Neutral Citation Number: [2021] EWHC 1387 (Ch)

Case No: CH-2020-000192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25/05/2021

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

BOYSE (INTERNATIONAL) LTD	**Appellant**
- and -	
(1) NATWEST MARKETS PLC	**Respondents**
(2) THE ROYAL BANK OF SCOTLAND PLC	

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- -

Stephen Auld QC and Simon Oakes (instructed by **Howard Kennedy LLP**) for the **Appellant**
Laura John QC and Laurie Brock (instructed by **DLA Piper UK LLP**) for the **Respondents**

Hearing date: 6th May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to

Bailii. The date and time for hand-down is deemed to be 10.00am on Tuesday 25th May 2021

Mr Justice Trower :

Introduction

1. This is an appeal, brought with the permission of Meade J granted on 17 November 2020, against an order made by Chief Master Marsh on 14 July 2020. The order was made following a written judgment he had handed down on 27 May 2020. By that order he dismissed the claimant's application to amend its particulars of claim, struck out what he described as the IRHP claim and granted summary judgment in favour of the defendants in respect of the remainder of the claim.

2. The Chief Master dealt with a number of issues which are not relevant to this appeal. I shall touch on those a little later in this judgment. The issue with which the appeal is concerned is whether the Chief Master was correct to conclude that it was sufficiently clear that a claim for fraudulent misrepresentation (the "LIBOR misrepresentation claim") was barred by the provisions of sections 2 and 32(1) of Limitation Act 1980 ("LA 1980") to justify the grant of summary judgment in favour of the defendants.

The Factual Background

3. The Chief Master's description of the factual background to the proceedings was not in dispute in any material respects. In large part it was drawn from the claimant's own pleaded case, which the parties assumed to be correct for the purposes of both the hearing before the Chief Master and the hearing of this appeal.

4. The claimant, Boyse (International) Ltd ("Boyse"), is a Gibraltar registered trust company managed by a professional trust manager, M & M Management Services Ltd. Its business is to hold commercial property investments for the ultimate benefit of Mr Rahul Sharma and Mrs Rita Sharma, the owners of a successful travel agent, Best At Travel plc. Although Mr and Mrs Sharma were not directors of Boyse, they made recommendations to its directors on the management of the commercial properties that it acquired for investment.

5. The second defendant, the Royal Bank of Scotland plc, acted as agent for the first defendant, NatWest Markets plc, in relation to the matters in issue in these proceedings and the Chief Master said there was no need to distinguish between them. I agree and will refer to the defendants as "the Bank". Boyse's relationship with the Bank was conducted through Mr Sharma and dated back to the early 2000s.

6. Boyse had a number of dealings with the Bank. The relevant ones for present purposes led to Boyse entering into two loan facilities with the Bank in 2004 and 2007. The first was a £3.5 million loan facility to enable Boyse to acquire a property at 22 Stephenson Way, London SW1 (the "Stephenson Way property") for £4 million. The second was a £6.5 million loan facility for the purposes of acquiring a property at 79 Fortress Rd, London NW5 (the "Fortress Road property") and refinancing the earlier 2004 facility.

7. The interest rate agreed under the 2007 facility was linked to the Bank's base rate, a reference which had been requested by Mr Sharma in response to the Bank's original proposal that interest on the facility should be 1% over LIBOR. There was a term of the 2007 facility that the Bank's obligations were conditional on Boyse entering into an interest rate hedging product ("IRHP") acceptable to the Bank.

8. In the event, Boyse entered into two IRHPs with the Bank pursuant to its obligations under the 2007 facility. The first was dated 10 August 2007 when Boyse agreed an interest rate swap with the Bank at a fixed rate of 6.23%, under which the Bank agreed to pay Boyse a floating rate of 3-month BBA GBP LIBOR. The second was dated 27 November 2008, when Boyse agreed an amortising interest rate collar with the Bank, which replaced the earlier swap, under which Boyse purchased an interest rate cap from the Bank at a rate of 5.5% with an interest rate floor to the Bank at a rate of 3.2%. As with the swap, this IRHP was also linked to 3-month BBA GBP LIBOR.

9. Boyse was forced to sell the two properties as a result of the cost of the IRHPs and their negative effect on its cash flow and profitability. The Stephenson Way property was sold on 25 February 2011 and the Fortress Road property was sold on 17 January 2012, both for figures that were said to be at a substantial undervalue. This had significant adverse consequences for Mr and Mrs Sharma who depended on the properties for pension purposes. At this stage Boyse and Mr and Mrs Sharma were aware of the losses they had suffered, but they were not aware of all the facts which gave rise to the LIBOR misrepresentation claim.

10. By the early part of 2012, the Bank's conduct in relation to the fixing of LIBOR rates had started to become what Boyse described in its pleading as the subject of considerable adverse press comment and widespread concern. Thus, in a Reuters report dated 9 March 2012 (i.e. not long after the sale of the Fortress Road property) LIBOR was described as a system that many now regard as outdated and discredited. In June 2012 the Financial Services Authority ("FSA") announced that it had identified serious failings in the sale of IRHPs to small and medium-sized businesses by a number of financial institutions including the Bank. There were then Telegraph and Guardian newspaper reports in July and September 2012 that referred to a LIBOR rate-rigging scandal.

11. On 6 February 2013, the FSA issued a final notice (the "Final Notice") which gave details of a fine imposed on the Bank for misconduct in relation to JPY, CHF and USD LIBOR (but not GBP LIBOR). At the same time similar findings were published by other regulators, all of which received widespread publicity in the mainstream and financial press.

12. In their skeleton argument in support of the appeal, Boyse's counsel (Mr Stephen Auld QC and Mr Simon Oakes) characterised the issue of the Final Notice as the FSA's publication of its findings that the Bank had dishonestly manipulated or attempted to manipulate Swiss Franc, Japanese Yen and US Dollar LIBOR. This characterisation reflected the way in which the Chief Master described the Final Notice in paragraph 31 of his judgment:

> "The Final Notice published by the FSA on 6 February 2013 runs to 35 pages but is not a particularly complex document. It commences with a summary of the FSA's reasons for its decision to impose a £87.5 million financial penalty on RBS. It is clear from the first page that the financial penalty was imposed because "… RBS sought to manipulate LIBOR in connection with its own submission of rates that formed part of the calculation of Japanese yen ("JPY") and Swiss franc ("CHF") LIBOR and also sought to influence other banks' JPY and CHF LIBOR submissions." Over the next three pages the manipulation and collusion by RBS is summarised and at paragraph 14 the impact of RBS' misconduct is explained:

> "RBS' breaches of Principle 5 were extremely serious. Its misconduct gave rise to a risk that the published JPY, CHF and USD LIBOR rates would be manipulated and undermined the integrity of those rates. RBS' misconduct could have caused harm to institutional counterparties and other market participants. Where RBS, alone or acting in concert with panel Banks and Broker Firms, sought to influence Panel Banks' LIBOR submissions, the risk that LIBOR would be manipulated increased materially."

13. Later in his judgment, the Chief Master explained that Boyse was not in fact aware of the FSA findings at the time of publication or for a significant time thereafter. He also said that it was Boyse's evidence that Mr and Mrs Sharma did not follow the financial press and that there was nobody within Boyse who could reasonably have been expected to read or look out for the FSA or other regulatory findings, whether when they were published or during the course of the following two weeks.

14. On 15 October 2014, Boyse accepted the Bank's offer of redress in relation to its sale of the IRHPs. The figure agreed between the parties was £1,482,462.55, amounting to the sum paid by Boyse to the Bank under the IRHPs. The offer was made without admission of liability and was accepted by Boyse without prejudice to its right to proceed with a claim for consequential loss.

Boyse's Claims

15. In correspondence during the course of 2015, Boyse made a claim for consequential loss, which I understood from Mr Auld QC was valued in the region of £8 million. This claim was rejected by the Bank in August 2015, where matters lay for the next three years. On 17 December 2018, Boyse's solicitors sent a lengthy letter of claim, which was rejected by solicitors instructed by the Bank on 11 January 2019. Boyse then issued its claim form in these proceedings on 19 February 2019.

16. Initially, Boyse's claim sought "Damages and/or an indemnity for misrepresentation and/or negligence (including negligent misrepresentation and/or negligent misstatement) and/or under section 2(1) the Misrepresentation Act 1967 and/or for breach of contract and/or for breach of statutory duty". It was then amended in July 2019, immediately before service of the particulars of claim, in order to delete the references to negligence, negligent misrepresentation and negligent misstatement and insert a reference to intentional or reckless misrepresentation.

17. Boyse pleaded its case in relation to the Bank's sale of the IRHPs in 2007 and 2008 as three separate claims:

    i) the LIBOR misrepresentation claim, which was a claim in deceit to the effect that the Bank made implied misrepresentations in respect of the setting of the LIBOR benchmark, upon which Boyse relied when entering into the IRHPs;

    ii) a claim that the Bank's manipulation of LIBOR constituted a breach of certain implied contractual terms;

    iii) a claim in deceit to the effect that the Bank made implied misrepresentations in respect of the suitability of the IRHPs for Boyse upon which Boyse relied when entering into the IRHPs.

18. The Bank responded to the claim in October 2019 by issuing an application to strike out under CPR 3.4(2)(a) on the grounds that all of the causes of action advanced were time-barred at the date on which the proceedings were issued. The limitation issue had first been raised by the Bank in correspondence between the parties before the claim form was served. The Bank also contended that the particulars of claim were both inconsistent and inadequate, containing wholly unparticularised allegations of fraud.

19. In January 2020, Boyse cross-applied for permission to amend its particulars of claim and served a draft of an amended pleading. At the hearing before the Chief Master it was common ground that the claims pleaded in the draft amended particulars of claim were to be treated as Boyse's claims, even though permission to amend had not then been granted and the application for permission was opposed. There was no suggestion that I should not take the same approach on this appeal.

20. There was also some debate at the hearing before the Chief Master, as to whether it was open to the court to strike out a claim under CPR 3.4(2)(a) on limitation grounds or whether it was necessary for the Bank to have applied for summary judgment under CPR 24.2. In the event, he decided that, while it would normally be appropriate to take a limitation point of the type advanced by the Bank by way of application for summary judgment rather than by way of strike out, it was always possible for the court to grant permission to amend its application and that was the appropriate course in the present case. On this appeal Boyse does not challenge his approach to that issue.

The decision of the Chief Master

21. The Chief Master dealt separately with each of the three claims. He granted summary judgment in favour of the Bank in respect of the claim for breach of implied terms on the basis that it was clear that the normal limitation period must have expired because the alleged breaches dated back considerably more than six years before the claim was issued. He recorded in his judgment that Mr Auld QC did not at the hearing press for retention of this claim. Boyse does not appeal against this part of the Chief Master's decision.

22. The Chief Master also struck out Boyse's claim that the Bank made implied misrepresentations in respect of the suitability of the IRHPs. He did so on the basis that it was a poorly disguised negligence claim in respect of which the allegations about the Bank's state of mind as to the unsuitability of the IRHPs were wholly inadequate. There was no proper pleading of a case which might even arguably not be statute barred. Boyse does not appeal against this part of the Chief Master's decision.

23. For the purposes of this appeal, the LIBOR misrepresentation claim is the one which matters because Boyse's appeal is limited to the decision of the Chief Master to grant summary judgment in favour of the Bank on that claim. He did so on the basis that, although Boyse's cause of action was based on the alleged fraud of the Bank, it was clear that Boyse could with reasonable diligence have discovered the fraud no later than the publication of the Final Notice on 6 February 2013. This was more than six years before the issue of the claim form in these proceedings and so the action was time-barred by reason of the combined effect of sections 2 and 32(1)(a) of LA 1980.

24. There are two sections of the Chief Master's judgment which deal with the LIBOR misrepresentation claim. The first was his analysis of the law in paragraphs 38 to 47.

The second was his application of the legal principles to the facts in paragraphs 55 to 69.

25. As submitted by Ms Laura John QC and Mr Laurie Brock in their skeleton argument prepared on behalf of the Bank, Boyse's grounds of appeal do not rely on any error of law. What is said by Boyse is that the Chief Master misapplied the law and/or reached incorrect determinations of fact. It is said that a proper evaluation of the pleaded facts and uncontroverted evidence did not entitle him to reach the conclusion that Boyse could with reasonable diligence have discovered the Bank's LIBOR fraud on 6 February 2013 or in any event by 19 February 2013.

26. It follows that it is necessary to concentrate on paragraphs 55 to 69 of the Chief Master's judgment when considering whether he was wrong in the conclusion that he reached. Before I do so I should explain the applicable principles of law, referring where appropriate to the Chief Master's own discussion of them, while recognising that the dispute relates to their application, rather than the formulation of what they are.

The Law

27. Section 2 of LA 1980 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". It is not in dispute that the LIBOR misrepresentation claim was an action founded on tort and would therefore be statute barred if section 2 were to be the only applicable provision, because it is plain that Boyse's cause of action had accrued prior to 19 February 2013.

28. It was also not disputed by the Bank, anyway for the purposes of the applications before the Chief Master and this appeal, that the LIBOR misrepresentation claim was an "action based upon the fraud of the defendant" within the meaning of section 32(1)(a) of LA 1980. It is well-established that claims for fraudulent misrepresentation fall within that sub-section. It therefore followed that the period of limitation did not begin to run until Boyse had "discovered the fraud, … or could with reasonable diligence have discovered it". It is not said by the Bank that Boyse had discovered the fraud it alleges before 19 February 2013, so it is the second part of this definition which is relevant to the appeal.

29. Discovery of the alleged fraud means discovery of the precise deceit which the claimant alleges has been perpetrated on him (*Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727 at [34] and [39]). This means that knowledge of fraud in a general sense is not enough (*Allison v Horner* [2014] EWCA Civ 117 at [14]). This principle applies both to that which has been discovered and that which could with reasonable diligence have been discovered. As Teare J put it in *Cunningham v Ellis* [2018] EWHC 3188 Comm at [87]:

> "For these purposes, that which must have been discovered or discoverable by the claimant before the limitation period will begin to run is knowledge of the essential facts constituting the alleged fraud. It is not sufficient that the claimant knows that there has been some unspecified deception (see McGee at [20-013] and *Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727) or only of a fraud "in a more general sense" as opposed to the precise deceit" (see *Horner v Allison* [2014] EWCA Civ 117 at paragraph 14)."

30. It is well-established that a claimant will have discovered a fraud when he is aware of sufficient material properly to be able to plead it: *Law Society v Sephton and Co* [2004] EWCA Civ 1627 at [110]. The same principle applies in the context of section 32(1)(b) of LA 1980, which postpones the date at which a period of limitation begins to run where there has been deliberate concealment of any fact relevant to the claimant's right of action: *Granville Technology Group Limited v Infineon Technologies AG* [2020] EWHC 415 Comm at [28]. On the appeal from *Granville* (sub nom *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501), Males LJ suggested at [26] that it may be even earlier:

> "The state of knowledge which a claimant must have in order for it to have "discovered" the concealment (or as the case may be, the fraud or the mistake) has been considered in the cases. For the most part the "statement of claim" test has been applied: that is to say, a claimant must have sufficient knowledge to enable it to plead a claim (e.g. *Law Society v Sephton & Co* [2004] EWCA Civ 1627, [2005] QB 1013; *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667; *Arcadia v Visa*; and *DSG Retail Ltd v Mastercard Inc* [2020] EWCA Civ 671, [2020] Bus LR 1360). This was the test which the judge applied in the present case and his approach is not challenged on appeal. More recently, in the *FII* case, where the issue was from what point it can be said that the claimant has discovered a mistake of law, the Supreme Court suggested that time should begin to run from the point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. This may mean that time begins to run somewhat earlier than under the statement of claim test, but this is a point which need not be explored in the present case."

31. Males LJ went on to explain at [27] that there will be cases, and they included *OT Computers* itself, where discovery of the relevant facts involves a process over a period of time as pieces of information become available. He said that in such cases it may be difficult to identify the precise point of time at which a claimant exercising reasonable diligence could have discovered enough either to plead a claim or to begin embarking on the preliminaries to the issue of proceedings. Mr Auld QC submitted that the difficulties identified by Males LJ militate in favour of resolving the issues in this case at trial rather than on a summary basis.

32. The next legal issue is what is meant by "reasonable diligence" in section 32(1) of LA 1980. On this issue the Chief Master referred to the following passage from the judgment of Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 418, which was described by Neuberger LJ in *Law Society v Sephton and Co* [2004] EWCA Civ 1627 at [110] as authoritative guidance:

> "The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was 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. I respectfully agree."

33. Since the decision of the Chief Master, Millett LJ's authoritative guidance has been approved by the Supreme Court in *FII Group Test Claimants v HMRC* [2020] 3 WLR 1369 at [203] and reconfirmed in the following passage from the judgment of the majority at [209(2)] and [213(16)]:

> "The question is not whether the claimant *should* have discovered the mistake sooner, but whether he *could* with reasonable diligence have done so. The burden of proof is on the claimant. He must establish on the balance of probabilities that he *could not* have discovered the mistake without exceptional measures which he could not reasonably have been expected to take."

34. Having cited Millett LJ's guidance in *Paragon* the Chief Master then went on to cite from the decision of the Court of Appeal in *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 at [46] and compared the views of Foxton J in *Granville* with those of Roth J sitting in the Competition Appeal Tribunal in *DSG Retail Ltd v Mastercard Inc* [2019] CAT 5 on the question of whether reasonable diligence is to be applied on the assumption that the claimant is on notice of the need to investigate. He decided that the approach of Foxton J in the following passage from his judgment in *Granville* at [45] was to be preferred:

> "… the drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry)."

35. In the event, the Chief Master's preference has proved to be correct, because Foxton J's judgment has subsequently been cited with explicit approval by the Court of Appeal in *DSG Retail Ltd v Mastercard Inc* [2020] Bus LR 1360 (per Sir Geoffrey Vos C at [65]) and, even more recently, has been upheld by the Court of Appeal in *OT Computers.* As Males LJ said at [35]:

> "In summary, when there has been deliberate concealment of a relevant fact, "reasonable diligence" will not require a claimant to take steps to discover that fact unless there is something (referred to in the cases as a "trigger") to put it on notice of the need to investigate. Whether there is such a trigger must be determined objectively as a question of fact. This was the ratio of *DSG Retail v Mastercard*, reversing the decision of the Competition Appeal Tribunal that it had to be assumed that the claimant was on notice of the need to investigate."

36. A little later in his judgment in *OT Computers* at [47] and [48], Males LJ summarised the applicable principles on this aspect of the "reasonable diligence" question in section 32 as follows:

> "Second, although 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.
>
> Third, while the use of the words "could with reasonable diligence" make clear that the question is objective, in the sense that the section is concerned with what the claimant could have learned and not merely with what he did in fact learn, the question remains what the claimant (or in the terminology of the section, "the plaintiff") could have learned if he had exercised such reasonable diligence. That must refer to the actual claimant, in this case OTC, and not to some hypothetical claimant."

37. In my view the Chief Master's analysis of this aspect of the law was consistent with the authorities that have been decided subsequent to his decision. He was correct in the way that he explained the question of reasonable diligence in paragraph 47 of his judgment as follows:

> "It can be seen from Henderson LJ's remarks in *Gresport Finance v Battaglia* that there must have been "something to put the claimant on notice" and that must be determined on an objective basis. Foxton J puts the same point as there being "something that has gone wrong". I would only add that to my mind there is a danger of further distilling a legal analysis of this type into one word. To say that a "trigger" is required might suggest that the court must look for a single event. To speak of a trigger may mask the fact that objective discovery for the purposes of section 32(1) may be the culmination of a series of events."

38. In particular I think that the Chief Master was correct to emphasise that the requirement of reasonable diligence applies throughout, and that care is necessary when using the word trigger. As Males LJ made clear in *OT Computers*, while the question of reasonable diligence may have to be asked in 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), reasonable diligence is an objective test that is required throughout, not just when the claimant is on notice of something that requires investigation.

39. The final relevant point on the law is also apparent from Males LJ's judgment in *OT Computers* at [47], and was reflected in the Chief Master's approach. In order to establish reasonable diligence, 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. This reflects the fact that the position in which the claimant finds himself is relevant for the purposes of assessing whether he has acted with reasonable diligence.

40. It is not in dispute that the claimant's personal characteristics are irrelevant for these purposes, but as the Bank pointed out in its skeleton argument, matters such as the fact that it has suffered a loss may be very important. As Lord Hoffmann said in *Peconic Industrial Development Ltd v Lay Kowk Fai* [2009] HKCFA 17 at [30]-[31] in a passage considered in *OT Computers* and *Hussain v Mukhtar* [2016] EWHC 424 (QB):

> "[30] What does "the plaintiff…could with reasonable diligence have discovered [the fraud]" mean? The word "reasonable" denotes an objective standard. But that is not the end of the matter. It is the plaintiff who is supposed to have shown reasonable diligence...It does not follow that because an objective standard is applied, he must be assumed to have been someone else…
>
> [31] There can be no doubt, I think, that for the purposes of the inquiry into what the plaintiff could have done, he must be assumed to have suffered the loss which he actually suffered. In this case, one assumes the plaintiff to be a bank which has lost HK$400m. When it discovered (or could reasonably have discovered) the loss, it must be assumed to have displayed some curiosity about why this should have happened…"

The Chief Master's application of the law

41. The Chief Master dealt with Boyse's case on limitation in what he described as two main strands. The first related to the question of whose knowledge was relevant. Was it Boyse itself, as a Gibraltar-based trust company with local directors, or was it Mr and Mrs Sharma as to whom the evidence was that they "are entitled to give directions to Boyse (and its trustees … who managed Boyse) in relation to the management of Boyse's properties"? He addressed this question against the background of a statement by Aikens LJ in *Allison v Horner* [2014] EWCA Civ 117 at [15] that knowledge of the deceit by a claimant's agent will not start the limitation period running under section 32(1), nor will the fact that an agent could with reasonable diligence have discovered it.

42. The Chief Master said that it was necessary to approach this first strand on the basis of Boyse's pleaded case. Boyse pleaded that it had a customer banking relationship with the Bank as a result of Mr and Mrs Sharma's dealings with the Bank, that its investments were held for Mr and Mrs Sharma and that they made recommendations to Boyse on the basis of which its directors made their decisions. He also referred to Boyse's plea that the Bank's knowledge of Boyse's business was obtained through its dealings with Mr Sharma and that Mr and Mrs Sharma and, through them Boyse, were aware of LIBOR and its purpose. He pointed out that Boyse also pleaded that the background to the sale of the IRHPs involved dealings between Mr Sharma and the Bank and that the express LIBOR representation was made to Mr Sharma.

43. His conclusion that in these circumstances it was quite impossible for Boyse to treat Mr and Mrs Sharma as mere agents for the purposes of section 32(1) was not challenged on appeal, nor was his conclusion that the distinction between the directors of Boyse on the one hand and Mr and Mrs Sharma on the other was of limited significance given the objective nature of the test. For the purposes of this appeal, therefore, I proceed on the basis that the individuals whose knowledge and states of mind are most relevant for the reasonable diligence test are Mr and Mrs Sharma.

44. The second strand concerned what the Chief Master called the character of the knowledge that could have been obtained, and whether it could only have been obtained by exceptional measures. The aspect of the Chief Master's decision which is subject to challenge was how Boyse could with reasonable diligence have discovered the fraud, in circumstances in which it is to be assumed that Boyse (through Mr and Mrs Sharma) had no actual knowledge of the Final Notice at any time before 19 February 2013.

45. The Chief Master expressed his conclusions on this aspect of the case in paragraph 68 of his judgment:

> "The LIBOR fraud that is based upon what are alleged to be dishonest representations was apparent from the FCA Final Notice and the other findings. Boyse was clearly aware that the IRHPs used LIBOR and upon widespread publicity being given to the findings of the manipulation of LIBOR and the undermining of its integrity, that something had gone wrong. Boyse had sold both properties long before 6 February 2013 and had therefore suffered loss. Objectively, Boyse was on notice that something had gone wrong. It is pleaded that sale was necessary because of the cost of the IRHPs and their effect upon Boyse's cash flow and profitability. A reasonably diligent person in Boyse's shoes would have been alert to the widespread publicity about LIBOR even before 6 February 2013. The Final Notice was a trigger that started time running."

The Grounds of Appeal

46. There were two specific parts of this conclusion which featured in the second and third of Boyse's grounds of appeal. The second ground was that the Chief Master erred in finding as a fact that Boyse was aware of "widespread publicity being given to the findings of the manipulation of LIBOR and the undermining of its integrity". The third ground was that the Chief Master erred in fact and/or application of law in finding that there had been, prior to 6 February 2013, a sufficient "trigger" for Boyse to investigate the Bank's LIBOR fraud.

47. The fourth ground of appeal was expressed in more general terms:

> "The Master erred in fact and/or application of law in finding, at paragraph [68] of the Judgment, that:
>
> a. Boyse could with reasonable diligence have discovered the Bank's LIBOR fraud on 6 February 2013;
>
> b. Alternatively, to the extent that the Master so found, in finding that Boyse could with reasonable diligence have discovered the Bank's LIBOR fraud by 19 February 2013."

48. The third and fourth grounds of appeal were further developed in Boyse's skeleton argument as follows:

> "… the Court erred in fact and/or law and should have found it more than fanciful that Boyse:

(1) was not "triggered" in respect of LIBOR fraud prior to February 2013, so as to be on the lookout on 6 February 2013 for news articles about LIBOR fraud

(2) would in its particular circumstances have needed to take exceptional measures in order to have discovered the Bank's fraud before 19 February 2013 (including reading the news articles on 6 February 2013)."

49. These lines of challenge are not straightforward for Boyse as a matter of principle. The conclusions reached by the Chief Master reflected his evaluation of the evidence and his assessment of all the circumstances of the case. They are therefore only susceptible to challenge if they were wrong by reason of some identifiable flaw in his approach which undermined the cogency of his conclusion. I will deal with the grounds in order.

Ground 2

50. In my view the second ground of appeal might have had some substance if it accurately recorded what the Chief Master decided. The reason for this is that such evidence as there was is not consistent with Boyse having actual awareness of widespread publicity being given to the findings of the manipulation of LIBOR and the undermining of its integrity. However, I do not think that this is what the Chief Master was saying for two reasons. First it would have been flatly inconsistent with the evidence he recited earlier in his judgment but secondly I do not think that it fits with the language he used.

51. The facts which the Chief Master said were facts of which Boyse was clearly aware were (a) that the IRHPs used LIBOR and (b) that something had gone wrong. The phrase "and upon widespread publicity being given to the findings of the manipulation of LIBOR and the undermining of its integrity" did not in my view reflect a finding by the Chief Master that Boyse was actually aware of that publicity. It simply recorded an actual state of affairs (relevant because of the objective nature of the underlying question) in the context of which the significance of Boyse's actual awareness of the facts that the IRHPs used LIBOR and that something had gone wrong was to be assessed.

52. The reason that Boyse was aware that something had gone wrong was that both properties had been sold long before 6 February 2013 and Boyse had therefore suffered loss, a conclusion that the Chief Master expressed in the next sentence. The significance of widespread publicity is then dealt with at the end of the paragraph where the Chief Master explained that a reasonably diligent person in Boyse's shoes would have been alert to the publicity about LIBOR even before 6 February 2013, because as he had just explained the property sales were necessary as a result of the cost of the IRHPs and their effect upon Boyse's cash flow and profitability. In my view this ground of appeal does not support Boyse's case that the Chief Master was wrong in the conclusion he reached.

Grounds 3 and 4

53. Boyse's skeleton argument concentrated on the third and fourth grounds of appeal. The question of whether the Chief Master erred in fact and/or application of law in finding that there had been, prior to 6 February 2013, a sufficient "trigger" for Boyse to investigate the Bank's LIBOR fraud is difficult to disentangle from the broader questions of whether Boyse could with reasonable diligence have discovered the Bank's

LIBOR fraud on 6 February 2013, or in any event before 19 February 2013. I shall therefore take them together.

54. First, it was said that there was some uncertainty as to the meaning of the final sentence of paragraph 68, and in particular whether the Final Notice was itself the trigger which should have caused Boyse to commence investigating with reasonable diligence. In my view, it is clear that that is not what the Chief Master meant. He was using the word "trigger" to describe the moment in time from which the limitation period commenced to run. He was not using it in the sense in which it has been used in many recent cases, most particularly by Foxton J in *Granville*, by Sir Geoffrey Vos C in *DSG Retail* and by Males LJ in *OT Computers* where it was used to describe a trigger point in the form of an event or circumstance sufficient to put the claimant on notice of something which merited investigation.

55. However, this construction of the Chief Master's judgment led to a submission based on the concept of "exceptional measures" with which I should in any event deal. As he had earlier identified, the question of whether knowledge (or more accurately discovery) of the fraud can only be obtained by "exceptional measures" is one which the court is required to consider in accordance with the authoritative guidance given in *Paragon*. On this issue, Mr Auld QC submitted, anyway initially, that a key question for the court was whether it was sufficiently arguable for summary judgment purposes that it would have required exceptional measures for Boyse to have discovered the Bank's specific LIBOR fraud within the 13 day window between 6 February 2013 and 19 February 2013.

56. This submission was, before the Chief Master, directed to the part of Boyse's case to the effect that if Mr or Mrs Sharma had read the Final Notice, they would still not have discovered the fraud within the meaning of section 32(1), having regard to the fact that discovery of a fraud "in a more general sense" is not sufficient and what is required is discovery of the precise deceit (*Allison v Horner* at [14]). By the time the appeal came to be argued, this was no longer part of Boyse's case, but it is relevant context for the points that remained in issue and I think I should deal with it.

57. The Chief Master accepted Mr Auld QC's submission that discovery of the fraud for the purposes of section 32 does not take place, in the sense that the essential knowledge has not been acquired, unless the person concerned has some understanding of what the knowledge so acquired actually means. However, he went on to say that it did not follow from this that the person concerned needed to know how to plead the dishonest representations that are said to have been made. He pointed out that the language used in the Final Notice was not technical and that "any person of reasonable sophistication could not fail to understand what LIBOR rates being manipulated and undermined could mean."

58. As I understood it, Boyse does not now dispute that the Final Notice and the widespread publicity surrounding it on 6 February 2013 did in fact contain sufficient information to enable Boyse to plead the LIBOR misrepresentation claim, but in any event I agree with the Chief Master's conclusion. I do not think that there can be any doubt that, if Boyse through Mr and Mrs Sharma had read the Final Notice they would have discovered that the Bank had behaved dishonestly in manipulating or attempting to manipulate LIBOR. Indeed, as I have already explained, Boyse's own case is that the

Final Notice was the FSA's publication of its findings to that effect, anyway in relation to Swiss Franc, Japanese Yen and US Dollar LIBOR.

59. Although the question of whether Boyse would have had to take exceptional measures in order to discover the specific fraud on which it now relies is a slightly different issue, the same conclusion applies. This question was dealt with in paragraph 56 of the Chief Master's judgment where he concluded that, although the Final Notice only related to Japanese Yen, Swiss Franc and US Dollar LIBOR, this made no difference because Boyse's own case was that the Bank was guilty of manipulation of LIBOR generally not a specific LIBOR currency.

60. The principal significance of this point went to the question of whether, even if Boyse should with reasonable diligence have discovered the Final Notice, it was entitled to a reasonable time thereafter to carry out further investigations for the purpose of determining, amongst other matters, the legal significance of what was disclosed. The Chief Master decided that, as the necessary facts to plead a case were available to Boyse from the time of publication of the Final Notice, it followed that further time for investigation could not be required. In reaching that decision he gave careful consideration to the content of the Final Notice, the facts of which Boyse was in any event aware and the form in which it has now advanced its case in its particulars of claim.

61. In my judgment, the Chief Master reached a conclusion on this point that was correct. The submission, before the Chief Master and not renewed on appeal, that further time was required does not give sufficient weight to the principle that discovery of sufficient facts to justify pleading a case in deceit is what is required. In light of the pleaded reliance on the Bank's representations as to LIBOR, he was entitled to conclude that the evidence contained in the Final Notice would have completed the picture required to plead a case of fraudulent misrepresentation in the form now advanced.

62. Boyse's skeleton argument recognised that there was an alternative reading of paragraph 68 of the Chief Master's judgment to the one I have described in paragraph 54 above. This was that the Chief Master made a finding that Boyse's obligation to use reasonable diligence was engaged before 6 February 2013, such that it should have been on the lookout for news articles on 6 February 2013. In my view, it is clear that that is what the Chief Master meant, having regard to his conclusions that Boyse knew that the IRHPs used LIBOR and that something had gone wrong (badly so on Boyse's own case) because the properties had had to be sold at an undervalue as a result of the cost of the IRHPs and their effect upon its cash flow and profitability.

63. The criticism of this conclusion advanced by Mr Auld QC was that there was nothing about the things which had gone wrong (i.e. the sales of Boyse's properties in 2011 and 2012 and their consequences) which, from an objective point of view, should have triggered an enquiry about an industrywide concealed LIBOR fraud, as opposed to an enquiry about IRHP mis-selling. In short it was said that the unexpected expense of the IRHPs did not and should not have prompted Boyse to investigate an unrelated and specific LIBOR manipulation fraud. To reach that conclusion would fly in the face of the principle that it was necessary to show that Boyse was on notice of the specific fraud rather than something more general.

64. The response of Ms John QC to this submission was that it was Boyse's own pleaded case that, from March 2012, the Bank's conduct in relation to the fixing of LIBOR rates was "the subject of considerable adverse press comment and widespread concern". She pointed to the fact that this widespread reporting commenced shortly after Boyse had been forced to sell the second of its properties for substantially less than it could have done in the absence of the IRHPs, thereby suffering a significant loss as a direct result of them. She relied on the fact that it was Boyse's own case that the IRHPs were entered into in reliance on the Bank's representations that LIBOR was not being manipulated.

65. In summary, the Bank's case was that there could be no credible challenge to the Chief Master's conclusion that a reasonably diligent person in Boyse's shoes would have been alert to the widespread publicity about LIBOR prior to February 2013 in circumstances in which on Boyse's own pleaded case there was widely-available material which indicated that it might have been lied to by the Bank about an issue which mattered to it and that it had suffered a substantial loss as a result.

66. In making that submission the Bank pointed to the fact that it was a central part of Boyse's case that it, through Mr and Mrs Sharma, was aware of LIBOR and what was described as "its supposed and proper purpose as an independent benchmark interest rate and were aware in general terms as to the way in which LIBOR was set and the involvement of the bank in that process." Boyse had also pleaded that it concluded the 2007 facility and the IRHPs in reliance on representations made to it by the Bank that LIBOR was an independent benchmark interest rate and that it was the appropriate interest rate for the purposes of the IRHPs in preference to the Bank's own base rate.

67. In my judgment it is clear that the Chief Master was entitled to reach the conclusion that he did on this point. He took into account a series of events and circumstances which set the scene for a reasonably diligent person in the position of Boyse to be required to be on the lookout for publications such as the Final Notice. These events and circumstances were all referred to in the course of the Chief Master's judgment, but I can summarise them in three categories as follows.

68. The first comprises facts directly relating to the LIBOR representations on which Boyse relies in pleading its own case:

    i) It was aware of LIBOR and its proper purpose as an independent benchmark interest rate and was aware in general terms as to the way in which LIBOR was set and the involvement of the Bank in that process.

    ii) It was conscious of the fact that, at the Bank's insistence, the IRHPs were referenced to LIBOR and it relied on what it was told by the Bank about LIBOR when deciding to enter into the IRHPs.

    iii) The LIBOR representations were of sufficient importance to it that they had a material influence on its decision to enter into the IRHPs.

69. The second category relates to the losses that it sustained as a result of the IRHPs and again forms part of Boyse's own case:

    i) Boyse was forced to sell two properties at a significantly lower value than it would have done but for the IRHPs and those sales were extremely significant

to Mr and Mrs Sharma because they effectively lost their pensions as a result of the IRHPs.

ii) It must be Boyse's case that the LIBOR representations influenced it in some way in entering into the IRHPs, because otherwise these losses could not (contrary to Boyse's case) be recoverable as part of its LIBOR misrepresentation claim.

70. The third category is that the publicity first about LIBOR, describing it as outdated and discredited, and then about the conduct of the Bank itself in fixing LIBOR rates was only shortly after Boyse sustained the losses it has pleaded from the sale of the two properties. It is plain that, on Boyse's own case, something had gone wrong (as that phrase is used in the authorities), and it is plain that Boyse was actually aware that it had.

71. Against that background I agree with the Bank's submission that the Chief Master's conclusion that a reasonably diligent person in Boyse's shoes would have been alert to that widely available material was plainly correct. I am also satisfied that he was entitled to reach the conclusion that there was no real prospect of the contrary being successfully argued at trial. The position was sufficiently clear to justify the grant of summary judgment in favour of the Bank. There is in those circumstances no need for a trial and one would not be justified.

72. Accordingly, I am satisfied that the Chief Master was entitled to reach the conclusion that he did. It is clear that Boyse has no real prospect of establishing at trial that it could not with reasonable diligence have discovered the fraud on which it relies before 19 February 2013. The appeal will therefore be dismissed.