought that a trust exists remain outside the ambit of the Limitation Act,[70] and the law of the effect of lapse of time outlined in section two of this paper will therefore apply.

C *Suits in which the trustee has committed a breach of an admitted trust, by which trust property has been lost, and the* cestui que trust *seeks to hold the trustee liable for the breach*

The Limitation Act requires that these cases be divided into two subcategories, namely, those cases that involve fraud to which the trustee was a party or privy, and those that do not. Section 21(1)(a) provides that in the first subcategory, no statutory period of limitation will apply. As has already been seen, the possibility of the law of the effect of lapse of time applying is expressly left open by section 31. Under that law, there are three laches and acquiescence defences which the trustee may plead.

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68 See *Mackenzie* v *Mackenzie* (1894) 12 NZLR 590, which dealt with s 13 of the Trustees Act 1883 Amendment Act 1891, which contained a provision very similar to s 21(1)(b). In that case Williams J said (at 593): "... [t]he principal has never been accounted for, or purported to have been accounted for, as having been expanded for the purposes of the trust, or with the intention of carrying out the trust. It must, therefore, be considered either as having been converted by [the defendant] to his own use, or as having been retained by him. In neither case does the statute apply ...".

69 The exceptional case, identified above n 29, of a suit to set aside a sale of trust property made by the trustee to the trustee would appear, although there is a lack of authority on point, to be covered by s 21(1)(b), as it is a suit to recover trust property, or the proceeds thereof, which is in the possession of the trustee. Accordingly the equitable rule that the *cestui que trust* can only avoid the sale within a reasonable time will continue to apply by virtue of s 31, and the position in respect of these suits will also be unchanged by the statute.

70 These cases are not covered by any other section of the 1950 Act. Section 4, the most general provision in the Limitation Act 1950, only provides for the limitation of actions based on contract and tort, and certain other actions which are not relevant for present purposes.

Briefly, these are: authorisation by acquiescence, release by acquiescence or estoppel, and gross laches.[71]

In *In re Timmis; Nixon* v *Smith*[72] Kekewich J said:

> "... [t]he intention of the statute was to give a trustee the benefit of lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest ..."

At first glance it would appear that the application of these three laches and acquiescence defences could frustrate the intention of the Act by allowing the trustee to evade liability for a fraudulent breach of trust, which is both morally wrong and dishonest, and for which the statute intended to retain legal responsibility despite a lapse of time. It is unlikely however that the operation of these defences will in fact allow this to occur. All three defences require that the *cestui que trust* has full knowledge of the facts.[73] Such knowledge is extremely unlikely to exist if the trustee has been fraudulent. The potential for these defences to apply in fraudulent breach of trust cases in which trust property is lost will therefore be limited. If, indeed, it can be said that, in full knowledge of the trustee's fraud, the *cestui que trust* authorised, by their inaction, an investment of trust property in breach of trust, then it is submitted there is no reason in principle why this defence should not operate in favour of the trustee. The same argument will apply in the case of a defence of release by acquiescence or estoppel.

In the case of the gross laches defence, the *cestui que trust* will be prevented from claiming relief if their unreasonable delay, while fully aware of all the facts (including the possibility of fraud by the trustee), has caused a loss of evidence that now prejudices the trustee's defence of the *cestui que trust's* action. In this case there will at least be an inference that the facts are not as they appear at the time of the action, making it inequitable to grant the *cestui que trust* the relief they seek. It is submitted that the application of this defence will not, therefore, frustrate the intention behind the Limitation Act.

In the second sub-category identified above, that of non-fraudulent breach of trust causing loss of trust property, section 21(2) prescribes a six year limitation period. This alters the law of the effect of lapse of time, under which only the three defences of authorisation by acquiescence, release by acquiescence or estoppel, and gross laches were available. It is submitted that, in the context of a statutory intention to allow trustees the benefit of lapse of time in cases of technical, rather than dishonest, breach of trust, this change is unobjectionable. It is to be noted that there is no possibility of the three defences, previously available under the law of the effect of lapse of time, operating by way of section 31 to shorten the period of delay allowed by the Act. It is settled law

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71 See above, text accompanying note 47.

72 [1902] 1 Ch 176.

73 Above n 1, 236 (authorisation by acquiescence), 241 (release by acquiescence or estoppel), and above, text accompanying notes 61-65 (gross laches).

that where there is an express statutory limitation period, no equitable bar to relief by reason of lapse of time can operate before the statutory period expires.[74]

A comprehensive picture of the law of the effect of lapse of time in relation to actions by *cestuis que trust* against their trustees, as modified by the Limitation Act 1950, has now been built up.

IV *ORR* v *FORD*[75]

In this section it will be submitted that *Orr* v *Ford* demonstrates the confusion which surrounds the law of the effect of lapse of time. This confusion inevitably raises the question whether reform in this area is needed. This question will be discussed in Part V of this paper.

Orr v *Ford* concerned a claim that a trust existed in relation to one half of "Cockatoo", a leasehold "selection" under the Land Act 1962 (Queensland). In 1968 Dr Stone had acquired "Cockatoo" for $156,000. Mr Orr alleged that pursuant to an agreement between Dr Stone and Mr Orr's parents-in-law, Mr Orr had contributed $30,000 to the purchase price, and thereby became entitled to a half share in "Cockatoo". According to letters dating from this period the original agreement was that Mr Orr would live on "Cockatoo" and farm the property in partnership with Dr Stone. This plan did not eventuate, and Dr Stone ran "Cockatoo", along with two other properties, assisted by his manager, Mr Nimmo, and his housekeeper and confidant, Mrs Nickerson. Mr Orr played no part in the running of "Cockatoo", he received no account of the income earned from the property, and he contributed to neither the further instalments of purchase price nor the various improvements undertaken by Dr Stone over the years. Mr Orr and his family did, however, visit "Cockatoo" frequently.

In 1977 Dr Stone wrote to Mr Orr asserting full ownership of "Cockatoo" and making it clear that Mr Orr was no longer welcome on the property. Mr Orr responded with a letter "... in conciliatory terms ... seeking to discuss the matter ...".[76] He did not however challenge Dr Stone's assertion or claim an interest in the property.[77] Mr Orr later explained that he considered at the time that "Cockatoo" would eventually come to his family anyway under Dr Stone's will. In June 1978 "Cockatoo" was subleased to Mr Nimmo, and in July of the same year Dr Stone made a new will in which he devised his three properties to Mr Nimmo and Mrs Nickerson. Mr Orr had no knowledge of either of these actions.

By June 1982 Dr Stone was hospitalised due to Alzheimer's Disease and a protection order was made. About this time, Mr Orr learned of the sublease during a visit to Dr Stone in hospital. Shortly afterwards, during a conversation with the executor of Dr Stone's will, Mr Orr claimed a beneficial interest in "Cockatoo". Mr Orr's solicitor also

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74 *Archibold* v *Scully* (1861) 9 HL Cas 360; 11 ER 769, 778.
75 Above n 3.
76 Above n 3, 328.
77 Above n 3, 332.

wrote a letter to the Public Trustee, who was then in charge of Dr Stone's affairs, claiming a resulting trust was created by Mr Orr's $30,000 contribution to the purchase price of "Cockatoo".

In October 1982 Dr Stone died. Mr Orr's wife (Dr Stone's niece) and daughter objected to probate being granted over Dr Stone's 1978 will on the grounds that Dr Stone had then lacked capacity to make a will. In 1978 Mr Orr had noticed Dr Stone was showing signs of memory loss. The Supreme Court of Queensland rejected this objection and granted probate in November 1985.

In October 1985 Mr Orr commenced proceedings against Dr Stone's executors in the Supreme Court of Queensland seeking a declaration that he was beneficially entitled to a one half interest in "Cockatoo".

At first instance Ryan J held the payment by Mr Orr of $30,000, which payment was not disputed, created an express trust of a one half interest in "Cockatoo".[78] Two further issues remained. The first of these was whether the trust was rendered illegal and unenforceable by certain sections of the Land Act. The second was whether Mr Orr was prevented from claiming relief by his laches, acquiescence or delay. Both the first instance decision, and the decision of the full Supreme Court on appeal, are reported only as to the first issues.[79] Briefly, in both the first instance decision, and on appeal, the Land Act defence was accepted, while that relating to laches, acquiescence and delay was rejected.[80]

Mr Orr's appeal to the High Court was heard by Mason CJ, Wilson, Deane, Toohey and Gaudron JJ. The Land Act defence was rejected by Wilson, Deane, Toohey and Gaudron JJ.[81] On the issue concerning laches, acquiescence and delay, the majority opinion, rejecting the defence, was delivered by Wilson, Toohey and Gaudron JJ.[82] There are significant differences, on this issue, between the judgment of the majority and the main minority judgment delivered by Deane J (with whom Mason CJ concurred).

It will be seen that their Honours agreed essentially as to the law to be applied, and that it is in their interpretation of the facts that the differences between the majority and minority lie. It will be submitted however, that a failure to differentiate the categories of claims which a *cestui que trust* may bring against their trustee, led their Honours incorrectly to require gross laches in this case.

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78 (1988) 2 Qd R 258, 259.

79 Above n 4, 258. The judgment of the Full Court on appeal commences at p 263.

80 See generally, above n 78.

81 Above n 3, 327 and 334. Mason CJ delivered only a short judgment concurring with Deane J on the laches issue, and did not express and opinion on the Land Act issue, above n 3, 323.

82 Above n 3, 331.

Before commencing a closer examination of the judgments of the High Court, it will be helpful to outline the law of the effect of lapse of time which the approach adopted in Parts II and III of this paper would dictate should be applied in this case were it to arise in New Zealand.[83]

This was a case of an alleged express trust. The respondent executor, Mr Ford, while not denying the fact of Mr Orr's contribution to the purchase price of "Cockatoo", denied that its effect was to create an express trust. Mr Ford claimed that he had been prejudiced in defending Mr Orr's claim because the evidence of Dr Stone and Mrs Nickerson (who had died by the time of the 1985 probate grant), which might have helped him to defend the alleged trust obligation, had been lost during Mr Orr's delay of almost eight years.

This case then, falls within Brunyate's second category, in which the trustee denies the existence of the trust. In that case, if the evidence which remains is sufficient to support a finding that an express trust exists, the trustee may be able to plead the "delay causing loss of evidence" rule of laches in answer to the *cestui que trust's* claim. There is in such a case no requirement of gross laches, for the reasons mentioned above.[84]

In both the majority and minority judgments of the High Court, however, it is considered that in order for the defence of "delay causing loss of evidence" to succeed in this case, gross laches would have to be shown to exist.[85] The majority cite *Hourigan* v *Trustees Executors and Agency Co Ltd*[86] as authority for the proposition "... that laches may be raised in answer to a claim by a beneficiary of an express trust, at least if there has been acquiescence or gross laches on the part of the cestui que trust ...".[87] In *Hourigan*, Dixon J cited *In re Cross; Harston* v *Tenison*[88] as authority for his gross laches proposition.[89] *Hourigan*, at least in the High Court, was a disputed trust case,[90] whereas *In re Cross* was a breach of trust case.[91] Thus, while, on the approach adopted in Part II above, gross laches was correctly required in *In re Cross*, it was, with respect, not necessary in either *Hourigan* or *Orr* v *Ford*. Dixon J in *Hourigan* failed to

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83 The law to be applied in Queensland would be substantially the same. The Limitation of Actions Act 1974-1981 (Qld) governs statutory limitation defences in Queensland. For present purposes that Act is very similar to New Zealand's Limitation Act 1950. (See especially ss 10 and 27 of the Queensland Act.) The main difference between these Acts in relation to actions by a *cestui que trust* against their trustee, is that the Queensland Act contains a provision regarding the limitation of actions in relation to land held in trust. (See s 16 of the Queensland Act.) This section does not relate to the case of a *cestui que trust* seeking a declaration that certain land is held on trust however, for its presumes the prior existence of a trust obligation.

84 See above, text accompanying notes 37-38.

85 Above n 3, 329 and 340.

86 Above n 40.

87 Above n 3, 329, quoting *Hourigan*, above n 40, 650.

88 Above n 43.

89 Above n 40, 650.

90 See above, text accompanying notes 40-41.

91 See above, text accompanying notes 43-44.

distinguish between the breach of trust case (which requires gross laches) and the disputed trust case (in which "general" laches will suffice). This failure is perpetuated in the judgment of the majority in *Orr* v *Ford.*

It is the majority's failure to recognise that in the law of the effect of lapse of time different considerations attach to the different types of trusts cases which may arise, that led them to comment that "... the respondents were not able to point to any authority where [the defence of delay causing prejudice] has defeated the claim of a beneficiary to specific property the subject of an express trust ...".[92] Clearly this is because, in the case of an admitted trust, there will be no question of any laches or acquiescence defences being raised against the *cestui que trust.*

Deane J similarly does not distinguish between the various types of trusts cases. Although he observes that "... [t]he availability of a defence of laches and what will suffice to make it good depends upon the nature of the claim ...",[93] he states a broad doctrine that where there is an express trust, lapse of time is to be entirely disregarded, and a general qualification to that doctrine in the case of gross laches.[94]

The majority do not engage in any express consideration of the meaning of gross laches. It is likely however, that they considered it to mean that the consequences of the delay must be of an aggravated nature. They say that any loss of evidence in *Orr* v *Ford* is not such as to "... amount to prejudice *of the character* which might defeat the appellant's claim ...".[95]

Deane J, on the other hand, did consider this question, and concluded that the preferable approach "... is to treat the phrase "gross laches" as an intentionally imprecise one which involves not merely considerations of the period of the relevant delay but which invokes the traditional notions of equity and good conscience which are the general determinants of whether a plaintiff should be refused relief by reason of laches in the circumstances of the particular case ...".[96] Deane J appears to recognise that so understood, the gross requirement adds little to the general requirements of laches,[97] and would perhaps concur with the view that "... [a]s a matter of principle, it is difficult to understand why it should be necessary to have gradings or scales of laches; in a Court's view, either the doctrine applies or it does not ...".[98]

It has already been argued that both the nature of, and the reason for the gross requirement are clear and understandable if Brunyate's approach, as outlined in Part II above, is followed. Clearly there has historically been a judicial failure to distinguish

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92 Above n 3, 330.
93 Above n 3, 340.
94 Above n 93. Like the majority Deane J relies on *In re Cross* and *Hourigan* for his requirement that the laches in this case be "gross": see above n 93.
95 Above n 3, 331, emphasis added.
96 Above n 3, 340-341.
97 Above n 3, 341.
98 JG Starke QC, above n 8, 105.

trusts cases expressly along the lines of Brunyate's approach.[99] There has similarly been a failure in the authorities to define the term "gross laches". These failings have certainly led to the confusion evident in *Orr* v *Ford* over what is the correct law to apply.

The consequence, in *Orr* v *Ford*, of their Honours' failure to distinguish the three types of trusts cases, and the different rules of laches and acquiescence that apply to each, was that gross laches was unnecessarily required in a disputed trust case. Given their Honours' interpretation of "gross" in this context, which did not add much to the general requirements of laches, this did not cause too many practical problems.

If the general approach in *Orr* v *Ford* is followed however, the situation may arise in which a *cestui que trust* of an admitted trust, the property of which is still in the hands of the trustee,[100] is barred by their gross laches from claiming that property from the trustee. This is the logical consequence of the *Orr* v *Ford* approach, and can be seen to be at variance with accepted equitable principles. Admittedly such a case is likely to be rare, and a court would probably attempt to frustrate such a result by holding the requirements of gross laches (as set out in *Orr* v *Ford*) not to be satisfied.

It is preferable nevertheless that such a situation be avoided altogether rather than be dealt with in a piecemeal fashion should it arise. Further, the principles behind the law of the effect of lapse of time are likely to become increasingly obscure as time goes by, frustrating a return to a clear and coherent approach. Accordingly, it is submitted with respect that either an overt return to the principled approach outlined in Part II of this paper, or some more radical reform is required. Two possible options for reform will be considered in Part V of this paper.

As has been seen, Deane J essentially agreed with the majority as to the law of the effect of lapse of time. It is rather in relation to the interpretation of the facts that the judgments of the High Court vary. This highlights another possible source of difficulty in this area of the law.

The majority commence their examination of the facts of the case with a statement of the correct approach to be taken to this laches defence:[101]

> ... The question of prejudice resulting from unavailability of evidence necessarily involves some degree of speculation, but it is not a question of pure speculation. The issue is not whether evidence may have been lost but whether evidence which may have cast a different complexion on the matter has been lost ...

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99 See for example, *Bright* v *Legerton*, above n 38, and *Hourigan*, above n 40.

100 In which case the combined operation of ss 21(1)(b) and 31 of the Limitation Act 1950 require that the law of the effect of lapse of time be applied. Under this law, none of the rules of laches and acquiescence will apply to this case.

101 Above n 3, 330. This approach was followed by the Full Court of the Supreme Court of Queensland in *Baburin* v *Baburin (No 2)*, above n 63, 254.

In this case, in the majority's opinion, no such loss of evidence had occurred or was likely to have occurred. The evidence available was not such as to give rise to an inference that a "... release, abandonment or discharge of the trust or conduct inducing an assumption by Dr Stone as to such matters and amounting to an estoppel ..."[102] had occurred:[103]

> ... On the view least favourable to the appellant the most that can be said was that he was content to stand by and let matters take their course in the expectation that they would be resolved within the family after the death of Dr Stone ...

Accordingly, the majority conclude that the question of loss of evidence was "... entirely suppositional ..." and could not amount to prejudice sufficient to defeat Mr Orr's claim.[104]

The judgment of Deane J on these matters is almost diametrically opposed to that of the majority. Deane J sets out four factors which he considers constitute gross laches in this case, precluding a grant of relief to Mr Orr. These are:[105]

> ... the nature of the claim to the fruits of what was (to the extent it exceeded a proportionate share) in substance an alleged gift made by Dr Stone, who was then an old man, that he remained sole owner of the leasehold selection; the deliberate and calculated character of the standing by until Dr Stone was dead; and the grave unfairness and injustice of the consequences if Mr Orr is permitted to enforce his claim at this late stage ...

In Deane J's opinion, Mr Orr's conduct was such as to give rise to an inference that a release or something similar had taken place,[106] and the defendant's case had been prejudiced by the loss of the evidence of Dr Stone and Mrs Nickerson which would have enabled the inference to be tested. There is also a suggestion that Deane J considered that Mr Orr might be estopped from seeking relief, as his standing by had served to confirm Dr Stone in the belief that he was the absolute owner of "Cockatoo".[107] Moreover, Deane J considered that to disturb Dr Stone's testamentary devise of "Cockatoo" would be to cause prejudice to third parties sufficient to make relief inequitable.[108]

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102 Above n 3, 331.
103 Above n 3, 331.
104 Above n 3, 331.
105 Above n 3, 346.
106 Above n 3, 344.
107 Above n 3, 342.
108 Above n 3, 345. This type of laches would correspond to the fourth type outlined above, see text accompanying note 16. It is to be noted that this type of laches is not available as a breach of trust case "gross" laches defence, but only as a general laches defence in a disputed trust case.

All of these findings are at odds with those of the majority. Deane J makes no apology for the "... inevitable element of conjecture or speculation involved ..."[109] in determining exactly what defences would have been available to Dr Stone in the absence of delay by Mr Orr. He says:[110]

> ... [E]quity is not so misguided as to recognise laches as a defence when it causes evidence to perish, but to treat the defence as lost if the laches continues for so long that it not only obliterates evidence but also produces conjecture or speculation as to what, if any, precise defences would have been available if proceedings had been instituted within a reasonable time ...

It is not however in their acceptance or rejection of speculation that the judgments of the High Court differ in this area, for the majority indicated that, had they considered that Mr Orr's conduct made the existence of a release or other such occurrence "at all likely" they may have allowed a laches defence based on prejudicial loss of evidence.[111] Some speculation would necessarily then be involved. It is rather in their consideration of the facts that the judgments vary, in their interpretation of Mr Orr's delay and specifically, whether or not that delay gave rise to an inference of a release or some other form of acquiescence.

This is perhaps a difficult area on which to comment, because by its nature it is susceptible to discretion and differences of opinion. Brunyate comments that laches defences generally operate by way of presumption. The plaintiff's delay will create a presumption of "*omnia rite esse acta*",[112] or a presumption that a right once held had been abandoned or satisfied.[113] Clearly these presumptions would, at least initially, be rebuttable.[114] Given this, the use of these presumptions may not have helped to resolve the divergence of opinion on the proper interpretation of the facts in *Orr* v *Ford*. It is likely that the majority would have held that any presumption which may have arisen against Mr Orr by reason of his delay was rebutted.

It is perhaps the length of the delay in this case which allows for the disagreement evident between the majority and minority. In *Orr* v *Ford* the delay was relatively short, almost eight years. This can be contrasted with the delay in *Sleeman* v *Wilson*[115] of 38 years. In *Sleeman* the plaintiffs had been told by their guardian, the defendant, of the existence of a bond which the guardian had failed to enforce, thereby rendering the debt irrecoverable. On the death of the guardian, 38 years later, the plaintiffs filed a bill against the guardian's executors to recover the amount of the bond and interest.

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109 Above n 3, 345.

110 Above n 3, 344-345.

111 Above n 3, 331.

112 Which "... is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done in right and not in wrong ..." *Gibson* v *Doeg* (1857) 2 H & N 615; 157 ER 253, 257.

113 Above n 1, 247.

114 Above n 1, 247.

115 (1871) 25 LT 408.

Bacon VC considered that while it was not to be disputed that a guardian in possession of their ward's property becomes trustee of it, no breach of trust had taken place on these facts. He held however, that the plaintiffs lost any remedy they might in any case have had, by reason of their failure to sue for 38 years. The plaintiffs had explained their delay as due to a desire to maintain friendly relations between themselves and the guardian - but his Lordship held that this gave rise to an inference that some other reason had existed for not pressing the guardian.[116]

After a delay of 38 years, the making of such an inference can hardly be regarded as rash. In this regard *Sleeman* can be seen to be at an extreme of the spectrum of delay. *Orr* v *Ford* on the other hand, is a more marginal case, the delay is not so short as to be readily ignored, nor so short as to be conclusive. In these marginal cases some degree of disagreement such as that evident in the two main judgments of *Orr* v *Ford* may be unavoidable, and serves to highlight the difficulties which will necessarily be encountered in this, and any area, in which discretion is involved.

In light of these considerations however, and of those highlighted above in relation to the law of the effect of lapse of time applied in *Orr* v *Ford*, the question whether reform of this area is desirable cannot be ignored. This question will be discussed in the next part of this paper.

V REFORM

In this, the concluding section of this paper, two proposals for reform of the law of the effect of lapse of time will be considered. The first is the New Zealand Law Commission's report on the possibility of statutory reform of this area.[117] The second arises from the judgment of Deane J in *Orr* v *Ford* and concerns the possibility that development in the common law may reform the law of the effect of lapse of time.[118]

The Law Commission's report, issued in 1988, proposes comprehensive reform in the area of limitation of civil actions. The Commission recommended a general statute of limitation which should embody, amongst other things, concepts of fairness, comprehensiveness, comprehensibility and unambiguity.[119] The suggested reforms, so far as they are relevant to this paper, may be summarised as follows:

1 A standard three year limitation period for all civil claims. The period would commence from the date of the act or omission complained of.[120]

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116 Above n 115, 409.

117 The New Zealand Law Commission *Limitation Defences in Civil Proceedings* (1988) NZLC R 6.

118 Above n 3, 339.

119 Above n 117, 45.

120 Above n 117, 150-179, draft recommended Bill, cl 4.

2 A number of circumstances in which extensions to the standard limitation period could be contemplated. Briefly, those circumstances include: when knowledge of the act or omission complained of has been delayed,[121] when alternative dispute resolution has been sought,[122] when there is incapacity or impairment on the part of the plaintiff,[123] or when there has been an acknowledgement or part payment of liability.[124]

3 A "long stop" defence which prevents any of these extensions operating to make the allowable period of delay longer than 15 years.[125]

4 Specific extensions, two of which are relevant here:

(a) The case of a claim by a beneficiary against a trustee for a fraudulent breach of trust of which the trustee was aware or to which the trustee was a party.[126]

(b) The case of a claim by a beneficiary against a trustee for the recovery of trust property in the possession of the trustee or previously received by the trustee and converted to the trustee's use, or the proceeds thereof.[127]

In these cases, the limitation period would be three years after knowledge of the act or omission complained of is gained. There would be no long stop defence to these claims.

The effect of these proposals, and a contrast with the present law are best illustrated by concentrating separately on each of Brunyate's three categories of possible express trust cases.

A *Suits in which the* cestui que trust *seeks to recover trust property which is still in the hands of the trustee*

At present there is no limitation on these actions, statutory or otherwise. Under the Law Commission proposals there would be a limitation of three years from the date on which the *cestui que trust* becomes aware that the trustee has converted trust property to their own use or is otherwise in possession of trust property to which the *cestui que trust* is entitled beneficially.

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121 Above n 120, cl 6.
122 Above n 120, cl 7.
123 Above n 120, cl 8.
124 Above n 120, cl 9.
125 Above n 120, cl 11.
126 Above n 120, cl 5(2)(c).
127 Above n 120, cl 5(2)(d).

B Suits in which the cestui que trust *seeks a declaration that a trust obligation exists in relation to certain property and the trustee denies the existence of the trust*

There is currently no statutory limitation period for these actions. However they are subject to the general rules of laches and acquiescence. The Law Commission proposes that these actions should be subject to a three year limitation period.[128] The period would commence, unless one of the extension provisions applied, from the date of the act or omission complained of. Presumably this would be the date on which, to the knowledge of the claimant, the alleged trustee first denied, or acted inconsistently with, the existence of the trust. Even if one or more of the extensions applied, no action could be brought after 15 years from the date of the act or omission complained of.

C Suits in which the trustee has committed a breach of an admitted trust, by which trust property has been lost, and the cestui que trust *seeks to hold the trustee liable for the breach*

Under the current law there is a six year statutory limitation period on these actions, unless the trustee was a party to, or privy to, fraud. In the latter case there is no statutory period, but the defences of authorisation by acquiescence, release by acquiescence or estoppel, or "gross" laches may apply.

It is proposed that the statutory period should be shortened to three years from the date of the act or omission complained of in cases that do not involve fraud. Again the extension provisions may apply, but the long stop of 15 years will limit the possibility for extension. If fraud is involved, the period is to be three years from the date on which the *cestui que trust* first becomes aware of the fraudulent breach of trust, with no long stop applicable.

The Law Commission's proposal does not contain a provision similar to section 31 of the Limitation Act 1950, nor does it expressly rule out the application of any equitable limitation defence. Given, however, that it is well settled law that no equitable limitation defence can operate to shorten a statutory period,[129] the comprehensive nature of the proposed statutory reform would preclude the operation of any of the equitable lapse of time defences.

The report sets out a number of the purposes behind limitation statutes. These purposes are largely gleaned from overseas reports on the same issue,[130] and include

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128 Unlike the present Limitation Act, which specifies contract, tort and certain other actions in its most general limitation provision (see above, n 70), the Law Commission proposed Bill would impose a statutory limitation on *all* civil suits (see above n 120, cl 4). This would cover, therefore, claims by a *cestui que trust* for a declaration of trust.

129 See above, text accompanying note 74.

130 Law Revision Committee, Fifth Interim Report (Statutes of Limitation) (Cmnd 5534, 1936) Wright Report; Report of the Committee on Limitation of actions in Cases of

limiting the evidentiary problems produced by stale demands. Connected with this is a desire to allow the courts to function more effectively and to encourage claimants not to sleep on their rights. Another purpose of limitation statutes is to allow potential defendants to treat a matter as closed after a sufficient length of time. It is thought that there should not be an indefinite threat of a law suit and that the disruptive effect of unsettled claims should be minimised. Finally, limitation statutes counter the problems that can arise in adjudging past conduct by contemporary standards.[131]

These purposes will undoubtedly apply to general civil suits, and provision of a limitation defence such as that recommended by the Law Commission may produce justice and equity in most cases. It is submitted however that rather different considerations are relevant to some suits by a *cestui que trust* against their trustee. Brunyate considers that trustees of express trusts should be debarred from pleading statutes of limitation because "... their *cestui que trusts* rely on them to a special degree as persons who are controlling and managing property for the benefit of the *cestui que trusts* (sic) ..."[132] This special degree of reliance, together with considerations of the equitable proprietary nature of a *cestui que trust's* interest in the trust, and the historical importance attached to ensuring that statutes of limitation should not operate in favour of trustees,[133] suggests that at least some classes of suits by *cestuis que trust* against their trustees should occupy a special position within any statute of limitation.

These considerations are not taken into account in the Law Commission's report. The "... feature of many express trusts that they may last for some decades ..."[134] is recognised and in response to this it is recommended that no long stop limitation defence should apply to claims of fraudulent breach of trust, or for recovery of trust property in the possession of the trustee or converted to their use.[135] This is considered to be a continuation of the policy underlying section 21(1) of the 1950 Act.[136] However we have already seen that under the 1950 Act no statutory limitation period applies to these cases, whereas the Law Commission would recommend a standard three year period to commence once knowledge of the cause of action is gained.

It is submitted that, in relation to claims by a *cestui que trust* against their express trustee, the paramount purpose of any limitation statute should be to ensure that the trustee is not permitted to use a limitation period to escape the duties toward the *cestui que trust* that they have expressly undertaken in accepting office as trustee. It is contrary to this purpose to prevent a *cestui que trust* from recovering trust property, or the proceeds thereof, which is in the hands of the trustee. Similarly, the trustee should

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Personal Injury (Cmnd 1829, 1962); Ontario Law Reform Commission, Report on Limitation of Action (1969); Institute of Law Research and Reform, Report for Discussion No 4 *Limitations* September 1986.

131 Above n 117, 36-40.

132 Above n 1, 56.

133 Above n 1, 234.

134 Above n 117, 101.

135 Above n 117, 102.

136 Above n 117, 102.

not, unless exceptional circumstances exist, be able to escape liability for a fraudulent breach of trust by which trust property is lost. Accordingly it is submitted that the Law Commission's contrary recommendations in this regard should not be adopted into law. Principle dictates that there should be no limitation defence in cases in which the *cestui que trust* sues to recover trust property in the hands of the trustee. In the case of a fraudulent breach of trust defences based on lapse of time should only be available to the trustee in exceptional circumstances, such as those recognised by the equitable defences of authorisation by acquiescence, release by acquiescence or estoppel, and gross laches, which are at present applicable by virtue of section 31 of the 1950 Act.

If some statutory reform of this area is to be undertaken, it may be desirable to codify these three defences. The main point however, is that a general statutory limitation of any length would be unacceptable in these cases. While there is a lot to be said for simplification and standardisation of the law, in this area exceptions will be essential due to conceptual considerations.

In suits in which the *cestui que trust* seeks a declaration that a trust obligation exists and the alleged trustee denies the existence of the trust, on the other hand, different considerations will apply. These suits are at present subject to the general defences of laches and acquiescence. Considerable confusion exists, however, in this area, as was evident in *Orr* v *Ford*, and it is submitted that this could be avoided by the application of a statutory limitation period. In this case, where the trustee claims that the property alleged to be subject to a trust is in fact their own, the consideration that a limitation statute should not permit the trustee to escape their duties will be outweighed by other considerations, such as those identified by the Law Commission and set out above. The application of a standard statutory period, with the extension provisions recommended by the Law Commission would therefore be acceptable, or even desirable.

In the context of a general move to a three year statutory limitation period, as recommended by the Law Commission, a three year period in the case of non-fraudulent breach of trust[137] would, in the interests of standardisation, be acceptable. It is beyond the scope of this paper to discuss the desirable length of statutory limitation periods in general. However, in light of international trends towards shorter limitation periods[138] and the other considerations highlighted in the Law Commission report,[139] three years after discovery seems reasonable.

The Law Commission's report was issued in 1988, and successive governments have shown little desire to enact the reforms recommended therein, or any variation of them such as that proposed in this paper. Given that statutory reform of this area seems unlikely to occur, at least in the short to medium term, it is now necessary to consider

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137 A six year limitation period applies to these sections at present (s 21(2) Limitation Act 1950). The intention behind the application of a limitation period in these cases was set out above, text accompanying note 72.

138 Above n 117, 49.

139 Above n 117, 48-63.

the possibility that development of the common law may reform the law of the effect of lapse of time.

This possibility was foreshadowed by Deane J in his judgment in *Orr* v *Ford*, when he said:[140]

> ... [i]t may well be that the developing scope and flexibility of estoppel by conduct is leading to a unification of doctrine in those areas, such as the field of laches, where equity precludes relief in cases where the enforcement of rights would be unconscionable ...

The primary authority for this view is found in a much quoted passage from *Taylors Fashions Ltd* v *Liverpool Trustees Co*[141] in which Oliver J said:[142]

> ... [f]urthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden* v *Dyson* LR 1 HL 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader inquiry which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour ...

This passage, and the idea it represents, have been endorsed in a number of subsequent judgments, some of which are cited by Deane J in *Orr* v *Ford*.[143]

A general equitable defence where the enforcement of rights would be unconscionable would, as formulated by Oliver J, appear to encompass those situations which are at present covered by the defences under which lapse of time operates by way of acquiescence. It is not so clear however, that such a defence would readily encompass

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140 Above n 3, 339.

141 [1981] 1 All ER 897; [1982] 1 QB 133 (Note).

142 Above n 41, 151-152.

143 Above n 3, 339. See for example, *Amalgamated Investment & Property Co Ltd (In Liq)* v *Texas Commerce International Bank Ltd* [1982] QB 84; *Habib Bank Ltd* v *Habib Bank AG* [1981] 1 WLR 84; *In Re Montagu's Settlement* [1987] Ch 264; *Attorney-General (Hong Kong)* v *Humphrey's Estate (Queen's Gardens) Ltd* [1987] AC 114; *Pacol Ltd* v *Trade Lines Ltd* [1982] 1 QB 84; *Waltons Stores (Interstate) Ltd* v *Maher*, above n 35. *Waltons Stores* was the first High Court of Australia case to discuss the development, which was again considered by the High Court in *Commonwealth of Australia* v *Verwayen* (1990) 64 ALJR 540. This decision "... takes the new Australian doctrine of estoppel even further down the - certainly bumpy-road begun in *Waltons Stores* ...": see M Spence, "Estoppel and Limitation" (1991) 107 LQR 221, 227. For New Zealand Court of Appeal discussion of this development, see *Dominion Rent A Car Ltd* v *Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395; *Burbery Mortgage Finance & Savings Ltd* v *Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Gillies* v *Keogh* [1989] 2 NZLR 327.

those situations which are currently covered by the rules of laches, under which lapse of time operates as a defence of itself. It is essential therefore that any general defence develop sufficiently to cover these latter circumstances, before it could be asserted that the unification of doctrine meant it was no longer necessary to rely on the specific rules of laches.

Assuming for the moment that a general defence could develop to that extent, there is at least one further obstacle to such a development. The creation of a general defence may lead to a liberation from rigid rules that have in the past led to arbitrary and unfair results in some cases, and is consequently to be applauded. It may also lead, however, to a "liberation" from principle, and particularly in the field of the law of the effect of lapse of time in relation to claims by a *cestui que trust* against their trustee, this could itself create unfair results. Our study of *Orr* v *Ford* demonstrated the confusion which can arise from a failure to recognise underlying principles in this area; and we have further seen that a continuation of the approach adopted in *Orr* v *Ford* could have serious and inequitable consequences.

A further point concerns the possible dangers of increasing the scope for judicial discretion. In *Orr* v *Ford*, there was significant disagreement between the majority and the minority in the High Court as to the correct interpretation to be placed on the facts of the case. It has already been argued that the possibility of such disagreement may be inescapable in situations where judicial discretion is involved.

Any move to a general defence precluding relief where the enforcement of rights would be unconscionable would necessarily involve increased judicial discretion, and with it, increased potential for disagreement such as that in *Orr* v *Ford*, and consequent uncertainty.

It is submitted therefore, that given the essential requirement of adherence to principle in the law of the effect of lapse of time, particularly in relation to suits by *cestuis que trust* against their trustees, there is perhaps little to be gained in the way of flexibility from a move towards a more general defence as suggested by Deane J in *Orr* v *Ford*. Further, so long as the principles which underpin this area of the law are clearly understood, it is submitted that adhering to the requirements of the specific defences is unlikely to lead to unfairness. Rather it will be more conducive to certainty, which, it is submitted, is likely to be lost if a general defence develops.

In conclusion however, the fact that the principles underpinning this area are not clearly understood, as was evident in *Orr* v *Ford*, means that statutory reform of the law of the effect of lapse of time should be welcomed. Again because of a lack of attention to underlying principles, the recommendations of the Law Commission in this regard should not be enacted without qualification. If however, the modifications of those recommendations suggested in this paper were put in place, it is submitted that statutory reform could see the law of the effect of lapse of time in relation to suits by *cestuis que trust* against their trustees become both more certain and less obscure.