Neutral Citation Number: [2023] EWCA Civ 330

Case No: CA-2022-001387

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
Mrs Justice Falk
[2022] EWHC 1712 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE NUGEE
and
LORD JUSTICE BIRSS

- -

Between :

SADDIQ OMAR ABU SEEDO	**Claimant**
- and -	
(1) FAHMY EL GAMAL **(2) EL GAMAL AND CO LTD**	**Defendants / Respondents**
(3) AMJAD SALFITI	**Defendant/ Appellant**

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- -

Joshua Munro (instructed by **Caytons Law LLP**) for **the Appellant**
Faisal Saifee (instructed by **TKD Solicitors**) for **the Respondents**

Hearing date: 22 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This second appeal concerns the question whether the claims of the 1st and 2nd Defendants against the 3rd Defendant are barred by limitation. It raises at least two questions of general interest on limitation in deceit claims.

2. Where an action is based on the fraud of the defendant, s. 32(1)(a) of the Limitation Act 1980 (**"LA 1980"**) provides that the period of limitation does not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the fraud. That means that in a claim based on the tort of deceit, where the limitation period is 6 years, the claimant has 6 years from when he discovered, or could have discovered, the fraud to bring an action.

3. The first question is whether for these purposes "the fraud" means the fraud as formulated by the claimant in his pleading, or the fraud as found by the judge after a trial. Where, as often happens, the question of limitation is raised by the defendant before trial by way of an application for summary judgment or to strike out the claim, the question necessarily has to be assessed by reference to the pleaded case as at that stage there have been no facts found. But is it different if the question of limitation arises after a trial when the facts have by then been found? In the judgment under appeal Falk J (as she then was) said that limitation was still to be assessed against the pleaded case. That was challenged on appeal (and this contention was the point which merited a second appeal), but in the result, as set out below, we heard no adverse argument on it, counsel being agreed that in such a case the question of limitation should be assessed against the facts as found.

4. The second question, which only really emerged clearly in the course of the oral argument, is this. Where the defendant has deceived the claimant into entering into a transaction by telling more than one lie, what happens if the claimant discovers that one lie is untrue but does not then bring a claim, and then some years later discovers that a second lie is untrue? Is his claim barred by limitation 6 years after he discovers the first lie, or can he bring a claim based on the second lie up to 6 years after discovering that to be untrue? This question, on which we were not shown any clear authority, is not entirely straightforward.

5. The appeal arises out of a trial concerning the ownership of a property which was heard in November and December 2020 by HHJ Dight in the County Court at Central London. The property had been acquired in the name of the 1st Defendant, Mr El Gamal, and subsequently transferred into the name of the 2nd Defendant, El Gamal and Co Ltd ("**EGC**"), a company of Mr El Gamal's. In a judgment delivered on 14 January 2021 HHJ Dight held that the property was held first by Mr El Gamal, and then by EGC, on trust as to 50% for the Claimant, Mr Seedo, and ordered various accounts against Mr El Gamal and EGC. Mr El Gamal and EGC had claimed over against the 3rd Defendant, Mr Salfiti. HHJ Dight upheld their claims and ordered him to indemnify them against Mr Seedo's claims and their own costs. In an addendum to his judgment added when approving the transcript he rejected a submission on behalf of Mr Salfiti that the claims against him by Mr El Gamal and EGC were barred by limitation.

6. Mr Salfiti appealed to the High Court on a number of grounds, one of which concerned the limitation point. The appeal was heard by Falk J. She dismissed the appeal on all grounds for reasons given in a judgment delivered on 24 June 2022 at [2022] EWHC 1712 (Ch).

7. Mr Salfiti now appeals to this Court solely on the question of limitation. Permission for a second appeal was granted by me on 20 September 2022.

Facts

8. There were many disputes of fact at trial but HHJ Dight in the course of a long and detailed judgment resolved such of them as he considered were needed to decide the claims that had been brought. Mr Salfiti challenged HHJ Dight's central factual findings in his appeal to the High Court, but Falk J dismissed all his grounds of appeal, and Mr Salfiti is now bound by the factual findings made at trial, as Mr Joshua Munro, who appeared for him, accepted. On that basis the facts are as follows (references in this, and the next two, sections to numbers in square brackets being to paragraphs of HHJ Dight's judgment).

9. The parties are: Mr Seedo, a wealthy Jordanian, resident in Dubai and with many investments around the world, including property in London [2]; Mr El Gamal, a surveyor and estate agent, resident in the UK and based in Camden, who also has property investments in London; EGC, a company through which Mr El Gamal operates his estate agency business and which holds some of his property investments; and Mr Salfiti, an English solicitor who was known to both Mr Seedo and Mr El Gamal and who had acted for each of them in the past [3]. Between 1994 and 2006 he ran his own firm called Salfiti & Co [31].

10. The property in question is a registered long leasehold interest in commercial property at 306-308 Elgin Avenue London W9 (**"the Property"**) [1]. On 2 June 2004 Mr Salfiti attended an auction and successfully bid for the Property at a price of £310,000 [4]. The purchase was completed on 8 August 2004 and registered in the name of Mr El Gamal [4]. In 2015 Mr El Gamal transferred the Property to EGC, in whose name it remained registered [5].

11. There was no dispute that £69,500 of the funds required for the purchase came from Mr Seedo, and another £69,500 came from Mr El Gamal, the balance being raised by Mr El Gamal on mortgage [4]. There was however a very lively dispute as to the arrangements agreed between the parties, specifically (1) as to what Mr Salfiti agreed with Mr Seedo; (2) as to what Mr Salfiti agreed with Mr El Gamal; and (3) as to whether Mr Seedo and Mr El Gamal knew anything about each other's participation. On the last point HHJ Dight found that they did not know each other, or of each other's existence, at the time of the purchase, Mr El Gamal first becoming aware of Mr Seedo's existence in 2009, and Mr Seedo not becoming aware of Mr El Gamal's existence until 2016 [23].

12. HHJ Dight had to resolve some stark inconsistencies in the rival versions of what happened and in general did so by preferring the evidence of both Mr Seedo and Mr El Gamal to that of Mr Salfiti. He described Mr Seedo as an open and frank witness [21], and said of Mr El Gamal that he gave evidence which he largely accepted (albeit "patchy in some places and problematic") [29]. He therefore

accepted the core evidence of both of them, which led him to reject the evidence of Mr Salfiti [30], which he described as neither honest nor reliable [31]. His overall conclusion was that Mr Salfiti had lied to both Mr Seedo and to Mr El Gamal in 2004 and for a number of years afterwards [23].

13. On this basis he found the arrangements agreed between Mr Seedo and Mr Salfiti to have been as follows. Mr Seedo wanted to make a new property investment in London. He intended to use Mr Salfiti for legal advice and conveyancing work. Mr Salfiti however proposed that they acquire the Property as a joint venture, and they ultimately agreed that they would each contribute 50% of the costs and would share rental income and profit on sale equally, with Mr Salfiti's firm collecting the rent and keeping Mr Seedo's share for him, the property to be held in their joint names or in the name of an offshore company [59]. Mr Salfiti's evidence was that his only role was to be as a solicitor, with Mr Seedo having originally agreed that his joint venture partner should be a Mr Bosheh, who was later replaced by Mr El Gamal [60], but HHJ Dight rejected that [61]. He found that Mr Salfiti told lies to Mr Seedo from the beginning, the essence of which was that he (Mr Salfiti) was to be the other joint venture partner [61]. He also found that such lies were never corrected, Mr Salfiti persisting in holding himself out to Mr Seedo as a joint owner of the investment as late as 2017 [62]. He specifically rejected as untrue Mr Salfiti's evidence that he had told Mr Seedo about the involvement of Mr El Gamal [64]. So far as Mr Seedo was concerned therefore, the purchase was held out by Mr Salfiti to him as a simple joint venture between him and Mr Salfiti with each contributing half the necessary funds [6].

14. Having reached this agreement with Mr Seedo, Mr Salfiti attended the auction on 2 June 2004 and successfully bid for the Property [65]. At the same auction he also successfully bid for some adjoining properties [4]. (There was no issue about these at trial, a separate dispute in relation to them having already been settled.) Mr Salfiti asked Mr Seedo for money for deposits for all the properties and on 8 July 2004 Mr Seedo transferred a sum of over £250,000 to Mr Salfiti's client account in respect of both the Property and the adjoining properties [68]. HHJ Dight found that those funds were held on trust for the purposes for which they had been requested and paid [68]. That has not been disputed and would appear to be plainly correct. It would appear that £69,500 of these funds were used for the Property.

15. The arrangements that Mr Salfiti made with Mr El Gamal were however entirely inconsistent with those he had made with Mr Seedo. Mr El Gamal became involved somewhere around the end of June to the middle of July 2004 [70]. HHJ Dight found that Mr Salfiti approached him and asked him to take over the purchase of the Property on the basis that he (Mr Salfiti) had paid the deposit but did not have the funds to complete [70]. Mr Salfiti told Mr El Gamal that he would lend him the £69,500 (which had in fact come from Mr Seedo) until resale of the Property, and they agreed that Mr El Gamal would fund the balance of the acquisition, partly from his own resources and partly by taking out a mortgage, Mr Salfiti acting as his solicitor [70]. Mr El Gamal knew nothing of the existence or involvement of Mr Seedo in the acquisition of the Property [9]. As far as he was concerned therefore the Property would be beneficially owned by him, subject to an obligation to repay the £69,500 to Mr Salfiti [10].

16. Completion took place on 6 August 2004 in the name of Mr El Gamal, the funds for

the purchase coming as to £69,500 from Mr Seedo, as to £69,500 from Mr El Gamal, and as to the balance (£162,000) from a mortgage taken out by Mr El Gamal with the Royal Bank of Scotland [4], [74]. Mr Salfiti was by now acting not only as solicitor for Mr Seedo, but also both for Mr El Gamal and for his mortgagee, the Royal Bank of Scotland [73].

17. At the same time a Deed of Trust was executed [74]. This was a two-page deed dated 6 August 2004. Although expressed to be made between Mr El Gamal as Trustee and Mr Seedo as Beneficiary, it took the form of a unilateral declaration of trust and only provided for execution by Mr El Gamal. It recited that the Trustee (ie Mr El Gamal) held, and was the registered proprietor of, the Property, and contained a declaration by him that he held the Property for Mr Seedo and Mr El Gamal in equal 50% shares, subject to the satisfaction of all outstanding mortgages/charges, currently standing at £162,000, and that he would transfer the Property as the beneficiaries should direct.

18. The Deed of Trust bore a signature, apparently duly witnessed, which purported to be that of Mr El Gamal. At trial Mr El Gamal's position was that he did not recall signing it and the signature was not his [52]. But HHJ Dight found that at the time he trusted Mr Salfiti as his solicitor and would have signed documents that the latter put in front of him [53]. There was another document, a sub-lease, which bore Mr El Gamal's signature, and, although he did not remember signing this, Mr El Gamal had accepted that he had done. He also accepted that it was among other papers he signed, and that it was a high-risk strategy to sign documents without reading them [53]. In those circumstances HHJ Dight found that it was likely that the Deed of Trust was part of a parcel or batch of documents put before Mr El Gamal which he signed without looking at or questioning [54]. He held that the deed was something that Mr Salfiti "decided to put in place to try and reflect what had happened on the purchase of the Property but he wanted to keep it in reserve for when he needed to use it" [54].

19. In about 2006 there was a breakdown in relations between Mr El Gamal and Mr Salfiti as a result of a dispute concerning a different property [79]. Mr Salfiti then became anxious about the Property and wanted to try and unwind the situation [80]. Mr Salfiti's case was that he sent various correspondence to Mr El Gamal as agent of Mr Seedo and asked him to account for the income of the property, but Mr El Gamal did not accept that he received the letters, and HHJ Dight accepted that he did not become aware of Mr Seedo's existence until he received a letter dated 26 August 2009 from Salfiti LLP [80]-[81]. Salfiti LLP was a firm of solicitors that in 2006 had become the successor to Salfiti & Co [31]. Mr Salfiti had himself resigned from Salfiti LLP in October 2006 when he gave up practice for a lengthy period, and was further suspended by the SRA for serious professional misconduct between 2008 and 2011 [31], but HHJ Dight found that Salfiti LLP's letter of 26 August 2009 was plainly written at the instigation of Mr Salfiti [81].

20. The letter was addressed to Mr El Gamal. It was headed "**OUR CLIENT: MR SADDIQ ABU SEEDO**" and "**RE: BREACH OF TRUST – LETTER BEFORE PROCEEDINGS**". It asserted that Mr Seedo had instructed the firm (which HHJ Dight found to be untrue) and continued:

> "Our client advises us that on 6 August 2004 you entered into a Trust Deed ("the Deed") with our client. You are named as the trustee and

> our client thus being the beneficiary.
>
> In the Deed, you as the trustee declared that you would hold the property on trust for our client and yourself in equal shares subject to the satisfaction of all outstanding mortgages and charges which stood at the time at £162,000…"

It continued by reference to the previous correspondence, in which Mr Salfiti as agent for Mr Seedo had demanded payment of Mr Seedo's share of profits together with accounts. The letter then asserted that Mr El Gamal was in breach of trust and threatened proceedings for a declaration of trust from the Court, an order requiring Mr El Gamal to produce accounts of rent, and payment of these sums. It purported to include copies of the previous correspondence and of the Trust Deed. HHJ Dight did not make any finding as to whether they were enclosed or not.

21. Mr El Gamal replied on 14 September 2009 [56], [82]. After acknowledging receipt he said:

> "We have had no notice of the appointment of your Mr Salfiti as agent for the beneficiaries. You also did not enclose a written authority of your appointment as acting solicitors in relation to this matter.
>
> Being the trustee of the beneficiaries of Abo Sido estate of Abu Sido, by law I am the only person who is empowered to instigate any action including legal proceedings on behalf of the trust."

22. Mr El Gamal sought to distance himself from this letter, saying that it was signed on his behalf by his brother and had been drafted by someone in his office and had been written to call Mr Salfiti's bluff in some way [57]. But HHJ Dight said that that was "somewhat hard to swallow". This is not as clear as it might be but taken with his statement at [82] that it was in response to Salfiti LLP's letter of 26 August 2009 that Mr El Gamal "wrote the somewhat equivocal letter of 14 September 2009", amounts to a finding that he did write it. The contrary was not argued.

23. The remaining facts can be shortly stated. There was no reply to Mr El Gamal's letter of 14 September 2009, and Mr Salfiti appears to have taken no further steps until about 2015 [86]. On 30 July 2015 Mr El Gamal sold the Property to his company EGC because he wanted to remortgage it, and it was transferred to EGC on 22 September 2015 [5], [88]. That prompted further letters from Mr Salfiti to Mr El Gamal threatening proceedings [90]-[93]. Eventually on 4 May 2016 Mr Salfiti issued proceedings in the Queen's Bench Division in the name of Mr Seedo against Mr El Gamal and EGC [94]. HHJ Dight found however that Mr Seedo knew nothing of the proceedings and that Mr Salfiti had commenced them without authority [96].

24. In November 2016 Mr Seedo received copies of the claim in Dubai but he did not then understand the details of the case, and it was only subsequently that he (and his son who was assisting him) became properly aware that the Property had been placed in the name of Mr El Gamal [102]-[103].

25. At some stage Mr Seedo's solicitors took over the conduct of the action from Mr Salfiti and he amended his claim to add Mr Salfiti as a third defendant. I have not

found in the papers any clear statement as to when that was, but nothing I think turns on it. Mr El Gamal and EGC also brought a claim against Mr Salfiti, in this case by way of Part 20 claim claiming an indemnity or contribution against Mr Seedo's claim and/or damages in the same amount. That appears to have been brought in February 2019. I will have to look at the grounds on which they sought such relief below.

Mr Seedo's claims

26. HHJ Dight dealt first with Mr Seedo's claims against Mr El Gamal and EGC. We are not in this appeal directly concerned with them, but in summary he found that the Property had been held on trust at all material times for Mr Seedo and Mr El Gamal (and then EGC) as tenants in common in equal shares [106]. That was principally on the basis that there was an express declaration of trust to that effect in the Deed of Trust, which was effective on its face and binding on Mr El Gamal [106], [109]-[110], although he would have reached the same conclusion on the basis of a resulting or constructive trust [106], [109]-[110], [113]-[115]. The trust was a trust both of the Property and of the income [112]. It bound EGC who did not and could not raise a defence of *bona fide* purchaser [115]. The trust gave rise to a duty on the part of Mr El Gamal and EGC to account for dealings with the Property [116].

27. HHJ Dight then dealt with Mr Seedo's claims against Mr Salfiti. Again we are not directly concerned with them, but in summary he held that there were breaches of the joint venture agreement, breaches of trust, breaches of duty as Mr Seedo's solicitor, and fraudulent misrepresentations [117]. He rejected a submission that the claims by Mr Seedo against Mr Salfiti were statute-barred: Mr Salfiti deliberately concealed his acts and hence by s. 32 LA 1980 time did not start to run until at the earliest November 2016; and there was in any event no limitation period for a number of the breaches of fiduciary duty and fraudulent breaches of trust [117].

Mr El Gamal's and EGC's claims against Mr Salfiti

28. The claim by Mr El Gamal and EGC against Mr Salfiti was pleaded as follows. It set out Mr Seedo's claim against them, and then claimed an indemnity against that claim and the costs of the action. Three causes of action were relied on. Two of these, negligence and breach of contract, were based on Mr El Gamal's retainer of Mr Salfiti as his solicitor, and alleged breaches of his tortious and contractual duties of reasonable skill, care and diligence.

29. The other cause of action relied on was fraudulent misrepresentation by Mr Salfiti. It was pleaded that Mr Seedo's loss and damage was caused by fraudulent representations made by Mr Salfiti to Mr Seedo and Mr El Gamal. Particulars of fraud were pleaded as follows:

> "i) Representation to [Mr El Gamal] that he was personally loaning him the money to purchase the Property, when in fact the money belonged to [Mr Seedo].
>
> ii) Representation to [Mr El Gamal] that the loan could be repaid following the sale of the Property, when in fact he had informed [Mr Seedo] that the Property had been purchased in the name of [Mr Seedo] and [Mr Salfiti] using money provided by [Mr

Seedo].

iii) Representation to [Mr El Gamal] that he was the person entering into the agreement.

iv) Created a Trust Deed dated 6 August 2014 expressly declaring that [Mr Seedo] and [Mr El Gamal] had equal beneficial interest in the Property, and had been signed by [Mr El Gamal]. [Mr El Gamal] did not sign the Trust Deed. It was created and signed by [Mr Salfiti].

v) Representation to [Mr Seedo] that he had purchased the Property at auction and requested [Mr Seedo] to send payment to [Mr Salfiti's] client account to enable the purchase to proceed, when in fact [Mr El Gamal] had purchased the Property."

30. It was then pleaded that if Mr Salfiti had not been negligent and/or in breach of the terms of retainer and/or made fraudulent representations to induce Mr El Gamal to purchase the Property, he would not have done so; and that if Mr El Gamal or EGC were found liable to Mr Seedo, they would contend that this liability arose because of Mr Salfiti's negligence, breach of contract or fraudulent representations, as a result of which they had suffered damage in the shape of their liability to Mr Seedo, costs payable by them to Mr Seedo and their own costs.

31. HHJ Dight had no difficulty in finding that these claims were established and dealt with them quite briefly in his judgment at [126] as follows:

> "126. I turn then to look at [Mr El Gamal's and EGC's] claims against [Mr Salfiti]. Undoubtedly, they are either entitled to damages or to be indemnified by [Mr Salfiti] against [Mr Seedo's] claim and the costs of the proceedings for three reasons. First, there has been a deliberate and fraudulent breach of agreement by [Mr Salfiti] that [Mr El Gamal] would become the sole owner of the Property and that the balance of the funds contributed by [Mr Salfiti] to the original purchase price would be a loan. Second, there has been a deliberate and fraudulent misrepresentation that [Mr Salfiti] would lend funds to [Mr El Gamal]. Third, there has been a plain and deliberate breach of [Mr Salfiti's] retainer as a solicitor by [Mr El Gamal]: there was a breach of the duty of disclosure of the true nature of the transaction to [Mr El Gamal]; a failure to advise on the true beneficial ownership of the Property; a failure to act in [Mr El Gamal's] best interests; [Mr Salfiti] was, as I have explained, seriously conflicted; and a failure to bring to the attention of [Mr El Gamal] and advise him on the terms and effects of the Deed of Trust."

It is not immediately obvious how EGC, as opposed to Mr El Gamal, was able to maintain these claims but no point on this was taken before Falk J or us. I propose in those circumstances to ignore the separate identity of EGC and concentrate on Mr El Gamal's claims against Mr Salfiti.

32. Limitation had been pleaded in Mr Salfiti's Defence to these claims, on the basis that those in negligence and breach of contract had been brought more than 6 years after the relevant breaches or negligence, and those in fraud more than 6 years after Mr El Gamal discovered or could with reasonable diligence have discovered the alleged fraud. In particular reliance was placed on Mr El Gamal's letter of 14 September 2009 (paragraph 21 above) acknowledging that he held the Property on trust for Mr Seedo, and it was said that Mr El Gamal therefore at that time discovered or could with reasonable diligence have discovered the alleged fraud of Mr Salfiti. A Reply was served on behalf of Mr El Gamal and EGC, but it did not plead any specific response to the limitation defence.

33. HHJ Dight did not when delivering judgment deal with limitation in relation to these claims. But he was then asked by counsel to rule on it, and did so by adding an addendum to his judgment when approving the transcript. He rejected the limitation defence as follows:

> "The primary limitation periods in the third party claims, insofar as there are statutory limits which are prima facie applicable, would have run from the breaches of contract or suffering of tortious loss. But there is no limitation period for the claims based on fraudulent breach of fiduciary or trust duties.
>
> I do not accept that [Mr El Gamal] became aware of [Mr Salfiti's] fraud in respect of the principal transaction and [Mr Salfiti's] fraudulent scheme, as a result of the correspondence in August and September 2009 or that was the date when the fraud scheme devised by [Mr Salfiti] and the acts which he carried out in furtherance of the scheme could have been discovered with reasonable diligence. As I have found, [Mr Salfiti] deliberately concealed his fraudulent acts. The documents which should have been on the conveyancing file evidencing what had been done by [Mr Salfiti] have not been disclosed. When, in 2009, [Mr El Gamal] probed the role then being assumed by [Mr Salfiti] he was rebuffed. The existence of the fraud and the true extent of the acts of [Mr Salfiti] only became apparent when [Mr Seedo] took over control of this claim from [Mr Salfiti] and actively participated in the claim, following which [Mr El Gamal] and [EGC] were able to plead the third party claims. The reason why with reasonable diligence [Mr El Gamal] could not have discovered that he had a good claim against [Mr Salfiti] is because of the very steps taken by [Mr Salfiti] to cover his tracks."

HHJ Dight's Order

34. HHJ Dight's judgment was given effect to by an Order dated 14 January 2021. This recited the claims found to have been established at trial, including in the case of the claims by Mr El Gamal and EGC against Mr Salfiti, that:

> "he has acted in breach of contract and breach of duty owed in the tort of negligence, and has made fraudulent misrepresentations, and that such actions were carried out fraudulently and/or concealed with the result that such claims are not time barred."

The Order continued with appropriate declarations to the effect that the Property, and all traceable proceeds of any dealings with it, had been and continued to be held on trust by Mr El Gamal and EGC respectively for himself or itself and Mr Seedo in equal shares. There was then a declaration that Mr Salfiti was liable to indemnify (a) Mr Seedo, Mr El Gamal and EGC in respect of all costs incurred as a result of the breaches and wrongs found to have been established and (b) Mr El Gamal and EGC:

> "in respect of all loss, damage, costs and expenses incurred as a result of their holding the Property and the traceable proceeds of their dealings with the Property on the trusts declared above rather than on trust for themselves alone, and all further liabilities to [Mr Seedo] arising from the Claim, including but not limited to, any amounts payable by way of accounts of profit, equitable compensation or otherwise after the taking of all necessary accounts and inquiries and subject to any costs orders already made."

Directions were also given for a further hearing to determine consequential matters, including the question of what accounts and inquiries were required. We were not given details of these, but Mr Munro told us that the total payable by Mr Salfiti under the indemnities was a substantial sum, of the order of £800,000.

Appeal to Falk J

35. Mr Salfiti appealed to the High Court. Most of his grounds of appeal sought to challenge HHJ Dight's central findings of fact and the bulk of Falk J's judgment is taken up with considering those challenges, all of which she dismissed.

36. He also appealed on limitation. The essential point argued was that the 2009 correspondence between Salfiti LLP and Mr El Gamal provided the latter with actual or constructive knowledge of the fraud, because the Trust Deed was inconsistent with Mr Salfiti having led him to believe that he would be the 100% owner of the Property.

37. Falk J dismissed the appeal on this ground also. She first decided that for the purposes of s. 32 LA 1980 the question when the claimant discovered, or could reasonably have discovered, the fraud was to be assessed against the claimant's pleaded case. Her reasons were as follows:

> "58 As submitted by Mr Saifee for Mr El Gamal, it is important to consider the actual claim made against Mr Salfiti by Mr El Gamal, rather than what the judge ultimately decided. Mr Saifee did not cite specific authority that explained why this was the correct focus, but I note that the submission was not directly contradicted by Mr Munro. Its statutory basis must be that it is the <u>action brought</u> that must be considered for the purposes of the Limitation Act (see sections 2 and 5 in respect of tort and contract respectively, and the text of section 32(1)(a) which applies where "the action" is based upon the fraud of the defendant).
>
> 59 I also note that this approach is consistent with the Supreme Court's analysis in *Test Claimants in the FII Group Litigation v HMRC* [2022] AC 1, recently applied in the context of section

> 32(1)(b) by the Court of Appeal in *Gemalto Holdings BV v Infineon Technologies AG* [2022] EWCA Civ 782. See in particular the *FII* decision at [199] to [202]. The correctness of the approach is also supported by an authority that Mr Saifee did rely on, *Barnstaple Boat Co. Ltd v Jones* [2007] EWCA Civ 727; [2008] 1 All ER 1124 at [34]."

38. Then, having considered the pleaded misrepresentations and HHJ Dight's finding on them, she said that it was not apparent from the 2009 correspondence that the story about a loan from Mr Salfiti was a lie or that the funds came from elsewhere and in fact were a contribution rather than a loan; there was no mention of the loan in the Trust Deed and Mr Abu Seedo's financial contribution to the acquisition of the Property was not mentioned in the correspondence.

39. She concluded as follows:

> "64 Mr Salfiti maintains that the correspondence did provide actual or constructive knowledge of the fraud, because the Trust Deed was inconsistent with Mr Salfiti having led him to believe that he would be the 100 per cent owner of the Property. However, the correspondence did not give Mr El Gamal the knowledge of the particular cause of action he alleged against Mr Salfiti, which focused on the fraud in respect of the alleged loan and Mr Abu Seedo's financial contribution, the Trust Deed being alleged to be invalid and so of no effect.
>
> 65 The judge was entitled to conclude that Mr El Gamal could not determine simply from the correspondence, sent by or on behalf of a person with whom Mr El Gamal had evidently fallen out, that Mr Salfiti had been guilty of the fraud that was subsequently alleged against him, including his misrepresentations as to the source of the funds and as to the deal being done with him rather than with anyone else. In 2009, what Mr El Gamal knew was being alleged was that he was a trustee under the terms of a trust deed."

For the purposes of s. 32(1) LA 1980 is the "fraud" that pleaded or that found?

40. Mr Munro's first argument on appeal to us was that Falk J had erred at [58]-[59] of her judgment in saying that it was the claim made that was significant for the purposes of s. 32(1) LA 1980 rather than what the judge ultimately decided.

41. But Mr Faisal Saifee, who appeared for Mr El Gamal and EGC, did not dispute this in his skeleton argument, and confirmed orally that he accepted Mr Munro was right. In those circumstances we heard limited oral argument on the point from Mr Munro and none from Mr Saifee. Nevertheless it is a point of general importance and it may be helpful to consider it.

42. The text of s. 32(1) and (2) LA 1980 is as follows:

> "**32. Postponement of limitation period in case of fraud,**

concealment or mistake

(1) Subject to subsections (3), (4A) and (4B) below, 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

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

43. We are here concerned with an action "based upon the fraud of the defendant" within s. 32(1)(a). It is well established that this does not mean any action in which the defendant is alleged to have acted fraudulently, but only one where fraud is a necessary allegation to establish the cause of action: see *Beaman v ARTS Ltd* [1949] 1 KB 550 where this Court held that a claim in conversion, even if alleged to have been carried out fraudulently, was not within s. 26(a) of the Limitation Act 1939, the predecessor of s. 32(1)(a) LA 1980. In the present case that means that s. 32(1)(a) could only apply to the claim based on fraudulent misrepresentations, that being in effect a claim for damages for the tort of deceit, and not to the claims in contract and negligence based on Mr Salfiti's retainer as solicitor for Mr El Gamal.

44. The question then is how one assesses when the claimant has discovered, or could with reasonable diligence have discovered, "the fraud". The leading case on when time starts running under s. 32(1) LA 1980 is now the decision of the Supreme Court in *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47 (***"FII"***). The specific question that arose was when time started running where the claim was for relief from the consequences of a mistake within s. 32(1)(c). The submission for the claimants was that where the relevant mistake was one of law (in that case as to the lawfulness of tax charges) they could not be said to discover their mistake until they knew what the law actually was, which meant that the limitation period did not start until the true state of the law had been established by a judicial decision from which there lay no right of appeal: see the majority judgment, given by Lord Reed PSC and Lord Hodge DPSC (with whom Lord Lloyd-Jones and Lord Hamblen JJSC agreed), at [8]. That would have the paradoxical result that, despite bringing claims in which they asserted that they had been mistaken, the claimants could not

discover that they had a claim until it succeeded (and indeed any rights of appeal were exhausted): see *ibid* at [173].

45. That somewhat ambitious submission was rejected by all the members of the Court. The minority, in a judgment given by Lord Briggs and Lord Sales JJSC (with whom Lord Carnwath JSC agreed), would have held that s. 32(1)(c) LA 1980 did not apply to a mistake of law at all. The majority held that s. 32(1)(c) does apply to a case based on a mistake of law, but that time starts running in such a case when the claimant knows, or could with reasonable diligence know, that he made a mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence", or when he discovers, or could with reasonable diligence discover, his mistake in the sense of recognising that "a worthwhile claim arises": see at [193], where they also say that there is no difference of substance between these formulations. In *Gemalto Holding BV v Infineon Technologies AG* [2022] EWCA Civ 782 (***"Gemalto"***) this test was referred to as "the *FII* test".

46. The Court was not therefore directly concerned with a claim based on fraud within s. 32(1)(a) LA 1980. But in the course of a wide-ranging historical survey the majority did say various things about such a case, particularly at [180]-[186]. There they referred to a number of decisions to the effect that time starts running in a fraud case where the claimants are "in a position to plead their own case": see *Biggs v Sotnicks* [2002] EWCA Civ 272 at [64] per Arden LJ, *Law Society v Sephton & Co* [2004] EWHC 544 (Ch) (***"Sephton"***) at [44] per Mr Michael Briggs QC, and *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 17 per Lord Hoffmann NPJ. At [191] they said that it was not the occasion to review the formulation used in the fraud cases, which reflects the special standards applicable to a pleading of fraud. This test was referred to in *Gemalto* as "the statement of claim test".

47. The question in *Gemalto* was which of these two tests applied to a claim in a cartel case where the claimant relied on deliberate concealment within s. 32(1)(b) LA 1980. Sir Geoffrey Vos MR (with whom Green and Birss LJJ agreed) held that it was the *FII* test: the proviso to s. 32(1) is to be construed consistently as between mistake and deliberate concealment cases, and time begins to run in a deliberate concealment case when the claimant recognises that he has a worthwhile claim: see at [53]. Sir Geoffrey Vos said that there was unlikely in most cases to be a difference between the application of the statement of claim test and the *FII* test (at [45]), but if there were a difference for fraud cases it would have to be found in the stricter rules of pleading in fraud (at [44]).

48. It can therefore be taken to be established that in a fraud case, time starts to run when the claimant has discovered enough to plead their case.

49. This does not however answer the question what "the fraud" is which the claimant needs to have discovered. In most cases the answer is obvious. A claimant brings a claim alleging a fraud. If you want to know if that claim is barred the relevant inquiry is when the claimant knew enough to plead that claim. What the majority judgment in *FII* makes clear is that a claimant can know enough to plead a claim without knowing whether it will succeed. This is a significant strand in their reasoning: see in particular at [177] where they say that the limitation period runs alike for claims

which fail as for claims which succeed; at [196] where they say that it is in the nature of litigation that facts and law are commonly disputed and that until the court has resolved that dispute the parties can at best have only a reasonable belief that their assertions are correct; and at [199]-[202] where they make the point that questions of limitation are decided on the assumption that the claimant has the claim that he asserts, and the fact that the defendant disputes an element of the cause of action does not mean that the commencement of the limitation period is postponed until that dispute is resolved.

50. This is the passage that Falk J referred to in her judgment. At [199] they say that a plea of limitation:

> "is legally distinct from the merits of the claim in question, and is often conveniently dealt with as a preliminary issue. The 1980 Act proceeds on the basis that a cause of action has accrued, without concerning itself with the question whether or not the action is well-founded. Section 32(1)(a) applies where "the action is based upon the fraud of the defendant", and section 32(1)(c) applies where "the action is for relief from the consequences of a mistake". If the action runs its full course, it may transpire that there was no fraud or mistake, indeed no cause of action at all. But where, at the stage of an inquiry into the defendant's plea that the action is time-barred, the claimant relies on section 32(1)(a) or (c), the question is not whether there was in reality any fraud or mistake: that will not be established unless and until the court issues a judgment on the merits of the case. The question under section 32(1)(a) and (c) of the 1980 Act is whether, upon the assumption that there was fraud or mistake, as identified by the claimant in the way in which he pleads his case, it was discovered or could with reasonable diligence have been discovered at such a time as would render the claim time-barred."

51. As both counsel recognised this makes sense when, as is very often the case, the question of limitation is raised before trial either, as Lord Reed and Lord Hodge suggest, as a preliminary issue, or on the defendant's application to strike out the claim or for summary judgment. In such a case the facts have *ex hypothesi* not been found, so the question of limitation can only be determined on the assumption that the facts alleged by the claimant will in due course be proved. As pointed out by Lord Reed and Lord Hodge at [201], that can even lead to the apparently paradoxical situation where for the purposes of limitation the defendant disputes the claimant's assertion that he could not have known or discovered a fact, despite the defendant, in relation to the merits, denying that it is a fact at all. This was the case in *Sephton* where Mr Briggs (as he then was) referred to the unreality of addressing the issue of when an assumed or unproven fact was or could have been discovered (see at [5]).

52. *Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727 (***"Barnstaple Boat"***), the other case referred to by Falk J in her judgment, was a case of this type. The claimant brought an action alleging three separate deceit claims against the defendant. The defendant applied for summary judgment on all three claims, and succeeded before the District Judge on the grounds that the claims were barred by limitation. On the first claim the claimant failed in a first appeal but succeeded in a second appeal to this Court. Waller LJ (with whom Moore-Bick and Moses LJJ agreed) said at [34] that

although there was a powerful case that the claimant had long suspected that the defendant had behaved dishonestly and that that dishonesty had led to its loss, time only started running:

> "when the claimant obtains knowledge of the fraud ie knowledge that the deceit which he alleges has been perpetrated."

The particular deceit which the claimant alleged was that the defendant had untruly said that he intended to buy a boat; and it was at least strongly arguable that the claimant did not know that that was untrue until shortly before issuing the claim.

53. Neither what Waller LJ said in *Barnstaple Boat* however, nor what Lord Reed and Lord Hodge said in *FII*, was expressly directed at the case where limitation is raised as a defence at trial and dealt with after the judge has made a decision on the merits. I agree with both counsel that in such a case the judge should address the question of limitation by asking when the claimant discovered (or could reasonably have discovered) the fraud that he or she has found to have taken place. As Mr Munro said, the relevant question (and only relevant question) is whether the action for *that fraud* is statute-barred, and that can only be answered by asking when the claimant discovered the facts relevant to that claim. I accept his submission that there is nothing in the authorities which requires the Court instead to confine its attention to the case as pleaded by the claimant. Normally of course one would expect the claim as found to reflect the claimant's pleaded allegations, but one can envisage a case where the pleading contains allegations that are not pursued or turn out not to be well-founded, but where the judge nevertheless finds there to have been a fraud. It seems wrong in principle, and a distraction, to ask when the claimant discovered allegations which in the end went nowhere: the question is when he discovered the essential facts of the fraud found proved by the Court.

54. I therefore accept this part of Mr Munro's argument. That by itself however is not sufficient for the appeal to be allowed and it is necessary to consider the application of the principle to the facts of the case.

Application to the facts of the case

55. Mr Saifee submitted that although Falk J had erred in what she said in her judgment at [58] (paragraph 37 above), this was not a material error. She had concluded in [64] and [65] (paragraph 39 above) that the 2009 correspondence did not give Mr El Gamal knowledge of Mr Salfiti's misrepresentations as to the source of the funds, and as to the deal being done with him rather than anyone else; that was correct, and it did not matter that she had taken those misrepresentations from the pleaded case rather than from what HHJ Dight had found in his judgment.

56. Mr Munro however said that the error was material because it had led Falk J to ignore the actual fraud that HHJ Dight had found, which he summarised as follows: Mr Salfiti misrepresented to Mr El Gamal that he would own the property outright whilst knowing, and indeed engineering the position, that Mr El Gamal would only end up with a 50% beneficial interest. That fraud was, he submitted, something that Mr El Gamal discovered in 2009 when he became aware of the Deed of Trust.

57. These submissions require us to look more closely at HHJ Dight's reasons for

upholding Mr El Gamal's and EGC's claims to an indemnity (or damages). These are found in his judgment at [126] (paragraph 31 above). He there gives three reasons. We can put to one side for the moment the third reason which is a series of breaches of the duties owed by Mr Salfiti to Mr El Gamal under his retainer as solicitor. But the other two are based on findings of fraudulent behaviour by Mr Salfiti, namely (1) a deliberate and fraudulent breach of agreement that Mr El Gamal would become the sole owner of the Property and that the balance of the funds contributed by Mr Salfiti to the original purchase price would be a loan, and (2) a deliberate and fraudulent misrepresentation that Mr Salfiti would lend funds to Mr El Gamal.

58. The latter is undoubtedly a finding that Mr Salfiti was liable for the tort of deceit. The former is not so clear. Mr Saifee said that although it was characterised as deliberate and fraudulent, it was evidently intended to be a finding of breach of contract. On the face of it there would appear to be quite a lot of force in that. But it is not quite as straightforward as it appears at first sight. First, Mr El Gamal's claims for an indemnity and damages were premised on three causes of action but breach of contract, other than the contract of retainer, was not one of them (see paragraph 28 above). So if HHJ Dight did mean to find a breach of contract he would have been giving judgment on a cause of action that had not been pleaded. I think we should be slow to assume that an experienced trial judge would have done that. Second, he referred to a deliberate and fraudulent breach of agreement. A "deliberate" breach of contract is clear enough, but it is not so obvious what a "fraudulent" breach of contract is. It must mean that Mr Salfiti had been deceitful in connection with this breach. But if one asks in what way Mr Salfiti had been deceitful, the obvious answer is that he agreed one thing with Mr El Gamal (namely that the latter would be the sole owner, the £69,500 being a loan rather than a contribution to the purchase price) while in fact deliberately arranging things so that Mr El Gamal was only a 50% owner. Seen in that light, I do not think it is really any different from Mr Munro's submission that in effect the fraud that HHJ Dight had found was that Mr Salfiti duped Mr El Gamal into the transaction by agreeing that he would be sole owner when he knew that he would not be. On this analysis HHJ Dight's first reason is also in effect a finding of deceit, even though it is not obviously framed as one.

59. In effect therefore HHJ Dight found that Mr El Salfiti deceived Mr El Gamal by telling him two lies. First he told Mr El Gamal that he would be the sole owner while putting in place the Deed of Trust under which he would only have a 50% interest. And second he told him that the £69,500 would be a loan from himself which Mr El Gamal could repay in due course whereas in fact it was not Mr Salfiti's money at all but Mr Seedo's money which was held by Mr Salfiti on trust to use as a contribution to the purchase price.

When did Mr El Gamal discover, or could he have discovered, the fraud?

60. The next question is when Mr El Gamal discovered, or could reasonably have discovered, the fraud. Here I think the position is not difficult. The letter of 26 August 2009 from Salfiti LLP (paragraphs 19 and 20 above) asserted in plain terms that the Property was held by Mr El Gamal on trust for himself and Mr Seedo in equal shares under a trust deed of 6 August 2004, that Mr El Gamal was in breach of trust, and that he was liable to account to Mr Seedo. The reply from Mr El Gamal (paragraph 21 above), although betraying some confusion, shows that he appreciated that it was being said he was a trustee. I accept Mr Munro's submission that that was

enough to show that Mr El Gamal actually discovered in 2009 that instead of being a sole owner as he had thought, it was being said that he was only a 50% owner; and that this is so whether or not the Deed of Trust was in fact enclosed with the letter.

61. Nor do I think it matters that at that stage Mr El Gamal may not have discovered enough to know whether the assertion that he was a trustee was well-founded or not. What he did know was that he was being threatened with an action for breach of trust; and I think he had discovered enough to know that if that claim was a good one, he must have been misled by Mr Salfiti into buying the Property on a false basis. That would be enough to plead a claim for an indemnity, even if only on a contingent basis.

62. In those circumstances it is not necessary to consider an alternative case that depends on what Mr El Gamal could have discovered with reasonable diligence. We heard some submissions from Mr Munro on whether such an argument was open to him on the wording of his grounds of appeal, but as he himself said this was very much a secondary case which added little to his primary submission, which I have accepted, namely that Mr El Gamal actually knew enough to have discovered the fraud.

63. On the other hand, there is nothing in the 2009 correspondence to alert Mr El Gamal to the fact that Mr Salfiti also lied to him about the source of the £69,500. I accept Mr Saifee's submission that that lie was neither discovered by Mr El Gamal, nor reasonably discoverable by him, in 2009, and indeed Mr Munro did not suggest that it could have been discovered.

64. The position is therefore this. Mr Salfiti told Mr El Gamal (at least) two lies to persuade him to buy the Property. He discovered that the first one was untrue in 2009 when he learned that he had been misled into buying the Property by Mr Salfiti promising him he would be sole owner. That was more than 6 years before he brought his claim. But he did not then discover, nor could he reasonably have done, that the second lie about the source of the funds was also untrue, and did not do so until Mr Seedo took over the claim, which was much less than 6 years before Mr El Gamal brought his claim against Mr Salfiti.

How does s. 32(1)(a) apply in such a case?

65. That brings me to the question how s. 32(1)(a) applies to a case where a defendant deceives the claimant into entering into a transaction by telling two lies, and the claimant discovers one of them, but not the other, more than 6 years before bringing his action.

66. Mr Saifee submitted that even if in such a case a claim based on the first lie is barred, there is nothing to stop the claimant from bringing a claim based on the second lie, as this is a separate cause of action. I agree that the relevant question is whether the second lie gives rise to a different cause of action. Limitation operates by barring particular causes of action. This is a very familiar principle which underlies the entire structure of the Limitation Act 1980. Thus the ordinary time limits laid down in Part I of the Act are drafted by reference to the accrual of particular causes of action: see for example s. 2 which provides that an action founded on tort "shall not be brought after the expiration of six years from the date on which the cause of action accrued". And it is a commonplace that different causes of action may have different time limits even if based on much the same set of facts, such that for example a claim in tort for

professional negligence may be in time even if a contractual claim for the same failure to take reasonable care is barred. The same principle underlies s. 35 LA 1980 and the rules made under it, the effect of which is that an amendment to an existing claim may be allowed if its effect is not to add a new cause of action but to amend the particulars of an existing one, but, save in narrowly defined circumstances, cannot be permitted if its effect is to add a new cause of action that is statute-barred.

67. The point is illustrated by *AIC Ltd v ITS Testing Services (UK) Ltd, The Kriti Palm* [2006] EWCA Civ 1601. The facts are complex but in summary the defendant (ITS) had issued the claimant (AIC) with a certificate of quality in respect of a cargo of gasoline, certifying that the fuel met specification. Unfortunately ITS had used the wrong test for a particular aspect of the specification, using the D323 test method rather than the D5191 method required by the specification. Subsequently ITS tested some surviving residues of the fuel using D5191 which gave a reading out of specification, these tests being referred to as "the Cooper retests". It did not disclose these to AIC at the time. By the time AIC issued proceedings, it was more than 6 years after it knew that the wrong tests had been used, but it sought to rely on ITS's failure to disclose the Cooper retests as a deliberate concealment of a fact relevant to its right of action within s. 32(1)(b) LA 1980. Rix LJ in a dissenting judgment would have held that the Cooper retests added at most further evidence in support of causes of action that AIC was always in a position to plead, and that this was not enough (at [363]); but Buxton LJ (with whom Nourse LJ agreed) held that the parts of AIC's pleading that relied on failure to disclose the Cooper retests asserted new causes of action, and not merely better evidence in support of existing causes of action (at [465]). As Buxton LJ said, a party may fail to perform his duty (in contract or negligence) in a variety of different ways. If complaints are made of breaches of duty which relate to different aspects or heads of that duty, that may generate different causes of action: see at [458]. In that case the complaint that ITS failed to correct the certificate was a different complaint from the simple complaint that the cargo was off specification; and the complaint that ITS failed to communicate the results of the Cooper retests, which it actually knew, was again a different complaint, and asserted a different cause of action, from the complaint that it failed to communicate what it should have known: see at [461].

68. So the question is whether the second lie gives rise to a different cause of action from the first lie. Mr Saifee said that it did, referring to what Waller LJ said in *Barnstaple Boat* about the third claim. This was also a claim in deceit, the allegation being that the claimant had bought a boat on the defendant's representation that it was in good working order. In fact the engine was seized up, the boat having been sunk. The claimant was later told that the defendant was well aware that the boat had been sunk and beyond repair before it was sold to the claimant. Waller LJ held at [40] that it did not matter whether Mr Tidmarsh (the relevant individual acting for the claimant) did or should have appreciated that the engine was seized: what was relevant was when he knew that the defendant had known about the sinking before the sale, saying:

> "As with claim one if he did not know that the representation made to him was untrue to the knowledge of [the defendant] until his chance encounter with the engineer in late 1999, limitation does not begin to run until that time, unless use of reasonable diligence would have brought about the chance meeting earlier."

That all seems entirely understandable, but I do not think it answers the question whether the two lies give rise to different causes of action.

69. Nor were we taken to any authority which really sheds light on this question. There are many cases which in the context of s. 35 LA 1980 discuss the question whether adding new particulars to a claim in, for example, negligence or breach of contract adds a new cause of action or not, but we were not shown any of that jurisprudence. I propose therefore to address the question as a matter of principle.

70. Take the case where a vendor sells a house to a purchaser. If in order to induce the sale the vendor tells the purchaser two distinct and unconnected lies, I would readily accept that they gave rise to different causes of action. Suppose for example the vendor untruthfully said that there were no ongoing disputes with the neighbours, and also that the house did not suffer from subsidence. The purchaser discovers soon after moving in that the first statement was untrue, but reaches an accommodation with his neighbour such that he does not think it worth suing the vendor for that deceit. Then some years later he discovers that the second statement was also untrue, with far more serious consequences. In my view that would be a separate complaint of a separate deceit; it would constitute a separate cause of action; and the purchaser would have 6 years from when he discovered (or could with reasonable diligence have discovered) that statement to be untrue, even if his right of action on the first deceit was statute-barred.

71. But it is not obvious that the same applies where the vendor tells two related lies as part of the same overall deceit. Suppose for example that the vendor tells the purchaser untruthfully that the house does not suffer from subsidence, and also that he has not made any insurance claim in respect of the house. In fact the house not only suffers from subsidence but the vendor made a claim on his policy for it. The purchaser discovers that the house does suffer from subsidence and that the vendor knew that, but fails to bring a claim within 6 years. He then happens to discover that the vendor also lied about not making an insurance claim. I would think it very surprising if that could give him another 6 years to bring what would in essence be a claim for the same deceit. In my judgment he could not do so, and that would be because the second lie did not give rise to a separate cause of action. Both lies, although different in their detail, were designed to conceal from the purchaser the same thing.

72. If that is right, it is now possible to apply that principle to the facts here. When Mr Salfiti told Mr El Gamal that the £69,500 was a loan from him that could in due course be repaid, was this a separate and distinct deceit from agreeing with him that he would be the sole owner, or was it all part of the same deceit?

73. I have come to the conclusion that it was all part of the same deceit. In order to induce Mr El Gamal to put up the money to complete the purchase, Mr Salfiti told him a package of related lies. The story he told Mr El Gamal was that he had bought the Property himself at auction; that he did not personally have the money to complete and risked losing it; that he had already invested the £69,500 in the purchase; that if Mr El Gamal bought the property, this would be treated as a loan to Mr El Gamal repayable on the sale of the property; and that Mr El Gamal would, subject to repaying the loan, be the 100% owner of the Property. That was all untrue; it was all directed at persuading Mr El Gamal to complete the purchase on the false basis that

he would be the sole owner; and it was all designed to conceal the same thing, namely Mr Seedo's involvement in the purchase. I do not think one can separate out the specific lies that Mr Salfiti had put up the £69,500 himself and would treat it as a loan from the overall fraud and treat them as a separate act of deceit giving rise to a separate cause of action.

74. If that is right, then I think Mr Munro's submission is well-founded. Mr El Gamal knew in 2009 that it was being said he was a trustee for Mr Seedo and himself. He knew enough to know that if this was so, Mr Salfiti had deceived him into buying the Property. The fact that he did not know all the details of the lies Mr Salfiti told him as part of this fraud does not matter: time started running in 2009 and his claim for the tort of deceit was barred by limitation in 2015 before the claim was brought.

The contractual and tortious claims under the retainer

75. The remaining question is whether the claim to an indemnity can be upheld on the basis of breach of Mr Salfiti's contractual and tortious duties under his retainer. The third reason given by HHJ Dight for the indemnity in his judgment at [126] (see paragraph 31 above) was that Mr Salfiti was in plain breach of his retainer in (i) failing to disclose the true nature of the transaction to Mr El Gamal; (ii) failing to advise on the true beneficial ownership of the Property; (iii) failing to act in Mr El Gamal's best interests, Mr Salfiti being seriously conflicted; and (iv) failing to advise on the terms and effects of the Deed of Trust.

76. Of these (ii) and (iv) concern the question whether Mr El Gamal was to be the sole beneficial owner, and I think the same is true of (i) as well, the true nature of the transaction being that Mr El Gamal would be a trustee for Mr Seedo and himself. For much the same reasons as I have already considered above, it seems to me that Mr El Gamal discovered, or could with reasonable diligence have discovered, from the 2009 correspondence that Mr Salfiti's advice as his solicitor was deficient in these respects. Mr El Gamal must have realised that if, as was being said, he was a trustee for himself and Mr Seedo, was liable for breach of trust, and under a duty to account, then Mr Salfiti had failed to advise him of any of that.

77. HHJ Dight in his addendum judgment held that Mr Salfiti had deliberately concealed his fraudulent acts, specifically referring to the conveyancing file not being disclosed (see paragraph 33 above). But for the purposes of s. 32(1)(b) LA 1980, it is clear from authority that the statutory words "any fact relevant to the plaintiff's right of action" are to be given a narrow rather than a wide interpretation and that the relevant fact must be a fact without which the cause of action is incomplete: *Johnson v Chief Constable of Surrey* (CA, 19 October 1992), *The Kriti Palm* at [323] (Rix LJ), [384] (Nourse LJ) and [453] (Buxton LJ). Concealing matters which merely add to the strength of the claim or fill in details is not enough.

78. That leaves (iii), the failure of Mr Salfiti to act in Mr El Gamal's best interests, he being seriously conflicted. The point here is that Mr Salfiti did not simply fail to advise Mr El Gamal as to the true nature of the transaction, but he had his own personal interest in getting Mr El Gamal to sign up to the Deed of Trust without realising it, because of the agreement he had reached with Mr Seedo. A solicitor, being a fiduciary, owes a duty to his client to fully disclose any personal interest of his own in the transaction in which he is acting for the client. HHJ Dight was plainly

correct to conclude that on his findings as to what happened Mr Salfiti was in gross breach of this duty.

79. Is this claim statute-barred? HHJ Dight in his addendum judgment said that there was no limitation period applicable to the fraudulent breach of fiduciary duties (see paragraph 33 above). It seems probable that this is the claim he had in mind, and I think he was probably right about that. But Mr Saifee disclaimed any reliance on this part of the judgment. So I will consider whether this is something that Mr El Gamal discovered, or could have discovered, from the 2009 correspondence. I do not see that it was. That told him that it was being said that he was a trustee and liable to account as such; but it did not tell him anything about Mr Salfiti's personal interest in the transaction, or his failure to disclose it.

80. In those circumstances I think HHJ Dight was right to find that this breach of Mr Salfiti's retainer was not statute-barred. Mr Munro had a point that deliberate concealment should have been specifically pleaded in the Reply. But Mr Saifee told us that the pleading point had not been relied on before HHJ Dight, nor does it seem to have been raised before Falk J. I agree that it is too late to raise it for the first time on a second appeal.

81. I also consider that this breach is sufficient to sustain the indemnity. Mr Munro said at one stage in his argument that it was only the fact that Mr El Gamal was a trustee (in other words the first of HHJ Dight's three reasons) that justified the indemnity and that the other two reasons by themselves did not. If that was intended to suggest that Mr Salfiti's breaches of his duties under the retainer could not sustain the indemnity, I do not accept the submission. Had Mr Salfiti fully disclosed his interest in the transaction, Mr El Gamal would never have entered into it, and would never have come under any liability to Mr Seedo. That seems to me to be enough to entitle Mr El Gamal to an indemnity from Mr Salfiti.

Conclusion

82. Although I have accepted much of the argument put forward by Mr Munro, I consider that HHJ Dight's order should be upheld on the basis of Mr Salfiti's failure to disclose to Mr El Gamal his personal interest in the transaction, a claim that for the reasons I have given was not in my judgment statute-barred.

83. I add that there may have been an easier route to reaching the same result, although it was not one that featured in any of the argument before us or, it would appear, in either of the courts below. On HHJ Dight's findings, Mr Salfiti would himself have been directly liable to Mr Seedo for the same sums as Mr El Gamal and EGC. So far as I can see, that would mean that they would have a claim against him for contribution under s. 1 of the Civil Liability (Contribution) Act 1978, which could (and in the present case no doubt would) have been for a 100% contribution, or in other words an indemnity. Such a claim would not suffer from the same limitation difficulties, as the limitation period for such a claim is, by s. 10 LA 1980, 2 years from the date that Mr Seedo obtained judgment against Mr El Gamal and EGC. As I have said no argument to that effect was in fact advanced before us, but it reassures me that there is no injustice to Mr Salfiti in the conclusion I have come to.

84. I would therefore dismiss the appeal.

Lord Justice Birss

85. I agree.

Lord Justice Bean

86. I also agree.