[2023 Gib LR 443]

HASSANS (a firm), LEVY and FELICE v. KINGSTAR UK LIMITED, ROSESTAR PROPERTIES LIMITED, N. ACKERMAN and B. ACKERMAN

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): May 30th, 2023

2023/GCA/009

Limitation of Actions—postponement of time—actions based on fraud—claimants could with reasonable diligence have discovered fraud before expiry of limitation period—despite complex corporate group structure, need for investigation should have been triggered in circumstances including significant losses and allegation in other litigation that defendants acted dishonestly

The respondent companies brought claims against the appellants based on dishonest assistance.

The present claim arose from a longstanding dispute between two parts of the Ackerman family. In the 1960s, two brothers, Joseph and Jack Ackerman, established a business ("the Ackerman Group") which they owned in equal shares. After Jack's death, his share and interest in the Group passed to his widow ("Naomi"), the third respondent. Joseph assumed overall management of the Group, assisted by his son-in-law ("Danny"). Naomi and her son ("Barry"), the fourth respondent, were also involved in running the Group. The first appellant, Hassans, was a firm of lawyers based in Gibraltar. The second appellant ("Mr. Levy") and the third appellant ("Mr. Felice") were at all material times partners in and/or employees of Hassans. Mr. Levy and Mr. Felice were closely involved in matters concerning the Ackerman Group.

In 2003, Hassans was instructed to advise as to (and ultimately drafted) a trust, the NOF Trust, which Naomi understood to be for the benefit of both sides of the Ackerman family but that was not the case. The trustee was Line Trust Corp. Ltd. In around 2004, the relations between the two sides of the Ackerman family had begun to deteriorate. By 2006, Naomi and Barry had become so dissatisfied with Joseph and Danny's management of the Ackerman Group that the relationship had broken down. Mr. Thornhill, K.C. was engaged to mediate between the two sides. Joseph and Naomi agreed in principle to demerge their respective interests in the Ackerman Group. Ultimately Mr. Thornhill produced reports setting out his findings

inter alia that Joseph had removed funds from the Group which greatly exceeded the Group's estimated value. The Ackerman Group was restructured such that all of the companies in the Group were transferred to a new single holding company ("BANA One"), of which the shareholders were Naomi and Barry.

The respondents claimed that in 2006, pending the restructure, it was agreed that Joseph could continue to carry out transactions on the basis that they would be on his own account, for the benefit of his side of the family only and could be financed using Group funds, assets and equity only if it took the form of a loan, was formally agreed with Naomi on a case-by-case basis, was on commercial terms and was small in terms of the size of the sums involved. Naomi and Barry subsequently became aware of rumours that Joseph was contemplating a substantial investment in two separate large property portfolios. In October 2006, Naomi's lawyers drafted a letter to Joseph (which was also sent to Mr. Levy) in which they sought details of transactions undertaken on Joseph's own account for the benefit of his side of the family. The letter provided that until Naomi had confirmed in writing that she was satisfied as to how the transactions had been structured and that they had no improper impact on the Group, her consent for any further such transactions was withdrawn.

The first respondent ("Kingstar") and the second respondent ("Rosestar") were companies incorporated in England and Wales, which at all material times were companies within the Ackerman Group and which, following the restructure, were transferred to BANA One. Their shares were ultimately beneficially owned by Naomi, Barry and other of Naomi's issue.

It was claimed that at all material times prior to the restructure of the Ackerman Group, Joseph and Naomi were equal shareholders in each of Kingstar and Rosestar. Rosestar's main asset was its 100% shareholding in Marylebone Alliance Ltd., a Group company. Kingstar's assets included a 100% shareholding in Lexham Alliance Ltd., another Group company. Investec Trust (Jersey) Ltd. employees and later Investec related companies acted as the directors of Marylebone and Lexham.

In October 2006, the Star Trust was established with Joseph as settlor and Line Trust as trustee. The Star Trust was set up for the intended benefit of Joseph's side of the Ackerman family. The trust was drafted by Hassans. The respondents claimed that it was to be inferred that Mr. Levy and Mr. Felice knew that the Star Trust was established for the intended benefit of Joseph's side of the family. It was also pleaded that Naomi was not made aware of the establishment of the Star Trust. Line Trust, as trustee of the Star Trust, held shares in a number of companies including Enduring Property Holdings Ltd. ("Enduring"). At all material times the directors of Enduring included Mr. Levy, Mr. Felice and a Mr. White, a lawyer and consultant at Hassans. In 2008, the assets of the Star Trust, including the shares in Enduring, were transferred to Line Trust as trustee of the White Star Trust, a trust established for the benefit of Joseph's side of the family and from which Naomi and her side of the family were excluded.

The present claims arose from loans made in November 2006 by Lexham and Marylebone to Enduring. The respondents claimed that Joseph unilaterally authorized the loans on behalf of the directors of Kingstar and Rosestar on the purported basis that the consent of the other director (Naomi) was not required. Further, that Mr. Levy and Mr. Felice knew that Joseph could not authorize any such loan on the part of Kingstar and Rosestar without Naomi's consent. No principal or interest was ever repaid and Lexham and Marylebone were ultimately liquidated and dissolved.

The respondents issued their claim on December 18th, 2020. It was summarized in the particulars of claim:

> ". . . the Claimants have suffered loss and damage in the amount of the principal of and interest on or use value of certain loans that were made by their subsidiaries as lenders. These loans were made in circumstances in which one of the then two directors of each of the Claimants acted in breach of his fiduciary duties by inter alia unilaterally authorising the lending without the consent of his co-director and co-shareholders on uncommercial terms that were intended to (and did) favour the borrower, in which the director was personally interested. The Defendants dishonestly assisted those breaches of fiduciary duty and the Claimants claim equitable compensation and/or an inquiry and account of profits accordingly."

Relevant additional background information included a claim ("the NOF claim") issued in 2013 by Naomi and Barry against Line Trust, Hassans. Mr. Levy and Mr. Felice. The case concerned loans made by two companies within the NOF Trust to three companies within the Star Trust, including Enduring. The loans were made in November and December 2006. The pleadings alleged unlawful conspiracy, breach of trust and dishonestly assisting in the breach of fiduciary duty by Joseph. It was said that the defendants had knowingly acted at the behest of Joseph to prefer the interests of Joseph and his family to the exclusion of Naomi and her family. The overarching background in relation to the Ackerman Group was common to the NOF claim and the present claim. The NOF claim was amended in April 2015 to introduce a new allegation arising out of a loan made from another company in the Group, Wallshire. The allegation was that the defendants unlawfully assisted a breach of fiduciary duty by negotiating loans from Wallshire to two companies, Maxtel and Carlton. Wallshire was not an NOF Trust company and the defendants were not connected with it. The allegation was that in their capacity as directors of Maxtel and Carlton, the defendants negotiated these loans knowing that they were obtained without Naomi's consent, or reckless as to that fact. This amendment did not introduce a new claim and no damages were sought with respect to the Wallshire loans. It was advanced in support of an inference that in the context of the NOF loans the defendants had preferred Joseph and his family over Naomi and hers.

The NOF claim was settled in 2015. Naomi and Barry provided an indemnity to the defendants to the NOF claim against any claims which arose from or in connection with the facts of the NOF claim.

In 2007, another company in the Group ("PLA") made an unsecured loan to Star Poland Ltd., another company alleged to be part of the Star Trust. PLA's directors were Investec. PLA brought proceedings against Star Trust for repayment of the loan in December 2011. In December 2012, Star Poland was declared insolvent and placed into voluntary liquidation. In December 2016, the liquidator caused Star Poland to bring proceedings against its former directors. Barry was given access by the liquidator to documentation. Barry claimed that for the first time this alerted him to the fact that even when Mr. Felice was acting only on the borrower side of the transaction, he was engaged in fraudulent wrongdoing to assist Joseph. Barry considered this wrongdoing to be different from the wrongdoing disclosed by the defendants' activities with respect to the NOF Trust. Barry requested historic files from Investec, the former directors of Lexham and Marylebone, about their loans. Investec provided the files in October 2020. They included correspondence from November 2006 between Investec, Mr. Felice and others. Important information which emerged from the correspondence included the fact that there was a specific request by Investec as director of Lexham and Marylebone for shareholder approval from Kingstar and Rosestar. Although Joseph and Naomi were directors of the shareholding companies, Joseph had unilaterally given the requested approval.

The appellants sought an order pursuant to CPR r.24.2 granting summary judgment on the entire claim on the ground that it was time barred ("the limitation application"). They also sought summary judgment or the striking out of the claim on the ground of abuse of process and on the basis of the indemnity.

It was not disputed that the six-year limitation period under s.4(1)(a) of the Limitation Act 1960 had expired when the claim was made. In relation to the limitation application, the respondents submitted that they discovered the fraud for the purposes of s.32(1)(a) of the Limitation Act (which provided that in cases of fraud, time would not begin to run against a claimant until he had discovered the fraud (actual knowledge) or could with reasonable diligence have done so (constructive knowledge)) on October 2nd, 2020, which was the date when they received Investec documents which revealed to them for the first time the appellants' dishonesty in assisting Joseph's breaches of his fiduciary duties to Kingstar and Rosestar, and the appellants' assistance in respect of Joseph's breaches of his fiduciary duties concerning the November 2006 loan notes. Until then, they had not had a pleadable case of fraud against the appellants. In the alternative, the respondents submitted that the trigger arose by reason of the developments in the Star Poland proceedings, which occurred later than December 18th, 2014.

The appellants submitted that there was a pleadable case without the Investec documents and that the Investec documents could have been obtained much sooner.

In the Supreme Court, the Chief Justice dismissed the applications for summary judgment (the decision is reported at 2022 Gib LR 378). The

Chief Justice held that there was a realistic prospect that the respondents would at trial establish that the claim had been made in time, relying on s.32(1)(a) of the Limitation Act 1960. The Chief Justice considered whether the Thornhill reports and the identification of the losses suffered and/or the NOF claim established a trigger, putting the respondents on notice of the need to investigate the alleged fraud. The Chief Justice considered that given the complex factual matrix and Naomi and Barry's alleged exclusion from information, there was a real prospect of success in the respondents' argument that the losses suffered from Lexham and Marylebone did not make it objectively apparent that something had gone wrong (beyond those losses) so as to put the respondents on notice of the need to investigate.

The appellants submitted that the Chief Justice made numerous errors of law: (1) he did not properly deal with what was claimed to be the appellants' primary case on limitation, namely that there was a viable case to plead on what the claimants already knew, even without the Investec documents; (2) the Chief Justice was at fault in various ways in his approach to the question whether the appellants had acted with reasonable diligence: he failed to approach the question properly; he should have identified which parts of the viable claim were unknown in order to determine whether a reasonable person in the appellants' position could with reasonable diligence have discovered them. Furthermore, he failed to focus on the measures which the appellants would have had to take to discover the fraud or to ask whether these were exceptional measures; (3) the Chief Justice did not properly identify the material characteristics of the respondents when asking whether a reasonable person in their position would have inquired further. More specifically, he did not make the necessary assumption that a claimant must desire to discover whether there had been a fraud, and he had no regard to the fact that the respondents could have engaged professional assistance; (4) the Chief Justice focused on whether matters were subjectively known or appreciated by the respondents whereas he should have adopted an objective approach, asking what a reasonable person in their position would have known; (5) the Chief Justice set the bar too high when considering whether objectively the respondents knew enough to trigger an investigation; he wrongly focused on matters which they would need to know in order to plead a viable case, but that negated the very purpose of an inquiry which was to seek to discover whether there was a viable case to plead; and (6) the Chief Justice erred in giving weight to a range of considerations which were irrelevant to the issue he had to determine. It was submitted that virtually all the matters relied on by the Chief Justice were irrelevant. The appellants submitted that if the Chief Justice had approached the matter correctly, the only proper conclusion open to him was that the respondents had a proper basis to plead the case even without the Investec documents. In the alternative, the knowledge available from the NOF claim, in which allegations of dishonesty had been made against the same appellants, would have caused any reasonable party to investigate further, at least once it had knowledge

of the loans and losses. Had that investigation taken place, the Investec documents would have emerged and a proper case could then have been pleaded.

Held, allowing the appeal:

(1) The following were material principles relating to the meaning and application of s.32(1)(a) of the Limitation Act: (i) given the purpose of the section, there was no justification for construing it narrowly on the grounds that it was an exception to the normal limitation period, rather it should simply be given its natural meaning; (ii) time began to run from the point when a claimant discovered the relevant fraud. A party was deemed to have discovered it when it was in a position to plead a viable statement of claim, *i.e.* one which would not be struck out because an essential fact, necessary to complete the relevant cause of action, was missing. This was an objective test: the putative claimant might not appreciate that it had a cause of action, but that was immaterial; (iii) the statement of claim test did not require the claimant to be sure of success, or to know at that stage all the evidence which it later decided to plead: that was the function of disclosure. What was required was an ability to plead a complete cause of action; (iv) accordingly, a party could not delay time running whilst it evaluated the merits of the claim or obtained further evidence to support it. The limitation period itself was intended to take account of considerations of that nature; (v) the question of constructive knowledge—what a claimant would have known had it acted with reasonable diligence—raised its own problems of analysis. It would often be useful to consider the reasonable diligence approach under two headings: whether there was anything to put the claimant on notice of a need to investigate, and what a reasonably diligent investigation would then reveal; (vi) both questions in the assessment of reasonable diligence were questions of fact. Whether a party might be expected to react to a trigger was an objective question asking how a reasonable person in the claimant's situation would be expected to act; it was not whether the claimant subjectively understood that he had a cause of action; (vii) in some circumstances the mere fact that a party had suffered a loss, particularly a significant loss, might reasonably be expected to prompt the question: "why?" such as to generate some kind of inquiry; and (viii) when drawing inferences, the court must be careful not to be influenced by hindsight. Inferences must be capable of being fairly drawn from the materials before the putative claimant at the relevant time and a court must be astute not to be subconsciously influenced by later material. However, it was trite law that a party must not lightly plead fraud. The allegation must rest on a firm evidential basis. A party must be able to plead a precise fraud; general suspicion, or even knowledge, that a party had in the past been involved in unrelated fraudulent activities would be unlikely to suffice. Moreover, the pleading must particularize the primary facts (but not the detailed evidence) from which it was alleged that a finding of fraud could be made. These principles relating to the pleading of fraud did not modify the statement of claim test itself but they did bear upon its

application because they were pertinent to the question when a statement of claim would be viable or might be struck out for failing to show a proper cause of action. The pleading must identify at least the essential facts which, if proved at trial, would sustain a plea of dishonesty (paras. 49–52).

(2) In relation to constructive knowledge, none of the factors relied upon by the Chief Justice were material to the question whether there was a trigger and they caused him to reach an unsustainable conclusion. The question was whether, knowing what they did about the circumstances of the loans and losses, and knowing about similar transactions which they challenged in the NOF claim (which had been settled on very favourable terms), the respondents had a realistic prospect of establishing that, objectively viewed, that information was insufficient to raise suspicions of dishonesty. In holding in the respondents' favour, the Chief Justice relied upon several factors which identified gaps in the respondents' knowledge—what they did not know. However, the question was what they did know and whether it was sufficient to raise suspicions which required further inquiry. The very purpose of the inquiry was to make good gaps in their knowledge and thereafter, if appropriate, to plead a viable statement of claim. It was in any event difficult to see how the specific matters identified could bear upon the trigger question at all. The Chief Justice referred to the complex factual matrix of the Group, which it certainly was, and the fact that Naomi and Barry were excluded from relevant information. There was no doubt that the difficulty of obtaining information was a very real one where it had to be obtained from Joseph and his advisers, but here Naomi and Barry were not reliant on these parties to provide information about the loan transactions. They knew that the directors of the lending companies, Lexham and Marylebone, were appointees of Investec, an independent third party, and there was no reason to assume that they would be unwilling to cooperate with any requests for information. We now know how important their information was, but even without the benefit of hindsight there was always a realistic likelihood that valuable material about the transactions would be obtained if an inquiry were made. Quite apart from that, it was difficult to see how the difficulty of discovering potentially vital information could justify seeking to make no attempt to do so at all. The Chief Justice also gave weight, although he observed that this fortified his conclusion and was not central to it, to the fact that the appellants were senior and experienced lawyers held in high regard. No doubt if there had been no history casting doubt on their integrity, this would be a powerful factor. One would not readily suspect such lawyers of dishonesty. However, the respondents had been prepared to make allegations of dishonesty in the NOF claim. They could not legitimately have adopted the premise that they were talking about generally honest solicitors. The principal factors which in the Chief Justice's view made it at least arguable that the respondents had acted reasonably in not suspecting that the appellants might have been acting dishonestly with respect to the loan were the complex Group structure and the absence of knowledge and/or understanding by Naomi and Barry of the corporate framework of the

lending and borrowing companies and their directorships, the requests made by the directors of Lexham and Marylebone, what in fact was provided to Lexham and Marylebone's directors, and the defendants' knowledge of Joseph's alleged breaches of his fiduciary duties to the claimants. None of these factors is material to the point in issue. It was not clear what the Chief Justice meant by his reference to the corporate framework of the lending and borrowing companies. The respondents clearly knew in the context of the Thornhill reviews about the particular loan transactions between the companies and the fact that none of the moneys lent had been recovered. They also knew who the directors of all relevant companies were. More specifically, they knew that the appellants, as directors of Enduring, must have authorized the borrowing on its behalf. No doubt there was much detail about the appellants' precise role that they did not know, but if they were to know this, there would be no need for any further investigation at all. Again, the details of what the directors of the lending companies had requested and what information had been provided in response might be relevant evidence to plead; it was just the sort of material which might emerge on disclosure if not obtained before. But the lack of this information did not tell us anything about whether the information which the respondents did have ought to have triggered an inquiry. Moreover, if this information had been available, it would have negated the need for any further investigation because there would have been the requisite actual knowledge to plead the case. The factor relied upon most heavily by the respondents was the fact that Naomi and Barry did not know what the defendants themselves knew about whether or not Naomi had approved the loans. Ignorance of that could not justify the respondents doing nothing at all. The court agreed with the appellants that if the information identified by the Chief Justice was required in order to trigger the need for an investigation, it put the test impossibly high. It was the kind of information which an investigation was designed to discover, not information required to trigger the investigation (paras. 82–89).

(3) Since the Chief Justice erred in his approach to this question, it was for the court to determine whether there were factors which, taken individually or cumulatively, acted as a trigger which would have caused a reasonably attentive person in the respondents' position to inquire further. There was no realistic prospect of the respondents at trial establishing that they could reasonably not suspect wrongdoing. It might be that the mere fact of the losses themselves, without more, would not have been a sufficient trigger (although not for the reasons of complexity and lack of transparency relied on by the Chief Justice). Absent the history of dealing between the parties, the losses might not have suggested wrongdoing by anyone, and it might arguably at least have been inappropriate to give summary judgment on that basis. However here there was detailed knowledge about the conduct of the appellants which was relied upon by the respondents in the NOF claim. The respondents knew they were dealing with parties whom they believed had acted dishonestly and had favoured Joseph at the expense of Naomi; they knew that as directors of Enduring,

the appellants must have approved the loans; they knew that Enduring was a company under Joseph's control; they knew that Naomi had not given her consent to the loans and that it was fanciful to think she would have done so; and they knew that the appellants were aware from the October 2006 letter that her consent would be required. The court could not see how, objectively viewed, anyone in their position could possibly not at the very least suspect wrongdoing in these circumstances. The loans in this case shared many features with the NOF loans in respect of which they had thought it proper to take legal proceedings. There was every reason to suspect that something was again amiss and that further investigations were necessary. All this was known to them well before December 18th, 2014. It followed that whilst s.32(1)(a) was no doubt engaged to postpone the limitation period from starting when the alleged fraud occurred, it did not justify the respondents delaying as long as they did before bringing these claims. They could, exercising due diligence, have brought them well before December 18th, 2014 and the claims were now out of time. Accordingly, the appeal succeeded on this ground (paras. 90–92).

(4) In relation to actual knowledge, the critical question was whether it would have been proper to allege that the appellants must have known that Joseph had not obtained the requisite consent from Naomi before approving the loans, alternatively they were reckless in the sense of turning a blind eye as to whether she had given approval. The court agreed with the Chief Justice that these claims and the transactions the subject of the NOF claim were not materially different. They all involved the transfer of moneys from Ackerman Group companies to companies designed to benefit Joseph's side of the family and they were made at around the same time in 2006. There was plainly a proper basis for alleging dishonesty in these claims, even having regard to the need not to plead fraud lightly. It would have been fanciful to believe that Naomi had approved unsecured loans of this nature given her concerns that Joseph was using Group assets for the benefit of his family only. There was a strong case, and certainly a pleadable case, for saying that an honest solicitor, knowing the background and especially the October 2006 letter, would not have entered into these loans in the circumstances without at least inquiring about whether Naomi's approval had been given. Moreover, an important factor in this context was the fact that one of the allegations introduced by amendment into the NOF pleadings, namely that relating to the Wallshire loans, did not involve the appellants acting on the lending side. They were not loans made under the NOF umbrella. They were similar to the loans in this action in the sense that the appellants were only linked to the borrower and not the lenders. Yet in respect of the Wallshire loans Naomi and Barry clearly thought it proper to infer that the appellants were acting dishonestly in approving the loans on behalf of the borrower. It was true that the Wallshire loans were pleaded within the limitation period for the claims in this action and the judge accepted a submission that this made these loans irrelevant to the limitation analysis. However, with respect to the judge, the fact that Wallshire was pleaded within the limitation period for these claims was

irrelevant. If Wallshire was a proper allegation to advance in the NOF statement of claim, that strongly supported the view that the very similar facts of this case could equally sustain a proper pleading of dishonesty. Of course this evidence did not constitute proof of dishonesty: allegation was not proof. But it was not necessary to be sure that the case would succeed before a viable claim could be made, even where dishonesty was alleged. There was plainly a proper case to advance in the light of the known facts relied upon in the NOF claim and the Wallshire allegation and, more generally, the fact that there was evidence from those claims that the appellants had in various transactions knowingly sided with Joseph to the detriment of Naomi and her family. Therefore, viable claims of dishonesty could properly have been made. They would not have been imprecise allegations of a general nature but very specific claims identifying precise transactions and laying out the factual basis for the claims. The material information was available following the Thornhill investigations, and some of it earlier than that. It would not have been necessary for the claims to be pleaded once the information was available. Further inquiries could have been taken to strengthen the case, no doubt obtaining the detailed evidence which subsequently emerged from the Investec papers. But time would have started running once the information was known. These claims were therefore well out of time. The appeal would be upheld on this ground also (paras. 100–106).

Cases cited:

(1) *Ackerman* v. *Ackerman*, [2011] EWHC 3428 (Ch), referred to.
(2) *Bank of Credit & Commerce Intl. SA* v. *Ali*, [2001] UKHL 8; [2002] 1 A.C. 251; [2001] 2 W.L.R. 735; [2001] 1 All E.R. 961; [2001] Emp LR 359; [2001] I.C.R. 337; [2001] IRLR 292, considered.
(3) *Barnstaple Boat Co. Ltd.* v. *Jones*, [2007] EWCA Civ 727; [2008] 1 All E.R. 1124, distinguished.
(4) *Barrass* v. *Cruz*, 2021 Gib LR 14, referred to.
(5) *Bilta (UK) Ltd.* v. *SVS Secs. plc*, [2022] EWHC 723 (Ch); [2022] BCC 33, considered.
(6) *Canada Square Operations Ltd.* v. *Potter*, [2021] EWCA Civ 339; [2022] Q.B. 1; [2021] 3 W.L.R. 777; [2021] 4 All E.R. 1036; [2021] CTLC 1, referred to.
(7) *Easy Air Ltd. (t/a Openair)* v. *Opal Telecom Ltd.*, [2009] EWHC 339 (Ch), referred to.
(8) *Federal Deposit Ins. Corp.* v. *Barclays Bank plc*, [2020] EWHC 2001 (Ch); [2020] 5 CMLR 23, referred to.
(9) *Gemalto Holding BV* v. *Infineon Technologies AG*, [2022] EWCA Civ 782; [2023] Ch. 169; [2022] 3 W.L.R. 1141; [2023] 1 All E.R. 418, referred to.
(10) *Granville Technology Group Ltd.* v. *Infineon Technologies AG*, [2020] EWHC 415 (Comm), referred to.
(11) *Henderson* v. *Henderson* (1843), 3 Hare 100; 67 E.R. 313; [1843–60] All E.R. Rep. 378, considered.

(12) *Johnson* v. *Gore Wood & Co.*, [2000] UKHL 66; [2002] 2 A.C. 1; [2001] 2 W.L.R. 72; [2001] 1 All E.R. 481; [2001] 1 BCLC 313, considered.
(13) *Law Socy*. v. *Sephton & Co*., [2004] EWCA Civ 1627; [2005] Q.B. 1013; [2005] 3 W.L.R. 212, referred to.
(14) *Madoff Securities Intl. Ltd.* v. *Raven*, [2013] EWHC 3147 (Comm), considered.
(15) *Magner* v. *Royal Bank of Scotland Intl.*, Supreme Ct., August 10th, 2017, unreported; on appeal, 2020 Gib LR 75, considered.
(16) *OT Computers Ltd.* v. *Infineon Technologies AG*, [2021] EWCA Civ 501; [2021] Q.B. 1183; [2021] 3 W.L.R. 61; [2021] 4 All E.R. 1095; [2021] BPIR 986, considered.
(17) *Paragon Finance plc* v. *D.B. Thakerar & Co*., [1999] 1 All E.R. 400; (1999), 1 ITELR 735, considered.
(18) *Playboy Club London* v. *Banco Nazionale del Lavoro SpA*, [2018] EWCA Civ 2025, considered.
(19) *Test Claimants in the Franked Investment Income Group Litigation* v. *Inland Revenue Commrs*., [2020] UKSC 47; [2022] 1 A.C. 1; [2020] 3 W.L.R. 1156; [2021] 1 All E.R. 1001; [2020] BTC 30; [2020] STC 2387; [2020] STI 2464, considered.
(20) *Three Rivers District Council* v. *Bank of England (No. 3)*, [2001] UKHL 16; [2003] 2 A.C. 1; [2001] 2 All E.R. 513, considered.

Legislation construed:
Limitation Act, s.32(1)(a): The relevant terms of this provision are set out at para. 43.

Civil Procedure Rules (S.I. 1998/3132), r.24.3: The relevant terms of this rule are set out at para. 41.

R. Stewart, *K.C.* with *S. Pourghadiri* and *S. Chandiramani* (instructed by Attias & Levy) for the appellants;
A. Mold, *K.C.* with *J. Holmes* and *J. Castle* (instructed by Isolas LLP) for the respondents.

1 **ELIAS, J.A.:**

Introduction

This appeal relates to serious allegations of assistance in breach of fiduciary duty made by the claimant companies against Hassans, a Gibraltar firm of lawyers, and two of the partners in that firm, Mr. Levy, K.C. and Mr. Felice. The principal issue in the appeal is whether the Chief Justice should have granted summary judgment to the defendants on the entire claim pursuant to CPR 24.2 on the grounds that it was out of time and therefore had no real prospect of success (reported at 2022 Gib LR 378). It is not disputed that the six-year limitation period imposed by s.4(1)(a) of the Limitation Act 1960 had expired when the claim was made. The question

is whether, since the case is based on fraud, the claimants can take advantage of s.32(1)(a) of the 1960 Act which provides that in cases of fraud, time will not begin to run against a claimant until he has either discovered the fraud (actual knowledge) or could with reasonable diligence have done so (constructive knowledge). The Chief Justice held that whilst the defendants "may have the better part of the argument" (*ibid.*, at para. 103), nonetheless there was a realistic prospect that the claimants would at trial establish that the claim had been made in time. This would require them to show that they could not have pleaded a viable claim before December 18th, 2014, which date was exactly six years before the claim was made in 2020, because they did not have either the actual or constructive knowledge to do so.

2 A second issue relates to an indemnity made in a settlement deed dated July 3rd, 2015 ("the settlement deed") between the defendants and the third and fourth parties in connection with the settlement of an earlier dispute between those parties which has been referred to as "the NOF claim." The third and fourth parties had alleged dishonesty against the same defendants in those proceedings. The defendants advanced an additional claim in these proceedings against the third and fourth parties in which they alleged that the terms of the indemnity were such that the third and fourth parties would be legally obliged to indemnify them for all liabilities (including costs) to which the defendants might be held liable in the current proceedings. They sought summary judgment in their favour on the basis of this indemnity too. The defendants also sought to have the entire action struck out on this basis although since the third and fourth parties are the only shareholders of the claimant companies, a ruling in favour of the defendants on this ground would in practice be likely to bring the proceedings to an end even without a formal strike out. The Chief Justice refused to grant summary judgment on the ground that the third and fourth parties had realistic prospects of showing at trial that the indemnity did not apply to these claims.

3 A third ground relates to an allegation of abuse of process. It is asserted by the defendants that it was open to the claimants to bring this claim as part of the NOF claim, and that they could and should have done so in accordance with the principles in *Henderson* v. *Henderson* (11). The defendants sought to have the claim struck out on the grounds that bringing these claims in a later and distinct action was an abuse of process pursuant to CPR 3.4(2)(a). Again, the judge rejected this ground, concluding that it was bound to fail in the light of his decision on the other two points.

4 The defendants appeal against all these rulings of the Chief Justice. However, by the end of the hearing before us it was apparent that the abuse of process ground had been all but jettisoned. Accordingly, it will figure only briefly in this judgment.

The assumed facts

5 It is not in dispute that the summary judgment and strike-out applications before the judge had to proceed on the premise that the factual allegations made by the claimants and the third and fourth parties are true. However, it is right to put on record that the defendants vigorously deny any dishonesty and they also deny, or do not admit, many of the specific factual matters relied upon by the other parties.

6 The background facts are relatively complex. The judge set out them out in some considerable detail, and both parties accept that his account was fair and accurate. I will summarize the material facts more shortly than did the judge, but in doing so I gratefully draw upon his account.

7 The present claim is the latest in a series of actions arising out of a long-standing feud between two parts of the Ackerman family. In the 1960s, the brothers Joseph and Jack Ackerman ("Joseph" and "Jack") established a business for the purchase, sale and letting of UK-based properties. The business was run through well over a hundred companies operating in multiple jurisdictions and held through a variety of different structures ("the Ackerman Group"). Until a restructuring which took place in around 2011 after the events giving rise to this action, there was no single ultimate holding company. Joseph and Jack owned the Ackerman Group in equal shares until Jack's death in 1989. After Jack's death his share and interest in the Ackerman Group passed to his widow, the third party ("Naomi"), who became joint owner in equal shares with Joseph.

8 Following Jack's death, Joseph assumed overall management control of the Ackerman Group, assisted by his son in law Danny Wulwick ("Danny"). Naomi and her son Barry Ackerman ("Barry"), the fourth party, were also involved to some extent in the running of the Group, although the degree of their involvement is not agreed.

9 Hassans specializes, amongst other things, in contentious and non-contentious matters concerning trusts and companies. It provides services, if requested, as a trustee or company director, acting through its subsidiaries, partners or other members of the firm. The second defendant ("Mr. Levy") and the third defendant ("Mr. Felice") were at all material times partners in and/or employees of Hassans. Mr. Levy and Mr. Felice were each closely involved in matters concerning the Ackerman Group since at least 2003. It is asserted that they would have shared information about the Group activities in which they were involved and that actions taken by one of them would be taken with the knowledge and approval of the other.

10 In around 2003 Hassans, acting through Mr. Levy, was instructed to advise about the creation of a trust which became known as "the NOF Trust" and Hassans subsequently drafted the trust deed. Naomi understood

that this trust was to be for the benefit of both sides of the Ackerman family but that was not the case.

11 The trustee of the NOF Trust was Line Trust Corp. Ltd. ("Line Trust"), a company ultimately beneficially owned by the partners of Hassans. Its officers included partners and/or employees of Hassans. Following the establishment of the NOF Trust, Mr. Levy held himself out as a trusted advisor. At that time Naomi perceived his role as advisor to both sides of the family, without favouring one side at the expense of the other.

12 In around 2004 relations between the two sides of the Ackerman family started to deteriorate. By 2006 Naomi and Barry had become so dissatisfied with Joseph and Danny's management of the Ackerman Group that the relationship had broken down. Mr. Andrew Thornhill, K.C. was engaged to mediate between the two sides of the family and at a meeting in his chambers on February 15th, 2006, Joseph and Naomi agreed in principle to demerge their respective interests in the Ackerman Group. That agreement led to a corporate restructure several years later in 2011 when all the companies in the Group were transferred to a new single holding company, BANA One, incorporated under the laws of England and Wales. As part of the restructure, all the shares of that company were held by Naomi and Barry, and they were also directors of that company.

13 It is the claimants' case that at the meeting on February 15th, 2006, as reflected in subsequent correspondence, it was agreed that pending the proposed de-merger, Joseph could continue to carry out transactions on the basis that they would be on his own account provided they were small and transparent. Moreover, they could only be financed using any part of Naomi's share of the Group assets if certain conditions were met: the funds had to take the form of a loan, be formally agreed in writing with Naomi on a case-by-case basis, and be on commercial terms.

14 In the next few months Naomi and Barry became aware of rumours that Joseph was contemplating a substantial investment in two separate, large property portfolios. At Barry's instigation, various meetings were held with Joseph in September and October 2006 to discover precisely what transactions had been undertaken but although Joseph asserted that "there will be no linkage whatsoever" between his personal transactions and the Group, the information was not forthcoming. This caused Naomi to take more formal action.

15 In October 2006 Naomi's English solicitors prepared a draft letter to Joseph ("the October 2006 letter") in which they sought details of transactions undertaken on Joseph's own account for the benefit of his side of the family and carried out in that calendar year. The letter continued as follows:

> ". . . Until Mrs Ackerman has confirmed in writing that she is satisfied as to how these transactions have been structured and that they have had no improper impact on the Group, she has asked us to inform you that her consent to you to carry out any further such transactions has been withdrawn. In addition, to prevent any misunderstanding, proper formal proceedings including directors' and relevant signatures should be adhered to."

16 The draft October 2006 letter was attached to an email that was sent by Barry to Mr. Levy on October 11th, 2006. This was not because Naomi had suspicions about Mr. Levy's conduct at that time; it was simply to put him on notice that Naomi had ceased to authorize Joseph to undertake future transactions concerning Group assets without her agreement.

17 On October 16th, 2006 the letter was sent in final form to Joseph. Its contents were substantially the same as the draft that Mr. Levy had received on October 11th, 2006.

The present claims

18 The claims arise out of loans made in November 2006 by two subsidiaries of the claimant companies, Lexham Alliance Ltd. ("Lexham") and Marylebone Alliance Ltd. ("Marylebone"). The loans were made to Enduring Properties Holdings Ltd. ("Enduring").

19 Lexham was wholly owned by Kingstar UK Ltd. ("Kingstar"), and Marylebone was wholly owned by Rosestar Properties Ltd. ("Rosestar"), the claimants in this action. At the time of the loans, the only directors of both Rosestar and Kingstar were Naomi and Joseph. They were also equal shareholders in Rosestar. The shareholding position with Kingstar was more nuanced: its shares were all owned by a company named Superetto Ltd. whose shares were in turn owned equally by Naomi and Joseph, albeit held in trust for members of their respective families.

20 At all material times the directors of Lexham and Marylebone were employees of Investec Trust (Jersey) Ltd. ("Investec") or its subsidiaries. Investec was independent of the Ackerman families. (I will hereafter refer to the directors as Investec rather than identifying individuals.)

21 The recipient of the funds from Lexham and Marylebone, Enduring, was under the control of Joseph's side of the family in the following way. On or around October 10th, 2006 a trust known as "the Star Trust" was established by deed with Joseph as settlor and Line Trust as trustee. (Line Trust was also a trustee of the NOF trust.) Star Trust was a discretionary trust governed by the laws of Gibraltar. The trust deed was drafted by Hassans and the trust was set up with the intention of benefiting Joseph's side of the Ackerman family and excluding Naomi and her side. It is alleged that Mr. Levy and Mr. Felice must have known this. Naomi says

that at this stage she had not even become aware that Star Trust had been established.

22 Line Trust, in its capacity as trustee of the Star Trust, held shares directly or indirectly in several companies including all the shares in Enduring. At all material times the directors of Enduring included Mr. Levy, Mr. Felice and Mr. Christopher White, a legal consultant also from Hassans.

23 The loans to Enduring from Lexham and Marylebone were made pursuant to loan notes. They were issued by Enduring in the amount of £1,045,670 as regards Lexham and £2,016,190 as regards Marylebone. They were unsecured loans for five years with an interest rate of 7%. They were to be repaid in full by Enduring on or by November 16th, 2011, save that the principal and any accrued interest would be immediately repayable in full if Enduring failed to make any payment, including as to interest, within 14 days of that sum falling due under the loan notes. In the event no amount of the principal or interest was ever paid to either lender. Lexham and Marylebone ultimately went into liquidation and were dissolved.

24 On April 3rd, 2008 the assets of the Star Trust, including the shares in Enduring, were settled upon and/or transferred to Line Trust as trustee of a new trust known as the White Star Trust. This was another trust set up to benefit Joseph's side of the family alone.

25 Against this background, the case for the claimants is that the defendants dishonestly assisted in breaches of fiduciary duties by Joseph. The pleadings develop the case in some considerable detail. Suffice it to say that the essence of the claims is that, as directors of Enduring, Mr. Levy and Mr. Felice were actively involved in negotiating and approving the loan agreements on behalf of Enduring; that they knew, not least because of their active involvement in setting up the Star Trust, that the loans were being transferred from companies in the Ackerman Group to a company which operated only for the benefit of Joseph's side of the family; that they knew or had constructive knowledge that when the claimant companies gave their approval to the loans made by their subsidiaries, the only shareholder approving the loans on the respective company's behalf was Joseph; and they knew that the terms were uncommercial. They also knew, having received the draft October 2006 letter, that Joseph had no authority to act on his own or to approve these loans without the consent of Naomi, and there was no basis for believing that she had given her approval. Indeed, there was every reason to believe that she would have refused to do so. These matters established a clear breach of fiduciary duty by Joseph, and they also demonstrated that the defendants had knowingly and dishonestly assisted Joseph in his unlawful activities.

26 In the particulars of claim, there is considerable detail in relation to the negotiation, authorization, drafting and execution of the loan

transactions. Those detailed particulars are, to a large extent, derived from information contained in the "Investec documents" which were provided to Barry in 2020 in circumstances to which I refer below.

Other material transactions

27 The central issue in this case is what facts were known, or could with reasonable diligence have been known, to the claimants before December 18th, 2014 so as to enable a viable claim to be pleaded before that. There are three other legal disputes which have a potential bearing on that issue: the Thornhill reports arising out of the investigations of Mr. Thornhill, K.C. connected with the de-merger; another action; the NOF claim, referred to above, which was brought by Naomi and Barry against, *inter alia*, Hassans, Mr. Levy and Mr. Felice and which, as in this case, involved loans made by Ackerman Group companies to companies under the control of Joseph which loans were never repaid; and a claim by the liquidator of Star Poland Ltd., a Group company, which had made loans to companies with which the defendants were connected, and which loans again were never recovered ("the Star Poland claim").

The Thornhill reports

28 Mr. Thornhill, K.C. became involved by agreement between Joseph and Naomi in the de-merging of their interests in the Ackerman Group in 2008. That agreement was formalized in a series of written documents dated September 22nd, 2008, December 5th, 2008, and June 25th, 2009. The purpose of the exercise was to apportion randomly 50% of the Group companies to each side of the family with Mr. Thornhill thereafter conducting an adjustment exercise to ensure that both sides of the family received assets of equal value. In a provisional report provided in 2011, Mr. Thornhill found that in the light of Joseph's withdrawal of funds from the Group, there was relatively little net value remaining in the Group. He proposed to award the whole of the remaining Group to Naomi coupled with an additional adjustment payment of £20m. to be paid to Naomi. Joseph challenged that decision, but the action was dismissed by Vos, J.: see *Ackerman* v. *Ackerman* (1). In his judgment, Vos, J. commented upon how uncooperative Joseph and Danny had been, both with Naomi and Barry and with Mr. Thornhill himself. The judge said this ([2011] EWHC 3428 (Ch), at para. 177):

> "I am entirely satisfied that Joseph and Danny deliberately withheld information from Naomi and Barry and made it impossible for Naomi properly to perform her director's duties, and that their campaign continued throughout the process that Mr. Thornhill undertook."

Later in his judgment there were further comments to the same effect (*ibid.*, at para. 346):

> "To say that Joseph placed obstacles in Mr. Thornhill's path towards this end is a substantial under-statement. Joseph came close to making Mr. Thornhill's task impossible. I have already said that I formed the view that this was, at least on one analysis, his objective. It is very likely that he did not really want to be required to separate the Group; rather he wanted to be allowed to continue to run the Group in his own way, using Naomi's half interest without consulting her, as he had always done. To that end, he and Danny simply refused to provide Mr. Thornhill with the information necessary to allow him to undertake the process to which they had signed up."

29 Joseph appealed against this judgment and the appeal was settled on terms which led to a revised report in 2012. The final report settled the balance owing to Naomi at £36.225m.

30 In his provisional report, Mr. Thornhill had commented upon the two loans in issue in this appeal. He observed that the loans had been made without Naomi's consent and that she would probably have objected to them had she been consulted. He considered that in the circumstances responsibility for the loss of these moneys should fall solely on Joseph. Barry asserts in his witness statement that he and Naomi did not even know that the loans had been made until 2008 after they had obtained the assistance of an expert accountant, Mr. Portnoy, to assist them in their dealings with Mr. Thornhill.

The NOF claim

31 The NOF claim was issued on July 8th, 2013 by Naomi and Barry against Line Trust, Hassans, Mr. Levy and Mr. Felice. As initially formulated, the case concerned loans made by Rosara Properties Ltd. ("Rosara") and New Liberty Properties Ltd. ("New Liberty"), two companies within the NOF Trust, to three companies held within the Star Trust, namely Enduring, Maxtel Holdings Ltd. ("Maxtel") and Carlton Holdings Ltd. ("Carlton"). These loans were made in November and early December 2006 (the same month as the loans in the current proceedings). Rosara had refinanced its borrowing from the Royal Bank of Scotland to make these loans, in breach of banking covenants between itself and the bank. In total Rosara loaned in excess of £9m. and New Liberty in excess of £1m.; all loans were unsecured and in the event nothing at all was repaid. The link between the loan companies and the NOF Trust was that the shares in Rosara and New Liberty were owned by Brayfield (International) Ltd. ("Brayfield") and Line Trust owned all the shares in Brayfield in its capacity as trustee of the NOF Trust.

32 Hassans were active on both sides of the transactions. On the lending side, Mr. Felice and Mr. Levy were directors of Rosara, New Liberty and Brayfield. Mr. Felice was also a director of each of the three borrowing

companies and Mr. Levy was a director of two of them, Enduring and Maxtel.

33 The pleadings alleged unlawful conspiracy, breach of trust and dishonestly assisting in the breach of fiduciary duty by Joseph. In essence the allegation was that the defendants had knowingly acted at the behest of Joseph to prefer the interests of Joseph and his family to the exclusion of Naomi and her family. Furthermore, they knew that Naomi had not consented to the loans and as was apparent from the October 2006 letter, that Joseph had no authority to agree to the loans without her consent. It was also alleged, based on findings made by Mr. Thornhill in one of his reports, that the defendants had put forward a false document purporting to set out the beneficiaries of the NOF Trust but omitting Naomi and her issue from that description. This was said to be an administrative error, although the claimants asserted that this was simply not a credible explanation for the existence of this document.

34 In April 2015 the NOF particulars of claim were further amended with the introduction of a new allegation arising out of a loan made from another company in the Group, Wallshire Ltd. ("Wallshire"). The allegation is that the defendants unlawfully assisted a breach of fiduciary duty by negotiating loans from Wallshire of £6m. to Maxtel and £5m. to Carlton. Wallshire was not an NOF Trust company and the defendants were not connected with it. The allegation is that in their capacity as directors of Maxtel and Carlton, the defendants negotiated these loans knowing that they were obtained without Naomi's consent, or alternatively being reckless as to that fact (by turning a blind eye).

35 This amendment did not introduce a new claim as such, and no damages were sought with respect to the Wallshire loans. It was advanced in support of an inference that in the context of the NOF loans themselves, the defendants had been preferring Joseph and his side of the family in preference to Naomi and her side. In fact, the original draft claim form in the current action included claims relating to the Wallshire loans but for some reason these were removed by amendment before the claim form was served.

36 The NOF claim was compromised for a substantial sum by virtue of the settlement deed. By cl. 9 of that deed, Naomi and Barry provided an indemnity to the defendants in connection with future claims connected with the NOF claim. It is asserted that the indemnity applies to the claims in the current litigation.

The Star Poland claim

37 This relates to another loan from another company in the Group, Park Lane Alliance Ltd. ("PLA"), to another company alleged to be part of the Star Trust. On December 19th, 2007 PLA made an unsecured loan of about

£5.8m. to Star Poland Ltd. ("Star Poland"). Star Poland was incorporated in December 2007 and its directors were Ian Felice, Christopher White and Nadine Collado (who worked Line Gray Ltd., a company associated with Hassans). PLA's directors were Investec, the same professional service firm which acted as directors of Lexham and Marylebone.

38 The loan from PLA was due to be repaid in 2017 but fell due early upon a default on payment of interest. The directors of PLA made unsuccessful demands for repayment and in December 2011 brought proceedings against Star Poland for the repayment of the loan. In December 2012 Star Poland's directors declared it to be insolvent and it was placed into voluntary liquidation. The liquidator's investigations focused on locating the land in Poland for which the loan moneys were said to have been used. After some three years it was concluded that Star Poland did not hold a direct interest in the land in question and so there was nothing over which the liquidator could seek to enforce payment. In December 2016 the liquidator caused Star Poland itself to bring proceedings against its former directors.

39 The significance of this claim was that Barry was given access by the liquidator to the relevant documentation, including the pleadings and correspondence between the parties. Barry says that for the first time it alerted him to the fact that even where Mr. Felice was acting only on the borrower side of the transaction, he was (in Barry's view) engaged in fraudulent wrongdoing to assist Joseph. This, Barry contended, was different from the wrongdoing disclosed by the defendants' activities with respect to the NOF trust. Moreover, at this time Hassans offered Barry a substantial sum as a general release to settle any (unspecified) claims he may have against them. This suggested to Barry that Hassans were aware that they might be liable for other, as yet unidentified, claims. Finally, Barry learned that the Star Poland directors had settled for essentially the full amount of the claim. As Barry puts it at para. 93 of his first witness statement:

> "These developments in the Star Poland proceedings changed that picture, and suggested both that the Defendants may have had a much wider role than we had previously appreciated, and that their dishonesty may have extended beyond that alleged in the NOF Claim concerning their roles as office holders within the Ackerman Group."

40 Barry says that in the light of this information he requested historic files from Investec, the former directors of Lexham and Marylebone, about their loans. Investec provided their files on October 2nd, 2020. They included a run of correspondence from November 8th, 2006 to around November 22nd, 2006 between Investec, Mr. Felice and others. Important information which emerged from this correspondence included the fact that there was a specific request by Investec as the directors of Lexham and

Marylebone for shareholder approval from Kingstar and Rosestar. Although Joseph and Naomi were directors of the shareholding companies, Joseph had unilaterally given the requisite approval without Naomi's consent even being sought, and Mr. Felice at least plainly knew this. It is Barry's contention that it only then became apparent for the first time that the defendants must have known that Joseph was acting in breach of his fiduciary duty with respect to these loans. Although both he and Naomi did not believe that Hassans had acted honestly in relation to the transactions identified in the NOF claim, that was in relation to a specific set of companies and transactions. They did not have any reason to suspect that that pattern of behaviour would extend to the subject matter of the present claim where Hassans had acted outside the NOF Trust and only for the non-Ackerman Group borrowing party.

The law

Summary judgment

41 Both the limitation and the indemnity applications are applications for summary judgment. CPR 24.2 provides, so far as is material:

> "The court may give summary judgment against a claimant . . . on the whole of a claim or on a particular issue if—
>
> (a) it considers that that claimant has no real prospect of succeeding on the claim . . . or issue . . ."

42 It is now well established that to avoid summary judgment, the prospect of succeeding must be "realistic" as opposed to "fanciful," which means that it must be more than merely arguable: see the seminal judgment of Lewison, J. in *Easy Air Ltd. (t/a Openair)* v. *Opal Telecom Ltd.* (7) ([2009] EWHC 339 (Ch), at para. 15).

The limitation defence

43 The claimants accept that, subject to the postponing effect of s.32(1)(a) of the Limitation Act, the primary 6-year limitation period for their claims has expired. Section 32(1)(a) provides:

> "**Postponement of limitation period in case of fraud or mistake.**
>
> 32.(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims . . .
>
> the period of limitation shall not begin to run until the claimant has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it . . ."

44 It is common ground that the nature of the alleged dishonesty in this case would, if established, constitute fraud as defined in this section.

45 The section therefore requires that time runs from the date when the facts constituting the fraud are known or, if they are not known, from the date when, with reasonable diligence, they ought to have been known. In the latter case the putative claimant has constructive knowledge of the claim. The facts known will include inferences which can properly be drawn from the known primary facts. Frauds are not often plain and incontrovertible; they will in practice often have to be inferred from other facts.

46 Coincidentally, the equivalent English statutory provision is also to be found at s.32(1)(a) of the relevant Act, the Limitation Act 1980. It is not in identical language, but it is common ground that the principles are the same in the two jurisdictions and that English authorities can be relied upon with respect to the construction and application of the Gibraltar legislation.

47 The purpose of this provision is clear. As the joint judgment of Lord Reed and Lord Hodge put it in the decision of the Supreme Court in *Test Claimants in the Franked Investment Income Group Litigation* v. *Inland Revenue Commrs.* ("*FII*") (19) ([2022] 1 A.C. 1, at para. 193):

> "The purpose of the postponement effected by section 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake."

48 Lords Reed and Hodge also noted that it is a question of fairness (*ibid.*, at para. 228):

> "First, section 32(1)(c), like the equitable rule which preceded it, necessarily qualifies the certainty otherwise provided by limitation periods. It means that the 1980 Act does not pursue an unqualified goal of barring stale claims: its pursuit of that objective is tempered by an acceptance that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action."

Section 32(1) concerns not only fraud but also concealment and mistake—and indeed, the *FII* case concerned the application of the section to mistakes in law—but the general purpose is the same in each case.

49 We were referred to numerous authorities relating to the meaning and application of this provision. However, there is no significant dispute about the relevant law itself; the argument has focused principally on whether the Chief Justice properly applied the relevant principles. Accordingly, I will summarize the material principles relatively briefly.

(1) Given the purpose of the section, there is no justification for construing it narrowly on the grounds that it is an exception to the normal limitation period; rather it should simply be given "its natural meaning without a predisposition to interpret it either narrowly or broadly": Males, L.J. in *OT Computers Ltd.* v. *Infineon Technologies AG* (16) ([2021] Q.B. 1183, at para. 19, citing from his earlier judgment in *Canada Square Operations Ltd.* v. *Potter* (6) ([2022] Q.B. 1, para. 167).

(2) Time begins to run from the point when a claimant has discovered the relevant fraud. A party is deemed to have discovered it when it is in a position to plead a viable statement of claim ("the statement of claim" test): *OT Computers* ([2021] Q.B. 1183, para. 26, citing numerous authorities). A viable claim is one which will not be struck out because an essential fact, necessary to complete the relevant cause of action, is missing. This is an objective test: the putative claimant may not appreciate that it has a cause of action, but that is immaterial.

(3) The statement of claim test does not require the claimant to be sure of success, or to know at that stage all the evidence which it later decides to plead; that is the function of disclosure. The relevant principles were succinctly set out in *Bilta (UK) Ltd.* v. *SVS Secs. plc* (5) ([2022] BCC 33, at para. 31(7)(f), *per* Marcus Smith, J.):

> "It is trite that a statement of case in no way proves or establishes the claim asserted: it merely articulates, to a relatively low standard, the claim that the claimant wishes to vindicate before the courts. It follows that the test as to when the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered the same must be referable to what is needed properly to plead out the claim. That is the test that appears to be prevalent, particularly where fraud is involved: see *Peconic Industrial Development Ltd v. Lau Kwok Fai*, [2009] WTLR 999 at [56]; *FII Group Test Claimants v. HMRC*, [2020] UKSC 47 at [184] to [192]. What is required is an ability in the claimant to plead a complete cause of action: *Arcadia Group Brands v. Visa*, [2015] EWCA Civ 883 at [48] to [49]. By this is meant an ability to plead a *viable* claim, that is, one that will not be struck out because a necessary element of the cause of action cannot be asserted or because the necessary particularity cannot be pleaded. A *viable* claim does *not* require the claimant to need to know or have been able to discover all of the evidence which it later decides to plead. But it does require the putative claimant to be able to plead the precise case that is ultimately alleged: *Barnstaple Boat Co v. Jones*, [2007] EWCA Civ 727. In a case of fraud—as here—discovery of the alleged fraud means knowledge of the 'essential facts constituting the alleged fraud': *Cunningham v. Ellis*, [2018] EWHC 3188 Comm at [87]."

(4) Accordingly, a party cannot delay time running whilst it evaluates the merits of the claim or obtains further evidence to support it. The limitation period itself is intended to take account of considerations of that nature. Similarly, as Sir Geoffrey Vos, M.R. observed in *Gemalto Holding BV* v. *Infineon Technologie*s AG (9) ([2022] 3 W.L.R. 1141, at para. 47): ". . . the limitation period is not postponed until the claimant can show that it is more likely than not to succeed."

(5) The question of constructive knowledge—what a claimant would have known had it acted with reasonable diligence—raises its own problems of analysis. As Males, L.J. noted in *OT Computers* ([2021] Q.B. 1183, at para. 47), it will often be useful to consider the reasonable diligence approach under two headings:

> "[A]lthough the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the 'trigger'), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

(6) As Males, L.J. observed, both questions in the assessment of reasonable diligence are questions of fact. As to the trigger, some may recognize it more readily than others. The courts have sought to provide some guidance about how to assess whether a party might be expected to react to a trigger or not. Males, L.J. in the passage quoted referred to the response of a "reasonably attentive" person. In *Law Society* v. *Sephton & Co.* (13) ([2005] Q.B. 1013, at para. 116), Neuberger, L.J. referred to the putative claimant as someone with a "desire to know." In *Paragon Finance Ltd.* v. *D.B. Thakerar & Co.* (17) ([1999] 1 All E.R. at 418), Millett, L.J. expanded a little upon that describing an appropriate test as:

> ". . . how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency."

As this *dictum* shows, it is an objective question asking how a reasonable person in the claimant's situation would be expected to act; it is not whether the claimant subjectively understands that it has a cause of action. The justification for this approach was explained by Males, L.J. in *OT Computers* ([2022] 1 A.C. 1, at para. 59):

> "[I]t is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests."

(7) The courts have also given some indication of the kind of event which might be expected to trigger further investigation. In some circumstances the mere fact that a party has suffered a loss, particularly a significant loss, may reasonably be expected to prompt the question, "why" such as to generate some kind of inquiry: see Foxton, J. in *Granville Technology Group Ltd.* v. *Infineon Technologies AG* (10) ([2020] EWHC 415 (Comm), at para. 48). (This was the first instance decision in the *OT Computers* case.)

(8) When drawing inferences, the court must be careful not to be influenced by hindsight. Inferences must be capable of being fairly drawn from the materials before the putative claimant at the relevant time and a court must be astute not to be subconsciously influenced by later material: see the observations of Snowden, J. in *Federal Deposit Ins. Corp.* v. *Barclays Bank* (8) ([2020] 5 CMLR 23, at para. 44).

50 There is, however, an important consideration which has to be borne in mind in fraud cases when applying the statement of claim test. It is trite law that a party must not lightly plead fraud. The allegation must rest on a firm evidential basis. There is a plethora of authority to this effect, and it is sufficient to cite from a relatively recent judgment of Sales, L.J. in *Playboy Club London* v. *Banco Nazionale del Lavoro SpA* (18) ([2018] EWCA Civ 2025, para. 46):

> "The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence."

51 A consequence of this is that a party must be able to plead a precise fraud; general suspicion, or even knowledge, that a party has in the past been involved in unrelated fraudulent activities will be unlikely of themselves to be enough. Moreover, the pleading must particularize the primary facts (but not the detailed evidence) from which it is alleged that a finding of fraud can be made. This point was made emphatically by Lord

Millett in *Three Rivers District Council* v. *Barclays of England (No. 3*) (20) ([2003] 2 A.C. 1, at para. 186):

> "[S]ince dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud."

52 These principles relating to the pleading of fraud do not modify the statement of claim test itself, but they do bear upon its application because they are pertinent to the question when a statement of claim would be viable or may be struck out for failing to show a proper cause of action. The pleading must identify at least the essential facts which, if proved at trial, would sustain a plea of dishonesty.

The decision of the Chief Justice

The elements of dishonest assistance

53 There are three conditions which must be satisfied before an allegation of dishonestly assisting a breach of fiduciary duty can properly be established:

(1) There must be a breach of fiduciary duty.

(2) The defendant must have assisted in that breach.

(3) The defendant must have been dishonest.

54 It is not disputed that Joseph was in breach of his fiduciary duty in securing the loans from Marylebone and Lexham. He acted for the benefit of his family members only and without Naomi's consent.

55 The judge also appears to have understood that it was common ground that the defendants had assisted the breach by virtue of their being directors of Enduring, the borrowing company. They must, in that capacity, have approved and helped secure the loan. However, Mr. Mold, K.C., counsel for the claimants, contended in argument before us that participation in agreeing the loan would not suffice to constitute assistance; he asserted that the breach of duty by Joseph was the failure to obtain Naomi's consent, and the defendants would have had in some way to be assisting in relation to that. It was the duty of the lenders, not the defendants, to ensure that relevant consents had been obtained. This submission is not consistent with the claimants' own case: the claim form identifies the relevant assistance as being the procuring of the loans, and the particulars of claim set out in detail the involvement of the defendants in those transactions.

56 The submission is also inconsistent with authority. The nature of what amounts to assistance was discussed by Popplewell, J. in *Madoff Securities Intl. Ltd.* v. *Raven* (14) ([2013] EWHC 3147 (Comm), at para. 350):

> "[W]hat is required, or at least is sufficient, for the ingredient of assistance, is simply conduct which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty . . . So accessory liability on the part of a dishonest assistant requires no more from his point of view than the actus reus of assisting by participation in the transaction, and the mens rea of dishonesty. It is not necessary that the assistance should play any part in the mental state of the fiduciary, still less that it should assist the mental state of the fiduciary in a way which is necessary to render the fiduciary's act a breach of trust or fiduciary duty."

57 The wrongdoing by Joseph consisted of approving these loans from Lexham and Marylebone in breach of his fiduciary duty. But for the loans being made by subsidiaries of the claimants, there could be no cause of action against Joseph. The defendants, as directors of Enduring, were necessarily assisting in those transactions by approving the borrowing and securing the loans. That assistance would have been known to the claimants well before December 2014 (as the judge specifically found, 2022 Gib LR 378, at para. 99).

58 The critical issue, therefore, is whether the claimants (through the actual or constructive knowledge of Naomi and Barry) either could properly plead that the defendants were dishonest or should with reasonable diligence had been in a position to do so.

59 The meaning of dishonesty in this context has recently been considered by Lord Hodge giving judgment of the Judicial Committee of the Privy Council in *Magner* v. *Royal Bank of Scotland Intl. Ltd.* (15) (2020 Gib LR 750, at para. 10):

> "In this context, dishonesty can be subjective in the sense that the defendant knew that what he was doing was dishonest, but that subjective understanding is not necessary to establish dishonesty. Honesty in this context is an objective standard because it is sufficient that the defendant's knowledge of the transaction rendered his participation in it contrary to normally acceptable standards of honest conduct: *Barlow Clowes Intl. Ltd.* v. *Eurotrust Intl. Ltd.* . . . ([2005] UKPC 37, at para. 15, *per* Lord Hoffmann). Deliberately closing one's eyes, in the sense of having suspicions of misfeasance but making a conscious decision not to ask questions or otherwise enquire, satisfies the test of dishonesty: *Royal Brunei Airlines Sdn. Bhd.* v. *Tan* . . . ([1995] 2 A.C. at 389, *per* Lord Nicholls of Birkenhead)."

The burden of proof

60 Whilst at trial the burden would be on the claimants to establish that they could rely on the statutory postponement, this is not the position in a summary judgment application, as the Chief Justice recognized (2022 Gib LR 378, at para. 93):

> "[T]his is an application for reverse summary judgment brought by the defendants, and the burden is on them to establish that the claimants do not have a realistic prospect of establishing at trial that they could rely upon the statutory postponement."

61 The Chief Justice held (*ibid.*, para. 103) that whilst "the defendants may have the better part of the argument," they had failed to discharge the burden upon them of showing that the claimants did not have a realistic prospect of establishing that they did not have either actual or constructive knowledge to plead the case before December 18th, 2014. The defendants' case is that the judge erred in various ways and that had he properly applied the law, he must have found that they had both actual and constructive knowledge sufficient to plead a viable claim of dishonest assistance well before December 2014.

The judge's reasoning

62 The judge set out in some detail the facts, the law, and the parties' arguments. He developed his reasoning on the limitation argument relatively succinctly. He started by identifying the issue (*ibid.*, at para. 94):

> "[T]he question which falls for determination is whether the Thornhill reports and the identification of the losses suffered and/or the NOF claim, the former distinctly or both cumulatively, establish a trigger? That is to say, did these matters put the claimants on notice of the need to investigate the alleged 'particular fraud.'"

63 It is to be noted that the judge does not at this point focus at all on the question of actual knowledge, namely whether the claimants had sufficient information to plead dishonesty even without the Investec documents. The whole analysis here was on constructive knowledge, and in particular whether there was a trigger putting the claimants on notice of the need to investigate.

64 The judge then dealt with each of the two potential triggers which he had identified. The first (*ibid.*, at paras. 95–96) were the losses on these two loans which had become apparent to Naomi and Barry during the Thornhill demerger exercise. They were in excess of £3m. The judge recognized that a loss of this nature "would almost always put someone on notice of the need to investigate" but concluded that it did not do so in this case. The reason he gave was that (*ibid.*, at para. 96):

"[G]iven the complex factual matrix and Naomi and Barry's alleged exclusion from information, there is a real prospect of success in the claimants' argument that the losses suffered by Lexham and Marylebone did not make it objectively apparent that something had gone wrong (beyond the losses themselves) so as to put the claimants on notice of a need to investigate."

65 The second potential trigger was the knowledge of earlier alleged fraudulent activity by the defendants, as asserted by Naomi and Barry in the NOF claims. Would this cause an attentive person to investigate further? The judge noted that the claimants (through Naomi and Barry) knew of the losses and must have known the following facts since they were relied upon in the NOF particulars of claim (*ibid.*, at para. 99):

"(i) the Star Trust (which held Enduring) was settled with the intention of benefitting only Joseph's side of the family;

(ii) Mr. Levy and Mr. Felice were directors of Enduring. (Consequently they should also have been aware that in the Lexham and Marylebone loans Mr. Levy and Mr. Felice would have been involved in the borrower side of the transaction);

(iii) Mr. Levy was aware of the October 2006 letter; and

(iv) in the NOF claim the defendants participated in the arrangement of the loans, despite the absence of Naomi's consent."

66 The judge was not prepared to conclude that these facts, even considered cumulatively, were necessarily sufficient to constitute a trigger. His reasoning on this point lies at the heart of this aspect of the appeal and I set it out in full (*ibid.*, at para. 101):

". . . I caution myself against the danger of hindsight and remind myself that it is the 'particular fraud' which claimants need to be on notice of. For the purposes of the present application, it can properly be argued that given the complex Group structure and in the absence of knowledge and/or an understanding by Naomi and Barry of:

(i) the corporate framework of both the lending and borrowing companies and their directorships;

(ii) the requests made by the directors of Lexham and Marylebone;

(iii) what in fact was provided to Lexham and Marylebone's directors; and

(iv) the defendants' knowledge of Joseph's alleged breaches of his fiduciary duties to the claimants,

the NOF claim was an insufficient trigger to put the claimants on notice of the need to investigate the loss and consequently the alleged

> fraud. I am fortified in that view given that other professionals, including Ms. Cottrell of Shepherd and Wedderburn, acted for the claimants in the transaction. This would arguably weigh against a suspicion that the defendants had acted dishonestly, as would the fact that the defendants are a professional law firm and senior experienced lawyers who are highly regarded. The latter, notwithstanding the allegations advanced in the NOF claim. Naomi and Barry may legitimately have not suspected them of what they now say are further instances of dishonesty. These are evidential issues which merit examination at trial."

67 The reference to the requests in (ii) is a reference to the request for shareholder approval with respect to each company by Investec, and the response referred to in (iii) is Joseph's purported approval on behalf of Kingstar and Rosestar given without Naomi's knowledge or consent (see para. 40 above).

68 However, the judge specifically rejected an argument on which the claimants had placed particular emphasis, namely the fact that in the NOF claims the complaints had been directed at the defendants' activities in relation to the lending companies (albeit that they were acting on both sides of the loan) whereas in this case it was directed at their role within the borrowing company only. The judge was not persuaded by this submission (*ibid.*, at para. 100):

> "[T]hat deals with the framing of the claim not with the factual matrix of which Barry and Naomi would have been aware. The distinction between the transactions in both sets of proceedings is not something which materially assists the claimants."

69 The Chief Justice then considered what would have been involved at the second stage if, contrary to his view, there was a trigger requiring further investigation (*ibid.*, at para. 97):

> "[I]t would appear that a reasonably diligent investigation would have involved requesting the transactional documents from Investec and that obtaining these would not have proved difficult."

70 This is an important conclusion, fully supported by the evidence, and it is not challenged by Mr. Mold. If Investec were able to provide what Barry alleges were critical documents relating to the Lexham and Marylebone loans in 2020, then manifestly they could, if requested, have provided them at any time after the transactions were completed in November 2006, and certainly well before December 18th, 2014.

71 It follows that the only question in issue before us with respect to the reasonable diligence question is whether the judge was entitled to hold that there was a realistic prospect that the claimants might be able to establish

at trial that, objectively viewed, there was no trigger prompting them to investigate further.

72 The judge dealt with the defendants' alternative argument on actual knowledge—that there was a pleadable case without the information disclosed in the Investec documents—in very brief terms (*ibid.*, at para. 102):

> "For the purposes of a summary judgment application the foregoing is also an answer to the submission that there was a pleadable case without the Investec documents. If there was nothing to put the claimants on notice of the need to investigate, they would not be aware of the alleged dishonesty and that is evidently a prerequisite to pleading any such cause of action."

In short, he considered that there could not be actual knowledge sufficient to advance a viable claim if there was nothing to trigger an inquiry.

The submissions on appeal

73 It is common ground that in a case of this nature, where a judge is determining a strike-out and/or summary judgment application, the appellate court should adopt a limited review jurisdiction. As I put it in a recent decision of this court, *Barrass* v. *Cruz* (4) (2021 Gib LR 14, at para. 57), after considering some earlier authorities, in a judgment with which Sir Colin Rimer, J.A. and Sir Maurice Kay, P. agreed: "The first instance judge's determination should be upheld unless it involves some misdirection in law or is plainly wrong." Errors of law include failing to have regard to relevant considerations and taking into account irrelevant considerations.

The alleged errors of law

74 The defendants say that the Chief Justice's analysis betrays numerous errors of law. The alleged errors overlap to some extent. I will consider them in a slightly different way than they were advanced before the court:

(1) The judge did not properly deal with what was claimed to be the defendants' primary case on limitation, namely that there was a viable case to plead on what the claimants already knew, even without the Investec documents. I will discuss this aspect of the case after considering the question of constructive knowledge.

(2) Mr. Stewart, K.C., counsel for the defendants, asserts that the Chief Justice was at fault in various ways in his approach to the question whether the claimants had acted with reasonable diligence. First, he failed to approach the question properly; he ought to have identified which parts of the viable claim were unknown in order to determine whether a reasonable person in the claimants' position could with reasonable diligence have

discovered them. Furthermore, he failed to focus on the measures which the claimants would have had to take to discover the fraud or to ask whether these were exceptional measures.

(3) The judge did not properly identify the material characteristics of the claimants when asking whether a reasonable person in their position would have inquired further. More specifically, he did not make the necessary assumption that a claimant must desire to discover whether there had been a fraud, and he had no regard to the fact that these claimants could have engaged professional assistance.

(4) The judge focused on whether matters were subjectively known or appreciated by the claimants whereas he ought to have adopted an objective approach, asking what a reasonable person in their position would have known.

(5) The judge set the bar too high when considering whether objectively the claimants knew enough to trigger an investigation; he wrongly focused on matters which they would need to know in order to plead a viable case, but that negates the very purpose of an inquiry which is to seek to discover whether there is a viable case to plead.

(6) The judge erred in giving weight to a range of considerations which were irrelevant to the issue he had to determine. In fact it is submitted that virtually all the matters relied upon by the judge (*ibid.*, at para. 101, set out in para. 66 above) were irrelevant.

75 The defendants contend that had the Chief Justice approached the matter correctly, the only proper conclusion open to him was that the claimants had a proper basis to plead the case even without the Investec documents. In the alternative, the knowledge available from the NOF claim, in which allegations of dishonesty had been made against the same defendants, would have caused any reasonable party to investigate further, at least once it had knowledge of the loans and losses. Had that investigation taken place, the Investec documents would have emerged, as the judge accepted, and manifestly a proper case could then have been pleaded.

76 Grounds (2) to (6) cover constructive knowledge. I will follow the approach of the judge and deal with them first before I consider ground (1) which relates to whether the claimants had actual knowledge sufficient to plead dishonesty.

Constructive knowledge and the trigger

Ground 2: error of approach

77 I do not accept that any of the matters identified under this heading establish an error of law. It may well be necessary to identify which parts, if any, of the viable claim were unknown to the claimants before December

18th, 2014 when considering whether the actual knowledge was sufficient to justify pleading a case, but it cannot in my view be necessary when considering whether there is a trigger prompting further investigation. The issue is whether a claimant is put on inquiry. The nature and extent of a claimant's knowledge about the circumstances of his loss will undoubtedly bear upon that question, and that may (as in this case) include his knowledge about elements of a potential claim. But frequently a claimant may have no clear idea before the inquiry has been undertaken whether there is a cause of action at all, or what form it might take, or who might be potential defendants. The focus at this stage is on what a claimant knows, not what he does not know.

78 Nor in my view did the judge err in failing to identify what measures the claimants should have taken to discover the fraud, and whether these were exceptional. Indeed, this goes to the second stage of the inquiry, which is not in issue precisely because the judge did identify the very measure which a reasonably diligent inquiry would involve—and which was in fact subsequently taken—namely asking Investec for information about the loans. Nobody, least of all the judge, suggested that this would be an exceptional step to take.

Ground 3: material characteristics

79 In my judgment there was no error by the judge in this regard either. I do not accept that because the judge did not specifically refer to certain matters in his discussion, it must be inferred that he did not have regard to them. He was plainly aware that the claimants had obtained professional legal assistance as he referred to this fact in his judgment. Similarly, he had cited passages from the authorities in setting out the law to the effect that a claimant should be attentive and might be expected to respond as a reasonable person in his position would act. Having set out these matters, the judge did not have to refer to them again when applying the law to the facts of the case. It can reasonably be inferred that he had them in mind.

Ground 4: adopting a subjective approach

80 The alleged subjective approach is said to be shown by the judge's comment (*ibid.*, at para. 101) when he said that notwithstanding the allegations in the NOF claim: "Naomi and Barry may legitimately have not suspected them of what they now say are further instances of dishonesty."

81 Although the language is somewhat ambiguous, I think the word "legitimately" is intended to indicate that these were not simply their beliefs but were the beliefs which a reasonable person in their position would be entitled to take.

Grounds 5 and 6: irrelevant considerations and setting the bar too high

82 I will treat grounds 5 and 6 together because they overlap to a considerable degree. In my judgment none of the factors relied upon by the judge were material to the question whether there was a trigger and they caused him to reach an unsustainable conclusion. The question is whether, knowing what they did about the circumstances of the loans and losses, and knowing about similar transactions which they challenged in the NOF claim (which had been settled on very favourable terms), the claimants had a realistic prospect of establishing that, objectively viewed, that information was insufficient to raise suspicions of dishonesty. In holding in the claimants' favour, the judge relied upon several factors which identified gaps in the claimants' knowledge—what they did not know. But as I have said, the question is what they did know and whether it was sufficient to raise suspicions which required further inquiry. The very purpose of the inquiry is to make good gaps in their knowledge and thereafter, if appropriate, to plead a viable statement of claim. Highlighting areas of lack of knowledge do not assist in determining whether a trigger exists.

83 It is in any event difficult to see how the specific matters identified could bear upon the trigger question at all. The judge referred to the complex factual matrix of the Group, which it certainly was, and the fact that Naomi and Barry were excluded from relevant information. There is no doubt that the difficulty of obtaining information was a very real one where it had to be obtained from Joseph and his advisors, but here Naomi and Barry were not reliant on these parties to provide information about these loan transactions. They knew that the directors of the lending companies, Lexham and Marylebone, were appointees of Investec, an independent third party, and there was no reason to assume that they would be unwilling to cooperate with any requests for information. We now know how important their information was, but even without the benefit of hindsight there was always a realistic likelihood that valuable material about the transactions would be obtained if an inquiry were made. Quite apart from that, it is difficult to see how the difficulty of discovering potentially vital information can justify seeking to make no attempt to do so at all.

84 The judge also gave weight—although he observed that this fortified his conclusion and was not central to it—to the fact that the defendants were senior and experienced lawyers held in high regard. No doubt if there had been no history casting doubt upon their integrity, this would indeed be a very powerful factor. One would not readily suspect such lawyers of dishonesty. But the claimants had been prepared to make allegations of dishonesty in the NOF claim. They could not legitimately have adopted the premise that they were talking about generally honest solicitors; they had been prepared to affirm that their belief was otherwise.

85 I will for convenience set out again the principal factors which, in the judge's view, made it at least arguable that the claimants had acted reasonably in not suspecting that the defendants might have been acting dishonestly with respect to these loans (2022 Gib LR 378, headnote, at 383).

> "For the purposes of the present application, it could properly be argued that given the complex Group structure and in the absence of knowledge and/or understanding by Naomi and Barry of (i) the corporate framework of both the lending and borrowing companies and their directorships; (ii) the requests made by the directors of Lexham and Marylebone; (iii) what in fact was provided to Lexham and Marylebone's directors; and (iv) the defendants' knowledge of Joseph's alleged breaches of his fiduciary duties to the claimants . . ."

86 In my judgment, none of these factors are material to the point in issue. It is not entirely clear to me what the judge meant by his reference to the corporate framework of the lending and borrowing companies. The claimants clearly knew in the context of the Thornhill reviews about the particular loan transactions between the companies and the fact that none of the moneys lent had been recovered. They also knew who the directors of all relevant companies were. More specifically, they knew that the defendants, as directors of Enduring, must have authorized the borrowing on its behalf. No doubt there was much detail about the defendants' precise role that they did not know, but if they were to know this, there would be no need for any further investigation at all.

87 Again, the details of what the directors of the lending companies had requested (which is a reference to their seeking shareholder consent) and what information had been provided in response (purported consent from Joseph alone) might be relevant evidence to plead; it is just the sort of material which might emerge on disclosure if not obtained before (as in fact it was). But the lack of this information does not tell us anything about whether the information which the claimants did have ought to have triggered an inquiry. Moreover, if this information had been available, it would have negated the need for any further investigation because there would have been the requisite actual knowledge to plead the case.

88 The factor which was relied upon most heavily by the claimants—indeed, they did not seek to place much, if any, weight on the other matters relied upon by the judge—is the fact that Naomi and Barry did not know what the defendants themselves knew about whether Naomi had approved the loans or not. I accept that this is at least potentially relevant to the question which arises on actual knowledge, namely whether the claimants had a viable case to plead without knowing the answer to that question. But if the lack of this information made it improper to plead a claim in dishonesty, that simply reinforces the need to investigate the matter by

making further inquiries. In my view ignorance of the answer cannot conceivably justify the claimants doing nothing at all.

89 I also agree with Mr. Stewart, K.C. that if the information identified by the judge was required in order to trigger the need for an investigation, it puts the test impossibly high. At best this is information which might be required to plead a viable claim or might be used as evidence in support of a claim. It is the kind of information which an investigation is designed to discover, not information required to trigger the investigation.

90 Since the judge erred in his approach to this question, it is for this court to determine whether there were factors here which, taken individually or cumulatively, acted as a trigger which would have caused a reasonably attentive person in the claimants' position to inquire further. In my view there is no realistic prospect of the claimants at trial establishing that they could reasonably not suspect wrongdoing. It may be that the mere fact of the losses themselves, without more, would not have been a sufficient trigger (although not for the reasons of complexity and lack of transparency relied upon by the judge). Absent the history of dealing between the parties, the losses may not have suggested wrongdoing by anyone, and it may arguably at least have been inappropriate to give summary judgment on that basis. But here there was detailed knowledge about the conduct of the defendants which was relied upon by the claimants in the NOF claim.

91 I will briefly recount the extent of the claimants' knowledge. They knew that they were dealing with defendants whom they believed had acted dishonestly and had favoured Joseph at the expense of Naomi; they knew that as directors of Enduring, the defendants must have approved the loans; they knew that Enduring was a company under Joseph's control; they knew that Naomi herself had not given her consent to the loans and that it was fanciful for the defendants' to believe that she would have done so; and they knew that the defendants were aware from the October 2006 letter that her consent would be required. I cannot see how, objectively viewed, anyone in their position could possibly not at the very least suspect wrongdoing in these circumstances. The loans in this case shared many features with the NOF loans in respect of which they had thought it proper to take legal proceedings. There was every reason to suspect that something was again amiss and that further investigations were necessary. All this was known to them well before December 18th, 2014.

92 It follows that in my view whilst s.32(1)(a) was no doubt engaged to postpone the limitation period from starting when the alleged fraud occurred, it did not justify the claimants delaying as long as they did before bringing these claims. They could, exercising due diligence, have brought them well before the cut-off date of December 18th, 2014 and therefore the claims are now out of time. Accordingly, the appeal succeeds on this ground.

Actual knowledge: was there a viable case to plead absent the Investec documents?

93 I turn to consider the issue of actual knowledge. This is not strictly necessary given my conclusion on constructive knowledge, but we heard argument on the point and I shall address it.

94 The judge dealt with this argument extremely briefly. In para. 102 (*ibid.*) he simply asserted that given his conclusion that there was no trigger, Naomi and Barry "would not be aware of the alleged dishonesty and that is evidently a prerequisite to pleading any such cause of action."

95 At first blush I considered that this was a valid analysis but on reflection I do not believe that the conclusion necessarily follows from the premise. The fact, if it be a fact, that there was nothing to trigger a further investigation is premised on the assumption that the claimants could not plead a viable case with the information they already had; that is why the issue of constructive knowledge had to be considered. But the lack of a trigger prompting further inquiry cannot of itself demonstrate that they did not already have the requisite information. It may well be the case that the claimants did not subjectively appreciate that they had a properly viable case to plead, and perhaps that is what the judge meant when he said (*ibid.*) that if not put on inquiry "they would not be aware of the alleged dishonesty." But that is not what the statement of claim test requires; whether there is sufficient knowledge to plead a viable case is an objective question.

96 In any event, given that I have held that the premise of the judge's conclusion was false, the question of actual knowledge must be revisited. Since the judge made no independent finding on this question, there is no decision to review: the court must look at it afresh.

97 The question is whether there was arguably insufficient information to plead dishonesty bearing in mind that such an allegation must not be made lightly and needs to be particularized and based on known facts or proper inferences from primary facts.

98 I have set out above at para. 90, the range of factors which strongly pointed to the possibility that the defendants had acted dishonestly. In that context it was to establish whether the claimants had reason to suspect wrongdoing, but they are also relevant to the question whether this information was itself sufficient to plead a viable claim of dishonesty.

99 The claimants accept that they knew all those matters. They contend, however, that there was a crucial piece of the jigsaw which they did not have, and that without it they could not properly plead dishonesty. The claimants did not know until receipt of the Investec documents what the defendants actually knew about whether or not Naomi had given consent. Of course, Naomi knew that she had not done so, but she did not know

whether the defendants were aware of this. The claimants assert that it would not have been proper to plead the case until they knew the answer to that question because the allegation of dishonesty would have been grounded purely on evidence of dishonesty drawn from unrelated transactions. It would have been illegitimate speculation to infer from the nature of the dishonesty alleged in the NOF claim that the defendants were dishonest with respect to these loan arrangements. There was a material difference between the NOF loans and those from Lexham and Marylebone: in the former the defendants had been involved on both the lenders' and the borrowers' side, and indeed the allegations of dishonesty related to their conduct as directors of the lending companies. By contrast, in this case they had only been acting for the borrower. There was no duty on the defendants as directors of Enduring to satisfy themselves that Lexham and Marylebone had obtained appropriate consents when making the loans—indeed, this was precisely the argument which the defendants themselves had asserted in their defence. The court must beware of making inferences with the benefit of hindsight.

100 The critical question in my view is whether it would have been proper to allege that the defendants must have known that Joseph had not obtained the requisite consent from Naomi before approving the loans, alternatively that they were reckless, in the sense of turning a blind eye, about whether she had given approval or not. I agree with the judge that these claims and the transactions the subject of the NOF claim were not materially different. They all involved the transfer of moneys from Ackerman Group companies to companies designed to benefit Joseph's side of the family and they were made at much the same time in around October 2006. In my judgment there was plainly a proper basis for alleging dishonesty in these claims, even having regard to the need not to plead fraud lightly. It would have been fanciful to believe that Naomi had approved unsecured loans of this nature given her concerns that Joseph was using Group assets for the benefit of his family only. In my view there was a strong case, and certainly a pleadable case, for saying that an honest solicitor, knowing the background and especially the October 2006 letter, would not have entered into these loans in the circumstances without at least inquiring about whether Naomi's approval had been given.

101 Moreover, an important factor in this context is the fact that one of the allegations introduced by amendment into the NOF pleadings, namely that relating to the Wallshire loans, did not involve the defendants acting on the lending side. They were not loans made under the NOF umbrella. They were similar to the loans in this action in the sense that the defendants were only linked to the borrower and not the lenders. Yet in respect of the Wallshire loan, Naomi and Barry clearly thought it proper to infer that the defendants were acting dishonestly in approving the loans on behalf of the borrower. In this context it is pertinent to note that Mr. Chandiramani, in

his second witness statement on behalf of the defendants, specifically drew attention to the similar features in the Wallshire loans and the loans by Lexham and Marylebone. No explanation was given in response by Barry, in his second witness statement, as to what additional information was available with respect to the Wallshire loans which made dishonesty an appropriate allegation in that case but was missing with respect to these loans. It is true, as Mr. Mold observed, that the Wallshire loans were pleaded within the limitation period for the claims in this action and the judge accepted a submission that this made these loans irrelevant to the limitation analysis (*ibid.*, at para. 91). But with respect to the judge, the fact that Wallshire was pleaded within the limitation period for these claims is nothing to the point. If Wallshire was a proper allegation to advance in the NOF statement of claim—and nobody asserted that it was not—that strongly supports the view that the very similar facts of this case can equally sustain a proper pleading of dishonesty.

102 Of course, this evidence does not constitute proof of dishonesty: allegation is not proof. But it is not necessary to be sure that the case will succeed before a viable claim can be made, even where dishonesty is alleged. In my judgment there was plainly a proper case to advance in the light of the known facts relied upon in the NOF claim and the Wallshire allegation and, more generally, the fact that there was evidence from those claims that the defendants had in various transactions knowingly sided with Joseph to the detriment of Naomi and her family.

103 Mr. Mold relied on two cases in support of his submission that it would not have been appropriate to plead dishonesty by relying on the earlier NOF allegations. In *Barnstaple Boat Co. Ltd.* v. *Jones* (3), the claimant had brought three actions against the defendant in which he had alleged conversion and possibly dishonestly interfering with contract. Later he brought further proceedings in respect of another transaction in which he alleged deceit, which is the making of a false representation which the defendant knew to be false. One of the points raised in defence was that the claim was out of time. As in this case, this depended, at least in part, on whether he could properly have inferred dishonesty from the earlier matters. The Court of Appeal accepted that he could not. First, although in the earlier actions dishonesty had been alleged, fraud was not a necessary element of those allegations whereas it lay at the heart of the deceit allegations: see Waller, L.J. ([2008] 1 All E.R. 1124, at para. 33). Second, the court found that it was at least arguable that the claimant did not know that the relevant representation had knowingly been made falsely, and that could not be inferred from earlier conduct.

104 In my view the circumstances of that case are materially different from these proceedings. The earlier allegations of dishonesty had not, it seems, been essential to establishing the conversion allegations. But more importantly, the nature of the alleged dishonesty in the fourth action was

of a different kind altogether from the earlier occasions. That is not so here; the essence of the wrongdoing remains the same. The alleged dishonesty involved knowingly preferring Joseph's interests over Naomi's, and more specifically being party to the making of loans in the knowledge, or at the very least turning a blind eye to the fact, that Naomi had not given the relevant consent to the loans being made.

105 The other case relied upon was *Magner* v. *RBSI* (15), a decision of Jack, J. (which subsequently went to the Privy Council but not on the issue considered here). The defendant bank was alleged to have been assisting a breach of trust and raised a limitation point by way of defence. The question was whether the claimant knew or was put on notice of the bank's alleged fraud as a consequence of knowing that the party in breach of trust was committing a fraud. The judge held that he was not. This was simply a finding of fact which turned on the evidence in that case. It is far removed from the circumstances of this case. Here it is the history of the relationship between Naomi and Barry and the defendants themselves which enables the claimants to plead dishonesty; it is not inferred from their relationship with Joseph.

106 In my judgment, therefore, viable claims of dishonesty could properly have been made. They would not have been imprecise allegations of a general nature but very specific claims identifying precise transactions and laying out the factual basis for the claims. The material information was available following the Thornhill investigations, and some of it earlier than that. It would not have been necessary for the claims to be pleaded once the information was available. Further inquiries could have been taken to strengthen the case, no doubt obtaining the detailed evidence which subsequently emerged from the Investec papers. But time would have started running once the information was known. In my judgment these claims are therefore well out of time. Accordingly, I would uphold this aspect of the appeal also.

Abuse of process issue

107 Strictly it is not necessary to engage with this submission, given my conclusion that there should be a finding in the defendants' favour on the limitation point. In fact Mr. Stewart came close to formally dropping the point in argument, and I shall deal with it very briefly.

108 The essence of the argument is that these proceedings should have been brought at the same time as the NOF action. The original authority of *Henderson* v. *Henderson* (11) has been developed in a number of ways and the present impact of the doctrine was succinctly set out in the judgment of Lord Bingham in *Johnson* v. *Gore Wood & Co.* (12) ([2002] 2 A.C. at 31):

> ". . . *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue

> estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

109 If the defendants are right in their limitation argument, as I have found them to be, then this argument adds nothing to the limitation point. At most it provides an additional ground for finding in the defendants' favour. On the face of it, there is a powerful argument supporting the proposition that if the claimants could have pleaded the case earlier, then they should have done so along with the other NOF claims. But as Lord Bingham pointed out, the fact that they could have done so does not mean that they should have done so, and I do not find it necessary to determine that issue in the circumstances.

110 The potential significance of the abuse argument only arises if this court were to uphold the Chief Justice's ruling on limitation and refuse to give summary judgment in the defendants' favour. Could the *Henderson* v. *Henderson* abuse argument still run? Mr. Stewart contended that there was still some potential role for the doctrine, but I do not see how there could be on the facts of this case. If the limitation argument were to fail, this could only mean that the claimants had a realistic prospect of establishing that they could not have pleaded a viable claim before December 18th, 2014. The NOF claim itself was settled in July 2015. If it had become objectively apparent that there was a viable claim between December 18th,

2014 and July 2015 then it would at least be theoretically possible to run the abuse argument, although even then it would be difficult to argue that this claim, involving different claimants, should have been brought into the NOF action by way of further amendment of the pleadings, particularly if this might have upset settlement discussions. But whatever the position might have been in those circumstances, there is simply no basis in the evidence to suggest that a viable claim emerged in that short window of time. On the contrary, the evidence of Barry (which must be accepted for strike-out purposes) was that he did not know of the material facts until, having been prompted by the Star Poland proceedings, he obtained the Investec documents from the former directors of Lexham and Marylebone in 2020. In so far as Star Poland provided a trigger, it did not do so before 2016 at the very earliest, by which time the NOF claim had been settled. It cannot be an abuse of process to fail to plead a cause of action which the putative claimant was reasonably unaware that it had.

111 For these reasons in my view the abuse argument, based on the *Henderson* v. *Henderson* principle, adds nothing to the defendants' case.

112 It is also contended that it is an abuse of process for the claimants to pursue the case if the indemnity applies to make them liable for damages and costs. That is abuse of a very different nature from the *Henderson* v. *Henderson* abuse. There is only (arguably) an abuse of this nature if the indemnity is triggered; the two are therefore inextricably linked. No abuse can possibly be found unless and until it is held that the claimants are pursuing the claims at their own expense. Even then it may be said that in the unlikely event that they still wished to pursue the case, this is their choice and not necessarily an abuse of process at all.

The indemnity issue

113 Again, strictly this argument does not arise; it is an alternative to the limitation point and success on either is enough for the defendants. However, we heard extensive argument about it, and I shall briefly consider it in case I am wrong on both aspects of the limitation point.

114 The indemnity arose out of the settlement deed in the NOF proceedings. Clause 9 defines the scope of the indemnity is as follows:

> "INDEMNITY
>
> Once the Settlement Sum is paid, the Claimants each jointly and severally agree to hold harmless and indemnify each of the Defendants against any claims, demands or actions (including, but not limited to, any claim for contribution, interest or costs), whether known or unknown and of whatever nature and whether in law or in equity, which arise directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves (the

> 'Indemnified Claims'), and against the Defendants' reasonable costs and expenses of defending such Indemnified Claims. The Defendants agree to take all reasonable steps to monitor and mitigate their costs and expenses. The indemnity provided in this Clause is provided solely in relation to Indemnified Claims which are brought by or on behalf of any past. present or future member of the NA Class whether born or unborn as at the date of this Deed, or by any assignee, transferee, principal or agent thereof and, for the avoidance of doubt, no indemnity is provided in relation to any claims brought by any other persons or entities."

"Claims" are defined at recital (C) by reference to the NOF claim which is defined as the "Proceedings." "Claims" are thereafter defined as:

> "The Proceedings, all claims made within the Proceedings, all Statements of Case (as amended and re-amended and including drafts thereof and those amendments for which permission has not been granted) prepared and/or served in the Proceedings . . ."

The "NA Class" is defined at recital (D) as:

> "Members of a named class of discretionary beneficiaries under the Nof Settlement consisting of [Naomi] and her children and remoter issue . . ."

115 The indemnity is one part of a more complex settlement arrangement. Clauses 5 and 6 provide for mutual releases once the settlement sum is paid. These releases involve parties in addition to the claimants (Naomi and Barry) and defendants. BANA One (the ultimate holding company of the Group companies) is a party to the release arrangements on the claimants' side, and all the companies which are part of the NOF Trust or the Star Trust or White Line Trust (defined as "the subsidiary companies") are brought in as parties to the release on the defendants' side.

116 Clause 5 provides that the claimants and BANA One agree to release each of the defendants from:

> "any rights, claims, demands or actions which any of the Claimants or BANA One have or may have, in any jurisdiction whatsoever . . ., whether known or unknown and of whatever nature, whether in law or equity, arising directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves."

117 Clause 6 provides the release *mutatis mutandis* of "rights, claims, demands or actions" which any of the defendants or the subsidiary companies have or may have against the claimants and BANA One. Clause 7 makes it plain that no release is given to Joseph or his family under this deed.

118 Clause 8 provides for an agreement not to sue. Essentially it provides that where parties have granted releases, they also undertake not to sue with respect to the same category of rights, claims, demands and actions for which releases have been given. The parties as defined include BANA One.

The three aspects of the indemnity argument

119 There are three aspects to the indemnity argument, the first two of which are matters of construction. The first construction issue relates to which potential claimants fall within the scope of the indemnity. More specifically, are these claims advanced by Lexham and Marylebone claims which are

> ". . . brought by or on behalf of any past, present or future member of the NA Class whether born or unborn as at the date of this Deed, or by any assignee, transferee, principal, or agent thereof"?

120 The second construction issue relates to the scope of the indemnity and, more specifically, whether the current proceedings can properly be said to arise "directly from, indirectly from, or in connection with the facts on which the [NOF claims] are based."

121 The third aspect involves a different and somewhat controversial doctrine—or potential doctrine—of English law referred to as the "sharp practice" doctrine. The possibility that there may be such a doctrine was adumbrated by the House of Lords in *Bank of Credit & Commerce Intl. SA* v. *Ali* (2). Lord Nicholls expressed the position as follows ([2002] 1 A.C. 251, at para. 32):

> "Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."

122 Lord Hoffmann made observations to similar effect (*ibid.*, at para. 70):

> "a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim."

123 The claimants contend that there was sharp practice in this case because the defendants would have known at the time of the NOF settlement of the existence of these claims whereas they had no knowledge of them.

It was at least arguable that it would be unconscionable for the defendants to rely upon the indemnity even if, purely as a matter of construction, it was otherwise applicable.

124 The Chief Justice was satisfied that both the construction points and the potential sharp practice defence to the indemnity argument were arguable and should be allowed to go to trial. The defendants contend that he should have determined these matters himself, and that the only proper conclusion was that the indemnity applied to these proceedings.

125 Before us, and contrary to the position before the judge, both parties agreed that there would not realistically be material evidence adduced at trial which might affect the proper construction of the contract, and so we were invited to rule on whether the indemnity applied to these proceedings.

126 When considering this issue, it is in my view material to note that it is not alleged that the bringing of the action itself involves a breach of cl. 8, the agreement not to sue. It is, in my view correctly, not suggested that the undertaking by BANA One not to sue thereby includes an undertaking by all the other companies falling within the Group umbrella, all of which are ultimately wholly owned by it. There is no express provision bringing all the Group companies within the scope of the agreement, and where the parties wanted to include subsidiary companies, they have done so, as in cl. 6 where the subsidiary companies have agreed to release the claimants and BANA One from the defendants' rights.

127 I will first deal with the question whether the claimants, as corporate entities, are caught within the scope of the indemnity clause. The defendants rightly submit that the difference between the release and agreement not to sue clauses (cll. 5, 6 and 8) on the one hand and the indemnity clause (cl. 9) on the other is that the latter covers a wider category of potential claimant. The defendants assert that the purpose of this was that the earlier clauses do not include the corporate entities within the complex Group structure, being limited to the parties to the 2015 deed of settlement itself. They contend that the obvious commercial purpose of the clause was to preclude any action by these parties which are ultimately owned by Naomi and her issue. Accordingly, one must construe the clause so as to have that effect.

128 The problem with this analysis is that cl. 9 focuses upon the NA class of claimants only. It applies to claims "brought by or on behalf of any past, present or future member of the NA Class whether born or unborn as at the date of this deed . . ." There is no reference to companies at all. The defendants submit that they are indirectly brought into the scope of the clause because where a company brings a claim, this will be "on behalf of" Naomi and her issue, or some of them, because they will benefit from the action.

129 I reject that analysis, mainly for the reasons relied upon by Mr. Mold. The premise behind the defendants' approach is that the obvious commercial purpose of cl. 9 was to prevent, by the mechanism of the indemnity, claims being brought by the Group companies. I do not accept that this was the relevant purpose. In my view the purpose is clearly identified in the language used; it was to capture claims by a member or members of the NA class, or claims taken on their behalf by other parties such as where they are too young or otherwise incapable of taking proceedings themselves. Plainly neither Lexham nor Marylebone are members of that class. It is not a natural or accurate use of language to say that a company which takes legal action is doing so on behalf of its shareholders, even though they may (but not necessarily) benefit if the action succeeds. It is trite law that the company has a separate corporate personality from its shareholders and does not act as their agent. It is not legitimate to pierce the corporate veil and treat the company as equivalent to its shareholders (save in very exceptional circumstances of *alter ego* companies, which these are plainly not). That doctrine of separate personality is part of the legal context in which this settlement deed was drafted. Moreover, it would have been very easy expressly to extend the indemnity to subsidiary companies within the Group had that been the parties' intention, in a similar way to the drafting in cl. 6. Furthermore, if the intention had been to prevent Group companies from taking proceedings, one would have expected that to be achieved by bringing them within the scope of cl. 8, which is directly dealing with limitations on the right to sue, rather than indirectly through the less appropriate mechanism of the indemnity.

130 There are additional problems with the defendants' analysis. The action by a Group company may well be in order to benefit creditors rather than shareholders, such as where the company has gone into liquidation. It would not then be an action taken on behalf of the NA class at all. It would be bizarre if the claimants were obliged to indemnify the defendants against liability in such an action. And what would be the position where the effect of the action was to benefit both creditors and shareholders?

131 I also have regard to the observation of Lord Bingham in *BCCI* v. *Ali* (2) who said ([2002] 1 A.C. 251, at para. 10):

> "But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

132 Plainly here there are express words surrendering such rights and this "cautionary principle," as Lord Bingham described it, is not directly apposite. However, the rationale of this approach would not in my view justify giving an artificial meaning to the language of the agreement where

the effect would be to expand the scope of rights of this nature which were being surrendered.

133 In my view these considerations point decisively against the construction advanced by the defendants.

134 I also consider that there are difficulties with the defendants' contention that the subject matter of the dispute falls within the category of proceedings which are "connected with the facts" on which the claims are based. The defendants point to certain features of the NOF claims which are to some extent replicated in these claims. But I am doubtful whether these features identify the *facts* of the NOF proceedings, or whether these proceedings can be said to be "connected" to those facts. However, given my clear conclusion that the indemnity does not apply in any event, I will not explore this issue further.

135 Nor is it necessary to consider the potential significance of the "sharp practice" doctrine. We were taken to a number of authorities which have discussed its potential application, but it is a developing doctrine and I do not think there is any useful purpose in expressing any views about its potential application here.

136 However, for the reasons I have given, I would hold that the indemnity clause in cl. 9 of the settlement deed does not apply to these proceedings and I would not, therefore, either grant summary judgment to the defendants or strike out the proceedings on this basis.

Conclusion

137 In my judgment the appeal should be upheld on the grounds that the claims were brought out of time. The defendants are entitled not to be subject to litigation commenced some fourteen years after the alleged wrongdoing unless the circumstances envisaged in s.32(1)(a) of the Limitation Act apply and have the effect of postponing time running so as to bring the claims within the six-year limitation period. For reasons I have given, I am satisfied that the section does not have that effect in the circumstances of this case and there is no realistic prospect of the claimants establishing otherwise at trial. This means that the alleged dishonest conduct of the defendants will not be scrutinized by the courts, but that is the inevitable consequence of claims being brought outside the relevant limitation period.

138 **DAVIS, J.A.:** I agree with the reasons and conclusion of Sir Patrick Elias. I add some observations of my own, however, because we are departing from the decision of the judge below and because of the evident importance to the parties of the case (where, I suspect, feelings may also have been running rather high).

139 Mr. Mold, K.C., for the claimants, understandably emphasized various points arising on the limitation issues, in particular:

(1) this was an evaluative decision by an experienced judge on a summary application and accordingly an appellate court can only properly interfere in the relatively limited circumstances set out in familiar authorities;

(2) the overall background, and legal structures involved, were highly complex;

(3) an allegation of fraud in a pleading is a serious matter, requiring a proper evidential basis and not to be advanced lightly or on purely speculative grounds;

(4) suspicion, or even awareness, in general terms of some fraud or wrongdoing on the part of a prospective defendant does not suffice; there must at the relevant times be knowledge (actual or constructive) of the particular fraud or wrongdoing in question;

(5) in making its assessment, a court must avoid the use of hindsight.

140 I bear in mind these points, and indeed all the arguments very thoroughly and ably advanced. But, in the result, I am in no real doubt that, with all respect to the judge, his decision was plainly wrong and cannot be sustained.

141 After a thorough review of the facts and of the relevant legal principles and authorities, the judge succinctly summarized (2022 Gib LR 378, at para. 76) the principal strands of the defendants' arguments, namely (1) whether there was a properly pleadable case in the absence of the Investec documents, and (2) whether the Investec documents could have been obtained much sooner. I think it is something of a pity that the judge did not go on to address those issues in that order. Instead, he dealt with the second strand of the argument relating to constructive knowledge (in the shorthand phrase used in argument) first; and then, having disposed of that point in favour of the claimants, he went on in short order to reject the first strand of the argument, relating to what was styled actual knowledge.

142 Even adopting the methodology of the judge, however, I find myself not able to agree with his reasoning or conclusions.

143 It was at the heart of the claimants' case that they were not in a position properly to allege fraud until they had sight of the Investec documents and that it was only the Star Poland proceedings which caused them to have reason to seek to obtain those documents. It was the production of those documents, it is said, which then revealed for the first time to the claimants the fraud subsequently pleaded in the present claim. So, on that approach, the question essentially is whether the claimants could and

should, exercising reasonable diligence, have obtained such documents prior to December 18th, 2014.

144 The principal explanation, much pressed in the witness statements of Barry and in the arguments of Mr. Mold, was to the effect that the Enduring loan transactions were of a kind quite different from the others identified prior to December 18th, 2014 and which were the subject of fraud allegations in the NOF proceedings, in that the transactions here were outside the NOF structure and in that the Hassans' representatives here were involved only as directors of the borrowing companies and not as directors of the lending companies. But on this I entirely agree with judge; the distinction is of no real materiality. That is further borne out by the fact that the claimants felt able, by proposed amendment, to include the Wallshire allegations into the NOF proceedings. That they ultimately did so as late as 2015—without, I note, any real explanation offered in evidence—after the expiry of the prospective limitation period does not seem to me to affect this point.

145 The claimants, as I see it, had sufficient trigger warnings prior to December 2014. They knew that a very sizeable, indeed total, loss had been made on these two, unsecured, Enduring loans (as evidenced by the Thornhill reports)—that of itself, one would have thought, would have sufficed to put them on inquiry as to how this could have happened. They knew that Hassans' representatives had been acting as directors of Enduring. They knew, of course, that Naomi had not consented to these two loans. They knew that these loans had been made to companies controlled solely by Joseph. They also knew from the Thornhill reports of Joseph's commonly adopted *modus operandi* in this sort of context. Further, they had their own experienced professional advisers at the relevant times; and, moreover, their own mindset had become (as evidenced by the allegations subsequently made in the NOF proceedings) that Hassans in numerous transactions had not been acting impartially or in good faith but had consciously been seeking to advance the interests of Joseph's side at the expense of their own. With respect, the reasons given by the judge on this issue in his judgment (2022 Gib LR 378, at para. 101) do not pass muster or really confront these matters, as explained by Sir Patrick Elias. The judge also sought to rely on "the complex group structure" in support of his conclusion. But that does not assist the claimants either. First, it was the very opaqueness and complexity of the group structure, coupled with the evasiveness and obstructiveness of Joseph and Danny, which in considerable part had given rise to the concerns in the first place. Second, Naomi and Barry had by now their own professional assistance. Third, and in any event, the structure of the transactions between Lexham, Marylebone and Enduring was not in reality that complex.

146 It was submitted on behalf of the claimants, in terms of assessing their own knowledge, that the claimants could properly proceed (in their

own appraisal of what the knowledge of the defendants was) on the footing that a party to a commercial transaction can ordinarily take it that the internal corporate procedures applicable to the counterparty have been complied with. As a general proposition of basic company law that is no doubt true. It was also emphasized that the Investec directors of Lexham and Marylebone were independent (and no one has ever suggested that they did not act in anything other than a professional way or in entire good faith). But it could not conceivably have been thought by the directors of Enduring that the Investec directors, in effect professional service directors, would have themselves have put forward or concluded the loan proposals on their own initiative. And the internal corporate procedures point falls away on the presumed facts when it is seen that the directors of Enduring were, as known to the claimants, to be taken as having known of the general background and of the October 2006 letter, and when the claimants had themselves been in a position to raise the allegations which they did raise in the NOF proceedings.

147 In all such circumstances, the claimants had, in my view, a clear "trigger" with regard to each of these two loans. Further, and as the judge found, they plainly were in a position to obtain the Investec documents before December 2014 without any undue difficulty—as, indeed, is borne out by the fact that they were readily obtained following the Star Poland proceedings. Accordingly, acting with reasonable diligence, they could have discovered the alleged fraud and have initiated these proceedings before expiry of the limitation period.

148 That is sufficient to decide the outcome for this appeal. But it actually goes further than that because, having had the advantage of reading the judgment in draft of Sir Patrick Elias, I in any event would accept that the claimants were able to plead a viable statement of claim in the absence of the Investec documents. It is important, indeed essential, to frame the issue that way because while no doubt the phrase "actual knowledge," reflecting the language of the section, is a convenient short-hand phrase, it is potentially misleading in so far as it might suggest the test is entirely subjective. But the authorities are wholly clear that the required approach is ultimately objective (albeit of course undertaken by reference to facts which are known to putative claimants). Accordingly, there is no requirement that putative claimants must actually appreciate that they have a claim in fraud. Hence the test is that identified in argument as "the statement of claim test."

149 There were three essential elements to the prospective claim.

(1) First, had Joseph acted in dishonest breach of fiduciary duty in procuring these loans to be made to Enduring? It is clear on the presumed facts (and as was not disputed before us) that he had. He had deliberately failed to seek or obtain the consent of Naomi to the transactions. Indeed,

the loans do not appear to have been made in any way to further the interests of the lending companies but had been made solely for the collateral purpose of furthering the interests of Joseph.

(2) Second, had the defendants assisted in the breach of fiduciary duty? Again, it is clear to me, on the presumed facts, that they had. Mr. Mold sought to characterize the requisite assistance as being that of participating in the failure to obtain Naomi's consent (which, he then of course said, could not have been pleaded by the claimants in the absence of the Investec documents). But I think that would be a mischaracterization. The relevant breach of fiduciary duty on the part of Joseph for these purposes was in the procuring of these two loans being made. In that act the defendants, in their capacity as directors of Enduring, assisted. To seek to widen out this requirement to being that of assistance in the deliberate failure to obtain the consent of Naomi in truth, as I see it, involves eliding all three elements of what was required to be made out. Mr. Mold also sought to say that in any event the defendants had not materially assisted (absent what was revealed by the Investec documents): in that they had, as he sought to put it, had no role to play beyond the "mere" fact of their being directors of the borrowers. But a loan is a bilateral commercial transaction requiring participation, negotiation and finalization between both parties. It may be that the Investec documents would have potentially, in evidential terms, provided gold in furtherance of establishing the extent of the assistance (and hence also of knowledge as well). But there was sufficient to plead assistance even without the Investec documents.

(3) Third, did the defendants know of Joseph's dishonest breach of fiduciary duty? That, as I see it, is the critical question here. Did the defendants, in lending assistance to the dishonest breach of fiduciary duty on the part of Joseph, know of (or had they wilfully shut their eyes to) his dishonesty? And could the claimants properly have pleaded that, in the absence of the Investec documents?

150 In my view, the very factors bearing on the issue of constructive knowledge to a very significant extent bear also on this (logically prior) issue. The defendants had the 2006 letter. The defendants could, it could properly be alleged, never have thought that the consent of Naomi would ever have been given to these loans, given that they were being made to a Joseph company in order for him thereafter to pursue his own property investment plans. Given what the claimants knew that the defendants knew from the October 2006 letter, given what the claimants knew from the Thornhill reports and given what the claimants were able viably to plead in the NOF proceedings, I consider that an allegation of dishonesty with regard to these two loans could properly and viably have been pleaded against the defendants, based on facts known to the claimants at the time and prior to December 2014. The allegation of dishonesty would of course at that stage have had to be pleaded as an inference. But that can be a

commonplace of fraud proceedings; and in the present case the primary facts as then known justified, in my view, a pleading of such an inference. Whether such a plea on such facts would then have stood up to proof at eventual trial is immaterial. What is material for present purposes is whether there was at the time a viable, pleadable, case in dishonesty on the part of the defendants. I would accept the submission of Mr. Stewart, for the defendants, that there was.

151 On the issue of indemnity, the factual matrix is known and the point of construction thus can be decided, albeit now strictly academic in the light of the conclusion to be reached on limitation. On this aspect of the appeal, I would shortly say that I would reject the arguments of the defendants and accept those of the claimants. In particular, I cannot see how the claims of Kingstar and Rosestar (not said to be nominee or *alter ego* companies) can be said to have been raised "on behalf of" Naomi or Barry or the designated beneficiaries. Mr. Stewart had no convincing explanation when he was asked in argument if, for example, a claim by a liquidator of the companies, pursued for the benefit of creditors, was the subject of such an indemnity.

152 In such circumstances, the separate abuse of process argument raised is also academic. In the light of the conclusion to be reached on limitation, it can be accepted that the claimants could have raised these claims at an earlier stage. But whether they should have done so, such that their failure to do so is to be characterized as an abuse of process, is altogether a different matter and I prefer to express no view on it.

153 For these short reasons, and more particularly for the far fuller reasons given by Sir Patrick Elias in his judgment, I also would allow the appeal.

154 **KAY, P.:** I agree with both judgments. The appeal is therefore allowed. Any consequential applications must be made by way of written submissions within fourteen days of the date of hand down.

Appeal allowed.