



# Limitation



# Speakers



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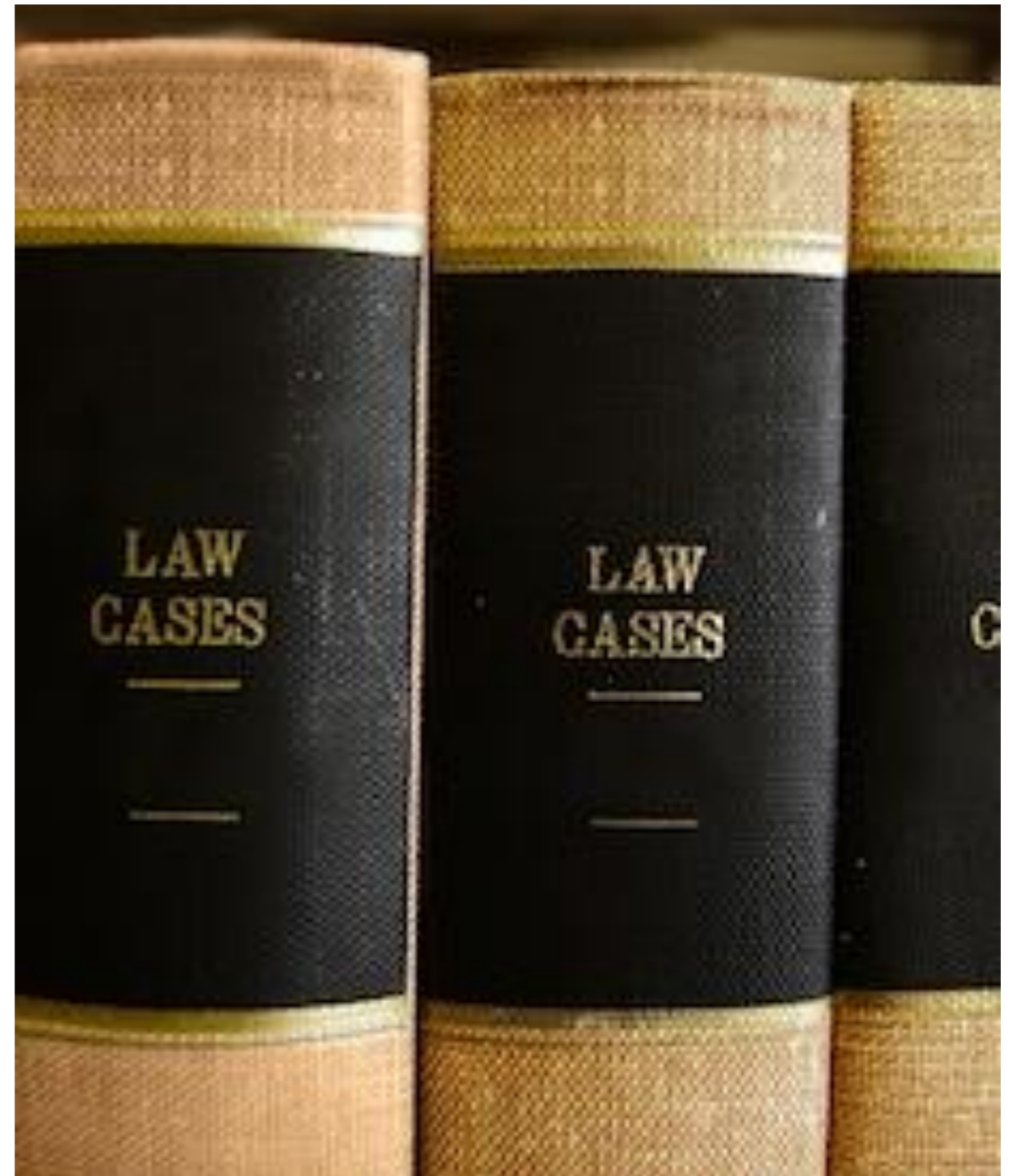
# Limitation Act 1980: stale claims and cruelty ...

“...Long dormant claims have often more of cruelty than of justice in them.”

*A'Court v. Cross* 3 Bing. 329

“... a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, [... and ...] there shall be an end of litigation, and that protection shall be afforded against stale demands.”

*R. B. Policies at Lloyd's v Butler* [1950] 1 K.B. 76



# Defence of Limitation

## Idiom:

To play a trump card

## Meaning:

To use a final trick or play a secret advantage



# Basic limitation periods

- Debt, generally 6 years from due date.
- No action can be brought on a judgment 6 years after it became enforceable.
- Winding up or bankruptcy proceedings after 6 years are not “an action upon judgment”.

# Basic limitation periods

- Simple contracts, generally 6 years from breach.
- Contracts made by deed, generally 12 years from breach.
- Tort, generally 6 years from loss.
- Latent damage (s. 14A Limitation Act 1980).
- Personal injury, generally 3 years.

# Tension

*“In a case where, on any view, the natural cause of action is for breach of contract, the courts should not favour a much later date of accrual for the co-existing action in tort unless they are compelled to do so.”*

Axa Insurance v Akthar & Darby Solicitors [2009] EW CA Civ 1166



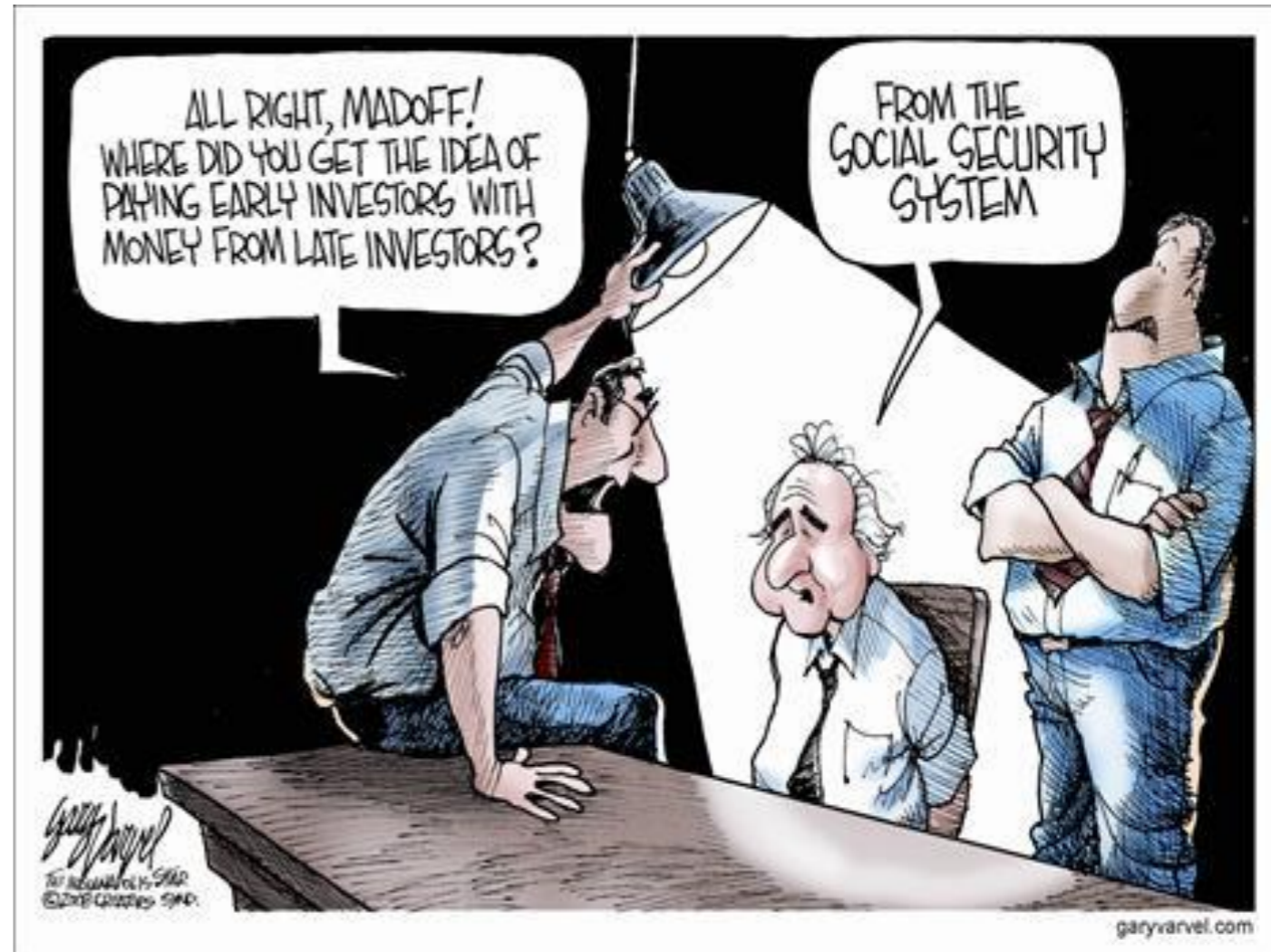
# Statutory claims

- Statutory claims, generally
  - 6 years from cause of action for money claims
  - 12 years for specialty
- s.9 Limitation Act
- Non fraudulent breach of director's duty, generally 6 years



# Breach of Trust

- Breach of trust, generally
  - 6 years for negligent or “innocent” breach of trust
  - 12 years if the trust property is land
- No limitation period for fraud or fraudulent breach of trust
- Conflicting authorities on dishonest assistance in a breach of trust



# Key Limitation Questions

- What is the cause of action?
  - Company claims vs Officeholder claims...
- When does it accrue?
  - Admin to CVL conversion...
- What is the limitation period?



# Insolvency causes of action

- Possession and sale / use it or lose it
- Unjust enrichment (127 / 284)
- Transaction avoidance: 236 / 238 or 338 / 239 or 339 / 423
- Dividend claim
- Wrongful trading / fraudulent trading
- Misfeasance / breach of duties
- Sham (is it even a cause of action...)

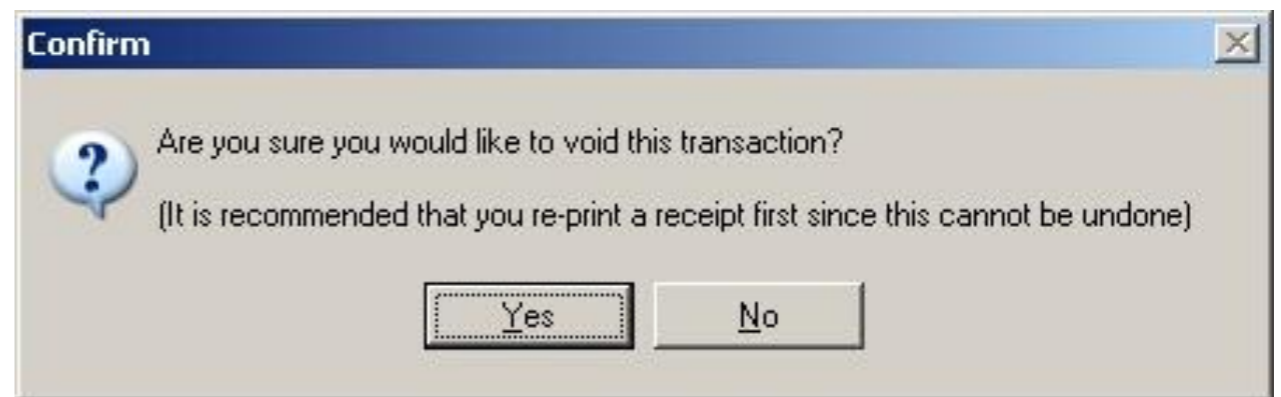
# Possession & Sale...

- TiB's application under s.14 TOLATA 1996 / s. 283A IA 1986
- When does time start: "the date of the bankruptcy" (date of OR appointment)
- 3-year time limit (other options to stop the clock are available)
- But... *Stonham v Ramrattan* [2011] EWCA Civ 119
- Beware ... *McKinnon v Graham* [2013] EWHC 2870 (Ch) [2013] BPIR 1070



# Void transactions under ss. 127 / 284 IA 1986

- Are ss. 127 & 284 'self-contained'?
- Cf *Ingram v Ahmed* [2018] EWCA (Civ) 519 and *Thomas v D'Eye* [2016] BPIR 883.
- Is the cause of action unjust enrichment? Unlawful interference with goods?
- 6 year period, but runs from date when cause of action is complete: i.e. insolvency?



# Alleging that an instrument or transaction is a 'sham'

- Uncertain whether it is an independent cause of action
- Limitation is unlikely to defeat a claim (s. 32 Limitation Act 1980)
- but assess on a case by case basis.



# Dividends

- Claimed:
  - directly from the shareholder: s. 847 CA 2006;
  - or as a breach of duty claim against a director
- Possible 6 year limitation period for s.847 ... but:
- Liability of a shareholder / director as a constructive trustee



# Officeholder's statutory claims

- TUV / Preference / s.423
  - 6 years if money claims  
(*Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144)
  - 12 years if claim is for specialty  
(*Giles v Rhind* [2007] EWHC 687 Ch)
- Fraudulent / Wrongful trading / ss. 213 & 214
  - 6 years from winding-up order / creditors' resolution: *Re Farmizer (Products) Ltd, Moore v Gadd* [1997] 1 BCLC 589, [1997] BCC 655, CA.)





# Director claims

- s.212 subject to Limitation Act.
- Not new cause of action. Enables liquidator to bring claim against delinquent director.
- *Eurocruit Europe Limited* [2007] EWHC 1433 (Ch).
- *Instant Access Properties Limited* [2018] EWHC 756 (Ch)



# Burnden Group Holdings Ltd v Fielding [2018] UKSC 14

- Directors and controlling shareholders of OldCo
- Vital Energi trading subsidiary
- OldCo's shares transferred to one NewCo and then another NewCo
- Mrs Fielding sold shares in second NewCo
- OldCo into Liquidation



"Here's where you give me non-comprehending nods of approval."

# The battlefield

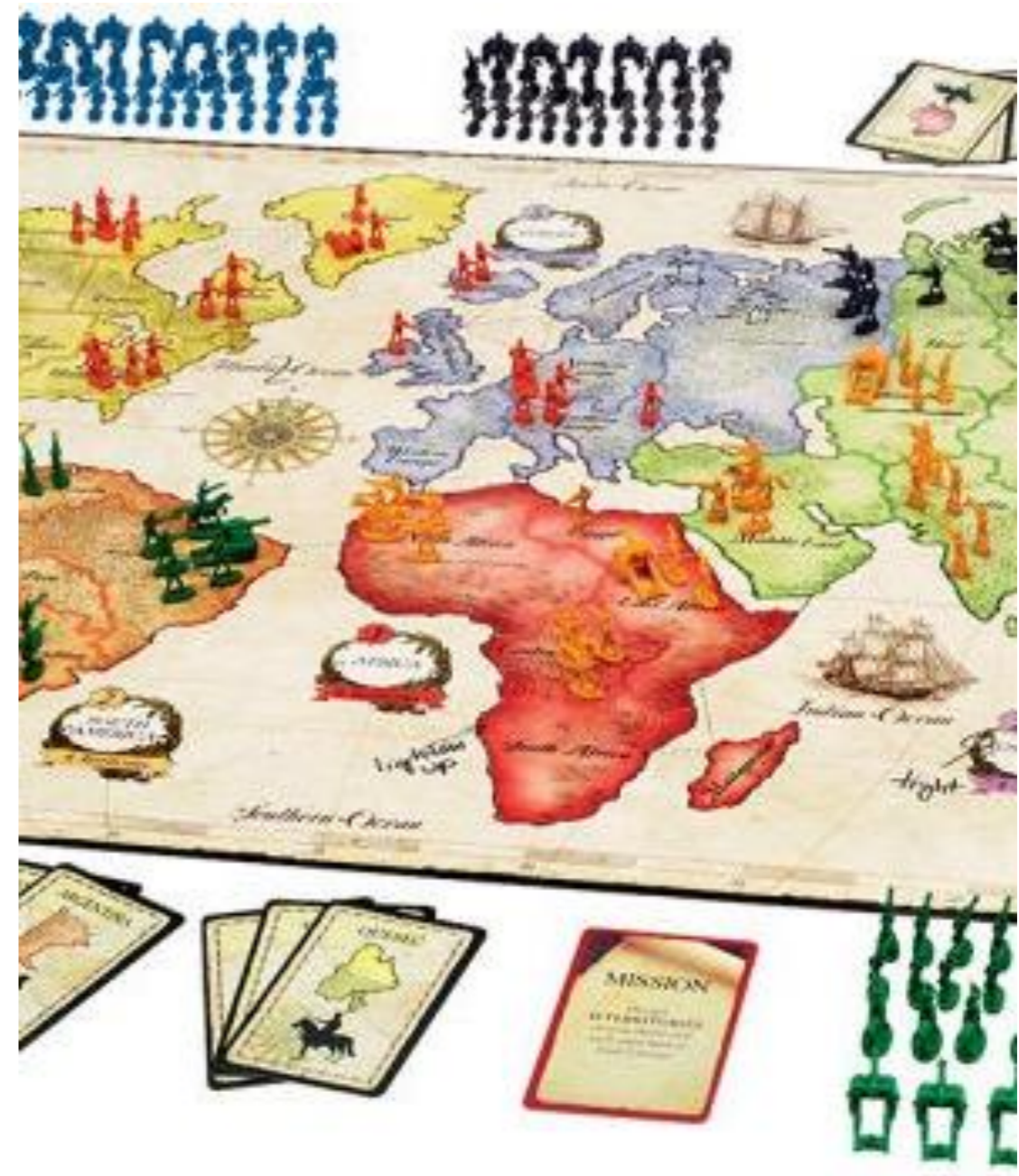
## Claim

- 6 years 3 days OldCo issued proceedings alleging:
  - Unlawful distribution, and
  - Breach of duty

## Defence

- Denies allegations,
- and argues limitation – s.21(3)

Defendants obtained summary judgment from HHJ Hodge QC.



## s. 21(3) of the Limitation Act 1980

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

## s. 21(1)(b) of the Limitation Act 1980

“(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action— ...

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”

# Court of Appeal

- Defendants argued:
  - Never had personal ownership of the share
  - Share had always been held by NewCo
  - Absent actual transfer to them, s.21(1)(b) of no application
  - No concealment / s.32 irrelevant

# Court of Appeal

- OldCo appealed arguing:
  - Defendants were trustees s.21(1)(b)
  - s.21(3) did not apply as claim against trustees for proceeds of trust property “*previously received... and converted for his use*”
  - Deliberate concealment s.32

# Court of Appeal

- Court of Appeal allowed appeal:
  - s.21(1)(b) had to be construed to include a transfer, in breach of trust, to a company controlled, directly or indirectly, by a defaulting trustee
  - Triable issue whether s.32 applied

After the appeal, OldCo amended the claim to allege fraud, bringing into play s.21(1)(a) of the Limitation Act 1980

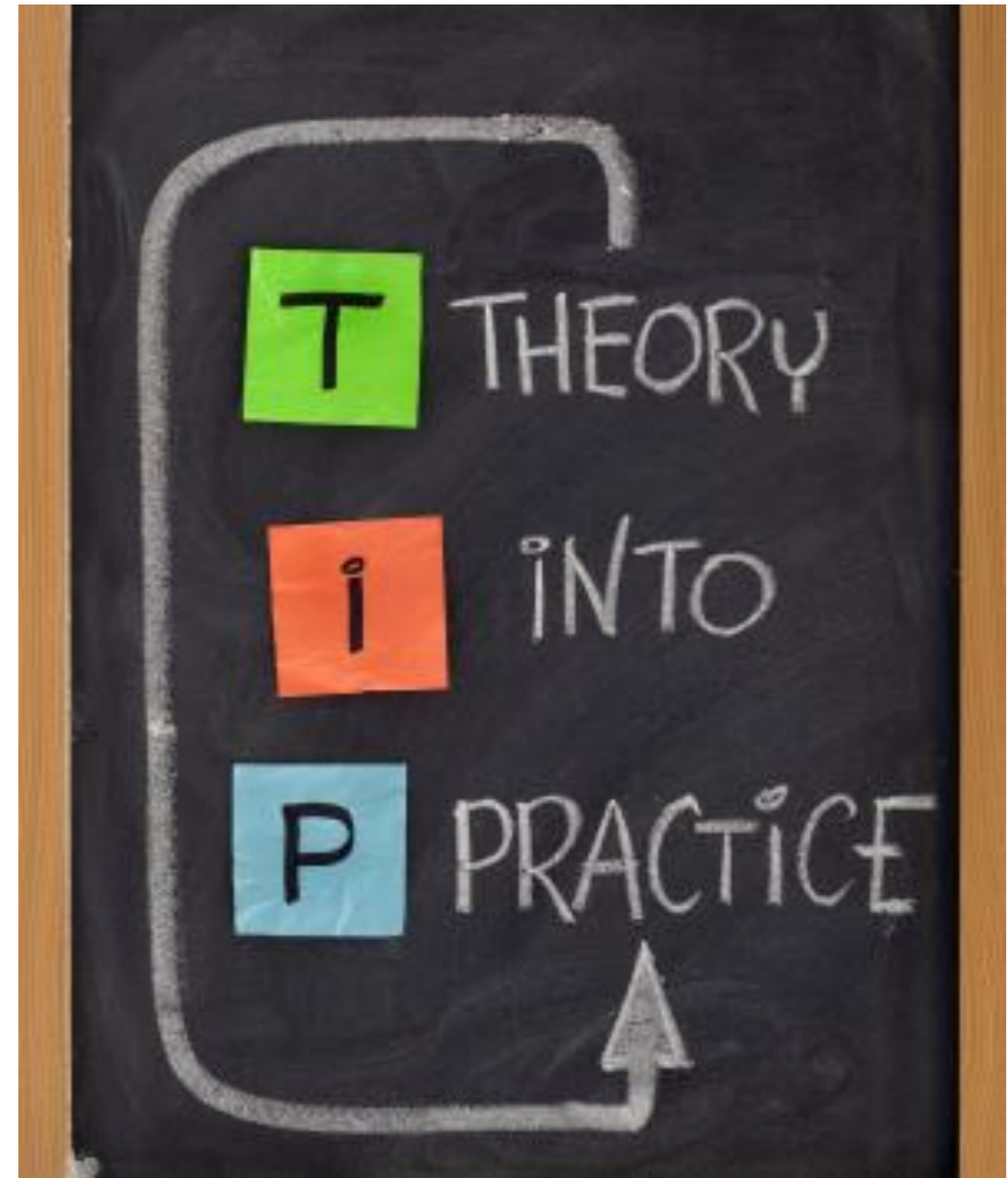


# Supreme Court

- Directors were trustees & owed fiduciary duties
- s.21(1)(b) prevents a limitation defence in cases involving unauthorised benefit from the trust
- s.21(1)(b) applied when misappropriated property held in corporate vehicle: defendants treated as being in possession of trust property
- Unlawful distribution amounted to conversion for own use

# Some practical points when limitation is about to expire...

- Issue protectively? (Court fees / Service: danger / Stay)
- Standstill Agreement? (careful drafting needed / pitfalls to avoid)
- Sell the claim?
- Tactical implications (would o/s read into failure to issue in good time that liq has no enthusiasm, not well prepared...)
- Administrator can assign claims – Small Business, Enterprise and Employment Act



2015



**QUESTIONS?**