Neutral Citation Number: [2022] EWHC 3271 (Comm)

Claim No: CL-2016-000758

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 22/12/2022

Before :

MR. ADRIAN BELTRAMI KC
Sitting as a Judge of the High Court

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Between :

GRANVILLE TECHNOLOGY GROUP LIMITED (IN LIQUIDATION) **VMT LIMITED (IN LIQUIDATION)** **OT COMPUTERS LIMITED (IN LIQUIDATION)**	**Claimants**
- and -	
~~**INNOLUX CORPORATION**~~ **CHUNGHWA PICTURE TUBES LIMITED** **LG DISPLAY CO. LIMITED** **LG DISPLAY TAIWAN CO. LTD** ~~**SAMSUNG ELECTRONICS CO. LIMITED**~~ ~~**SAMSUNG ELECTRONICS TAIWAN CO. LIMITED**~~	**Defendants**

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Tony Beswetherick KC (instructed by **Osborne Clarke LLP**) on behalf of the Claimants/Respondents

Daniel Piccinin and Sarah O'Keeffe (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) on behalf of the 3rd and 4th Defendants/ Applicants

Hearing date: 16 December 2022

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Approved Judgment

I direct that 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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ADRIAN BELTRAMI KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 21 December 2022 at 10:30am.

ADRIAN BELTRAMI KC:

1. This is an application, by notice dated 3 October 2022, made by the 3rd and 4th Defendants (together LG), to strike out or for summary judgment in respect of the claim made by the Claimants for pre-judgment interest on the compound basis under the Court's equitable jurisdiction. The application is made pursuant to CPR 3.4(2)(a), that the relevant part of the statement of case discloses no reasonable grounds for bringing a claim, and further or in the alternative pursuant to CPR 24.2, that the Claimants have no reasonable prospect of succeeding on that claim and that there is no compelling reason why its determination should be disposed of at trial.

2. The application is supported by the 5th witness statement of Jonathan Patrick Knox Kelly, dated 3 October 2022, and opposed by the 8th witness statement of Andrew Christopher Bartlett dated 18 November 2022. Whilst those statements are of assistance in setting out the relevant background and on directing the Court to the points considered by the parties to be significant, the application raises a point of law rather than any matter of disputed evidence.

The claim

3. This is a "follow-on" damages claim, initially brought against 6 defendants in respect of an infringement of EU competition law in the market for LCD panels in the European Economic Area, as found by the European Commission in its decision in Case COMP/39.309 adopted on 8 December 2010 (the **Decision**). The Decision established that the Defendants unlawfully entered into agreements and/or concerted practices in the EEA in respect of the sale of Liquid Crystal Display panels measuring at least 12 inches (**LCDs** and the **LCD Cartel**) during all or part of the period from 5 October 2001 to 1 February 2006. Granville accordingly alleges an infringement of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area, and a breach of statutory duties owed pursuant to section 2(1) of the European Communities Act 1972. The Defendants were addressees of the Decision, which is binding on the Court, and the remainder of the dispute is concerned with issues of causation and loss. This has been set down for a 5 week trial commencing in October 2023.

4. The 1st and 3rd Claimants were UK personal computer manufacturers in the 1990s and early 2000s. The 2nd Claimant carried out a manufacturing and assembly role on behalf of the 1st Claimant. The 1st Claimant ceased trading and entered administration on 27 July 2005 and liquidation on 15 January 2007. The 2nd Claimant entered administration on 5 August 2005 and liquidation on 15 January 2007. The 3rd Claimant ceased trading and entered administration on 29 January 2002 and liquidation on 5 April 2004.

5. The Defendants were, in the period covered by the Decision, sellers, distributors or manufacturers of LCDs. The claim arises from direct and indirect purchases by the Claimants of LCDs, which were purchased in the form of LCD monitors or notebook computers, and in their original form. The Claimants have obtained summary judgment on liability against the 2nd Defendant, which has taken no active part in the litigation since October 2020, and have reached confidential settlements with the 1st, 5th and 6th Defendants.

6. The Claim Form was issued on 7 December 2016. On 19 August 2022, the Claimants served Re-Re-Amended Particulars of Claim. This is the most current version of the pleading. After taking into account the various confidential settlements, the "*revised total claim value*" is said to be £19,758,105. This is inclusive of interest of around £13.5m, calculated (on a compounded basis) to 30 June 2022. This means that interest amounts to considerably more than half the claim value.

7. The claim to interest has itself been modified in the recent round of amendments. So far as material, it is in the following terms:

   "61. The Claimants are entitled to complete compensation for all of their losses, including for lost return on investments and/or for additional financing costs and/or for interest losses incurred as a result of having to pay unlawful Overcharge amounts in respect of LCD Panels and LCD Products throughout the Relevant Period and having been kept out of and denied the commercial use of monies.

   "62. Throughout the Relevant Period the Claimants and each of them borrowed money from banks and other creditors, on which interest was payable at prevailing rates. In the absence of the Overcharges to which the Claimants were subjected throughout the Relevant Period, the Claimants would have offset such savings against their respective borrowings and/or would have borrowed less and/or would have reinvested the amounts in their respective businesses.

   "63. In the premises and/or in view of the facts and matters pleaded herein, the Claimants are entitled to and do claim ~~compound~~ interest whether under common law and/or under the court's equitable jurisdiction on a compound basis. Compound interest is claimed at a rate of 2.5% per annum above the Bank of England Base Rate as it stood from time to time, alternatively at such rate and for such period up to the date of judgment as the Court thinks fit….

   "65. Further or alternatively, the Claimants claim simple interest under s. 35A Senior Courts Act 1981 on the sums found to be due to the Claimants at the rate of 8% per annum (being equivalent to the statutory rate of the interest that may accrue under s. 189 of the Insolvency Act 1986, Rule 14.1(3) of the Insolvency (England and Wales) Rules 2016 and Rule 2.88 of the Insolvency Rules 1986) or at such rates and for such periods up to the date of judgment as the court thinks fit."

   (underlinings represent amendments made by the Re-Re-Amended Particulars of Claim).

8. In July 2022, LG served a request for further information seeking details of the claims for compound interest. This was answered by the Claimants on 3 August 2022. The substance of the answers was as follows:

   a. In respect of the periods before the Claimants entered administration and ceased trading, the claim is for compound interest as damages, following the decision of the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561. In respect of subsequent

periods, the claim is based on the Court's equitable jurisdiction to award compound interest.

b. Facts relevant to the exercise of the equitable jurisdiction include (without limitation):

"(a) The intentional and/or serious wrongdoing on the part of the LG Defendants that constituted the cartel; and/or

(b) The deliberate concealment of such wrongdoing which prevented the pursuit of the claims and the recovery of damages by the victims of the cartel."

9. The reference to "*deliberate concealment*" had first appeared in the Claimants' Reply (now Re-Amended Reply) to the LG Defence where, in response to a plea of limitation, the Claimants alleged deliberate concealment for the purpose of section 32(1)(b) of the Limitation Act 1980.

The application

10. The application, as noted above, is brought pursuant to CPR 3.4(2)(a) and CPR 24.2. The sole focus of the application is on that part of the claim for compound interest which relies upon the equitable jurisdiction of the Court. LG contend that it is clear as a matter of high authority that the pleaded claim does not engage such equitable jurisdiction and that the Claimants must be restricted to a claim for simple interest pursuant to statute unless, and only in respect of the periods prior to administration, they can satisfy the criteria for establishing interest as damages.

11. Insofar as the application is made for summary judgment, the Claimants referred to the well known considerations set out by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15]:

"(i). *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

(ii). A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

(iii). In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

(iv). This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

(v). However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be

available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

(vi). Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

(vii). On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

12. I proceed on the basis that there is, on an application such as the present, no material difference in the test to be applied under CPR 3.4(2)(a): see *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, at [20]. The immediately applicable element of the *Easyair* test is that at (vii) above. LG contend that their application does indeed raise a short point of law and that the Court should "*grasp the nettle*" accordingly.

Preliminary point

13. Mr Beswetherick KC, on behalf of the Claimants, contended that the application was unsuitable for summary determination, that it served no useful purpose but created only litigation risk, and that I should dismiss it peremptorily as a matter of case management. This was for a number of reasons, principally the following:

    a. The application sought to strike out only part of the Claimants' claim for interest. Hence it would not dispose of the action, indeed would not even dispose of the claim for interest.

    b. On LG's case the point could be determined in two hours, which means that there would be no appreciable savings in having the argument now rather than at the trial.

c. On the Claimants' case, the point was not in fact capable of determination in two hours but was both difficult and appropriate to be determined on the facts as found at trial rather than in the abstract.

d. The litigation risk of deciding the point now is that it might open up a parallel avenue of appeal, which could be inefficient and wasteful of costs.

14. Mr Beswetherick referred me to dicta of Laddie J in *Aston Barrett v Universal-Island Records Limited* [2003] EWHC 625 (Ch) at [44] and [47] and of Potter LJ in *Wragg v Partco Group Ltd* [2002] EWCA Civ 594 at [27], which involve discussions of the sort of case management considerations which arise or which may arise when applications are made to dispose of parts of existing claims. The considerations are ultimately pragmatic ones, and the weight of specific factors will vary from case to case.

15. LG's response to this was to take issue with the suggestion that the point was difficult or fact dependent. Mr Piccinin, on their behalf, argued that, if the claim was a bad one, it was in everyone's interest that it be removed. He was dismissive of the possibility of an appeal. As for utility, he focussed on the quantum of the asserted claim. On LG's calculations, the equitable claim is said to be worth about £9.4m, which is half of the total amount claimed. A claim for simple interest at 2% would be worth considerably less and so there is likely to be value, and in particular settlement value, in resolving the point now. On the numbers, Mr Beswetherick countered that the alternative claim for simple interest at 8% amounts to more than the equitable claim and that a claim at 4% produces a broadly similar number.

16. The application was heard in the Friday Commercial Court list, in which half a day was allocated. It was not practicable to treat this point as a preliminary issue without putting in jeopardy the application itself. Instead, I heard full argument on the merits of the application, to which I will now turn. I will then return to the case management point when considering the consequences of my findings.

Compound interest in equity

17. A convenient starting point is the decision of the Privy Council in *Johnson v The King* [1904] AC 817. This was a claim for the recovery of monies from a government contractor in excess of his entitlement and as a result of inflated bills. It was advanced on two bases: (a) the return of money obtained by fraud; and (b) money had and received on the grounds of mistake. The contractor was convicted of obtaining the funds by false premises and sentenced to nine months imprisonment. In response to the civil claim, however, he denied the fraud and paid the money into Court. The Crown accepted the payment in satisfaction of its mistake claim and did not then seek to prove the fraud. The question for the Privy Council was whether, in such circumstances, the Crown should be entitled to an award of interest. The Privy Council concluded that it was not so entitled because, following the decision of the House of Lords in *London, Chatham and Dover Railway Co. v South Eastern Railway Co.* [1893] AC 429, interest was not payable at common law on such a claim.

18. Having observed that, if the Crown intended to rely on fraud as giving a right to interest, that case ought to have been stated plainly and proved clearly, Lord MacNaghten continued, at p 822:

"In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law, or in a Court which has a jurisdiction both equitable and legal, as the Supreme Court of Sierra Leone possesses under the Ordinance of November 10, 1881."

19. In *President of India v La Pintada Compania Navigacion SA* [1985] AC 104, Lord Brandon summarised the circumstances in which equity would award interest, including compound interest. This was not a case which was directly concerned with the award of compound interest in equity. Nevertheless, Lord Brandon summarised the law relating to the award of interest in four areas, including, at p 116:

"Thirdly, the area of equity. The Chancery courts, again differing from the common law courts, had regularly awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance, rescission and the taking of an account. Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position."

And on the same page, he then continued: "*... the Admiralty Court never, and Courts of Chancery only in two special classes of case, awarded compound, as distinct from simple, interest."*

20. It will be seen that the description of the power to award interest in cases of "*fraud*" bears a close relation to the passage contained in the speech of Lord MacNaghten in *Johnson*.

21. The scope of Lord Brandon's dictum was considered in detail by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. The claim was for the restitution of principal and interest on payments made under *ultra vires* interest rate swaps. The House concluded, on a 3:2 split, that only simple interest, rather than compound interest in equity, was available, an important factor in the reasoning being that Parliament had twice since 1934 addressed the award of interest on common law claims and had not authorised the use of equity to assist the common law with compound interest.

22. Lord Browne-Wilkinson said the following as regards the equitable jurisdiction, at p 701:

"In the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under common law or statute to award any interest. The

award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee."

23. There could be no sensible suggestion that, by so describing the "*fraud*" jurisdiction, Lord Browne-Wilkinson was intending to extend the ambit of Lord Brandon's dictum. *Westdeutsche* was not a case of fraud and there was neither need nor reason to do so. This was just a shorthand way of mentioning, but then excluding from further consideration, an aspect of the jurisdiction which did not matter for the purpose of the analysis. And indeed, his Lordship cited the dictum in the very next page without seeking to amend it.

24. However, the various speeches in *Westdeutsche* did traverse the question whether the dictum was inclusive or exclusive, and on this their Lordships were split. Lord Woolf, for example, at p 726, suggested that Lord Brandon might have been doing no more than "*describing the situations where in the past the equitable jurisdiction had been exercised."*

25. The proper interpretation of the House of Lords' treatment of Lord Brandon's dictum was considered by the Court of Appeal in *Black v Davies* [2005] EWCA Civ 531. Mr Black traded copper futures through various brokers including Brandeis Brokers Ltd, of which Mr Davies was the managing director. He obtained judgment against Mr Davies in deceit, in respect of representations dishonestly made about a large delivery of copper which caused Mr Black to retain short positions which he would otherwise have closed. The Judge ordered damages plus interest, with a further hearing to determine whether the interest should be simple or compounded. That hearing was allocated to a different Judge, McCombe J, who held that only simple interest should be awarded and that "*the Court does not have jurisdiction to award compound interest in respect of a judgment for damages for deceit."*

26. The Court of Appeal allowed Mr Davies' appeal to an extent that made the debate about interest academic. However, the Court went on to consider that debate, obiter, as a matter of "*general importance*". There are three relevant aspects of the judgment, delivered by Waller LJ (at [87-88]):

    a. The Court concluded that the majority in *Westdeutsche* were "*firmly of the view*" that the equitable jurisdiction to award compound interest was limited to the two categories of case identified by Lord Brandon.

    b. This meant that the "*fraud*" limb went no further than that described by Lord Brandon, namely "*a case where money has been obtained and retained by fraud; in other words, where the fraudster has had in hand a fund which he has, or is deemed to have, made use of for his own benefit."*

    c. The claim failed on the facts because the fraudulent misrepresentation by Mr Davies "*did not cause him to obtain and retain money belonging to the Black parties; it caused them to lose money by trading in the markets."*

LG's case

27. LG argued that the true ambit of the equitable jurisdiction to award compound interest is now settled, and that any claim must fall within one of the two limbs of Lord Brandon's dictum; that in the absence of any suggestion of a fiduciary relationship the second limb is inapplicable; and that there is no allegation that a fund has been obtained and retained by fraud, such that the first limb is also inapplicable.

28. In support of these contentions, Mr Piccinin pointed out that there is no express allegation of fraud or dishonesty on the face of the pleadings. And he submitted that an allegation of the statutory torts in breach of competition law does not intrinsically involve fraud or dishonesty. He cited in this respect *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920, in which the House of Lords concluded, at [62], that "*mere price fixing*", that is "*the making and implementation of a price fixing agreement without aggravating features"* was not without more, at least at any time relevant to that case, a criminal offence. I am doubtful that this case is itself authority for the broad proposition for which it was cited but, as I shall indicate, this was not itself challenged. Mr Piccinin also submitted that there was in any event no allegation that his clients had obtained or retained a fund by reason of any fraud. At one point, he added the further qualification that there was no fund "*belonging to the Claimants*" but then said that he did not need to advance that particular point lest it be "*controversial*". Mr Beswetherick did not accordingly respond on that point. In fact, it may be quite an important point for the purpose of the analysis, as I shall explain, but I do not consider it is a necessary point for the application.

29. Mr Piccinin pointed in particular to the Answers given to LG's request for information. Neither, he said, "*the intentional and/or serious wrongdoing*" which constituted the cartel nor "*the deliberate concealment of such wrongdoing*" could suffice. Otherwise, compound interest in equity would be available in every cartel damages claim.

30. At some points in his submission, Mr Piccinin gave the impression that he was advancing a more technical pleading point, to the effect that the Claimants' pleadings did not use the words "fraud" or "dishonesty" and that the absence of such words is itself fatal. The requirement that an allegation of fraud must be distinctly alleged and distinctly proved is undoubted, and as Mr Piccinin pointed out, it was even adverted to by Lord MacNaghten in *Johnson*. However, especially in a case involving concepts of equitable fraud (see below), I intend to focus on the substance, whilst always bearing in mind that the manner in which the substance is articulated may also be important.

The Claimants' case

31. Mr Beswetherick did not, as I understood it, advance any significant challenge to LG's analysis of the law. Whilst he did take me to the dissenting speeches in *Westdeutsche*, he did not invite me to conclude that Lord Brandon's dictum should be extended into other species of conduct. And although he pointed out, correctly, that the judgment in *Black v Davies* was, so far as interest was concerned, both obiter and delivered without the benefit of oral argument, he did not suggest that it was wrong in its assessment of *Westdeutsche* or even arguably so.

32. The starting point for Mr Beswetherick's argument was the need to understand what is (or, for these purposes, is arguably) meant by the word "*fraud*" in this context. He directed me to a commentary on "*The meaning of Fraud*" in *Grant & Mumford on Civil Fraud* (1st ed, 11-001):

"*The word fraud in English civil law is protean. Over at least three centuries judges and commentators have observed that it is elusive of any hard and fast definition. So Lord Hardwicke, writing in 1759 three years after he had stepped down as Lord Chancellor, commented, in an often-quoted sentence, that, "Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no further, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive…*

"The concept of fraud has a long and complex history in the court's equitable jurisdiction. Equity developed the twin notions of constructive or equitable fraud and actual fraud. The former extended to conduct which involved no form of dishonesty. So in Nocton v Ashburton Lord Haldane said that "in Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction." Later in Hart v O'Connor Lord Brightman defined constructive fraud as "conduct which falls below the standard demanded by equity, traditionally considered under its more common manifestations of undue influence, unconscionable bargains and frauds on a power. Fraud in this equitable context does not mean, or is not confined to, deceit: it means an unconscious use of the power arising out of the circumstances and conditions of the contracting parties."…

"… we can conclude, first, that the English law concept of fraud is much wider than the tort of deceit; secondly, that there is no free-standing cause of action in fraud; and thirdly, that the word's meaning is not fixed – "fraud" is a portmanteau expression with different meanings in different contexts. It is descriptive of a range of types of act or omissions which the law characterises as to a greater or lesser degree unconscionable.

"There is no unitary "law of fraud"; instead, as we conceive it, it is an expression which encompasses a widely disparate series of causes of action, substantive remedies and procedural mechanisms, which together constitute the law's response to what may be broadly described as dishonest or unconscionable behaviour."

33. In his skeleton argument, Mr Beswetherick submitted that the concept of "*fraud*" should not be construed as limited solely to the common law tort of deceit but rather as encompassing "*dishonest conduct*". The difficulty with this submission, from the Claimants' perspective, is that there is no allegation, in substance or in form, of dishonesty. So the Claimants would fail on their own test. In the event, the oral argument was put on a rather broader basis, so as to include what is often referred to as "*equitable fraud*", which does not or need not have a dishonest component. Such are the concepts described in *Grant & Mumford* and I certainly accept, at least for the purpose of the present application, that conduct fitting that description may in principle fall within Lord Brandon's use of the word "*fraud*". For example, I would expect that an allegation of undue influence could well do so and that it might not in

such circumstances be necessary to plead in terms the confirmatory statement that undue influence is a species of equitable fraud.

34. Developing this point, Mr Beswetherick submitted, which I also accept, that the boundaries of equitable fraud are not "*hard edged*". He also submitted, in response more to the pleading points taken against him, that it is not necessary to plead the word fraud. All that is required is that a party pleads "*facts which are sufficient to engage equity's jurisdiction."* That is all well and good, and may well be right in the abstract, but it is still necessary to undertake the task of identifying what those facts are for the purpose of assessing whether they do, or do arguably, engage the jurisdiction. On this point, I did ask Mr Beswetherick to explain what facts or conduct the Claimants did rely upon as constituting equitable fraud. In answer, he accepted that the mere operation of a cartel would not in and of itself be enough. What tipped the scales in the present case was the element of "*deliberate concealment*". This was what the Claimants relied upon as engaging equity's jurisdiction to award compound interest.

35. The intended centrality of deliberate concealment may have eluded a casual reader of at least the principal pleadings. It is not mentioned in any version of the Particulars of Claim at all. It does surface in the Reply, but only in the context of section 32(1)(b) of the Limitation Act. It is, however, pleaded as a factor in the Answers to the request for information about the claim for interest, this being something which is said to have prevented the pursuit of the claims and the recovery of damages. It was not argued that the other factor referred to in the Answers, namely the "*intentional and/or serious wrongdoing… that constituted the cartel"*, sufficed.

36. Mr Beswetherick also sought to rely upon some recent cases in which the Courts have accepted that the equitable jurisdiction to award compound interest may be exercised against a dishonest assistant who is not a fiduciary: see *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 and *FM Capital Partners Ltd v Marino* [2019] EWHC 725 (Comm). These cases do suggest an extension, albeit a logical extension, of Lord Brandon's second limb, but do not I feel assist on the application of the first limb.

Discussion

37. As it emerged during the course of the hearing, the issue for determination is a narrow one. Is the allegation of deliberate concealment, as pleaded, sufficient to engage equity's jurisdiction within Lord Brandon's first limb, or is it arguably sufficient so as to leave the matter for trial? I have come to the clear conclusion that it is not. This is for the following reasons:

38. First, I will assume without deciding that, in theory at least, conduct which involves the deliberate concealment of a wrong, may in appropriate circumstances be capable of being characterised as an equitable fraud, given the very broad scope of the concept described in *Grant & Mumford*. This seems most likely where the concealment is itself a breach of duty but I do not need to explore the limits.

39. Second, however, that can only be the beginning of the enquiry. Especially given that broad scope, it cannot be enough for a party merely to point to some conduct which

might fall within the definition of the term. So much is clear from *Black v Davies*. What has to be established is that "*money had been obtained and retained by fraud*".

40. Third, as it seems to me, this must mean that the "*fraud*" must be the cause of action or at least an element of the cause of action and, in any event, that it is the fraud which has caused money to be obtained and retained. Further, and as per *Black v Davies*, the money must be a "*fund which [the fraudster] has had in hand which he has, or is deemed to have, made use for his own benefit."*

41. Fourth, applying this analysis, the contention fails at multiple levels. The allegation of deliberate concealment is not itself a cause of action. Nor is it even alleged to be part of the cause of action, appearing only in the Reply for a different purpose. In any event, the deliberate concealment is not alleged to have caused LG to obtain and retain a fund for their own benefit. LG might or might not have benefited by the receipt of monies from the LCD cartel but that is not something which is explored on the pleaded case. And the only contention in the Answers to the request for information is that the concealment prevented the pursuit of damages but that is clearly not sufficient. Ultimately, the contention fails for similar reasons to those in *Black v Davies*, namely that it is not enough merely to contend that the wrong caused the Claimants to lose money.

42. Fifth, this conclusion is fully consistent with the approach of the House of Lords in *Westdeutsche*, which rejected the invitation to expand the jurisdiction of equity to award interest in aid of common law claims, save for the limited categories already identified, because this was already a matter covered by statute. Lord Browne-Wilkinson considered, at p 717, that their Lordships would be "*usurping the function of Parliament if, by expanding the equitable rules for the award of compound interest, this House were now to hold that the court exercising its equitable jurisdiction in aid of the common law can award compound interest which the statutes have expressly not authorised the court to award in exercise of its common law jurisdiction."* Whilst his Lordship was not thereby restricting the scope of the existing categories, his rejection of a more general extension of the equitable jurisdiction stands also as a warning against a loose approach to the categories. Should it be enough to allege deliberate concealment of a wrong leading to a delay in recovering damages, this would result, in cartel cases as well as many other common law claims, in the very usurpation of Parliament which he was at pains to avoid.

43. As I have noted above, the Court of Appeal in *Black v Davies* referred to a fund "*belonging to*" the Claimant. These were not throwaway words. It may well be the case that the reason for equitable intervention is that the fund in question was obtained in fraud from the Claimant and that the interest award is at least notionally ancillary to an equitable cause of action on the fund itself. That appears to have been one of the questions being considered by Lord Browne-Wilkinson in *Westdeutsche* at pp 717-8. If it is right, then it is a further and itself comprehensive reason why the claim fails. But, as I have indicated, this point was avowedly not advanced by Mr Piccinin and was then avowedly not responded to by Mr Beswetherick, so I do not find it necessary or appropriate to explore further.

Resolution

44. For the reasons I have explained, there is in my judgment no basis on which to invoke the equitable jurisdiction to award compound interest in this case. That only leaves Mr Beswetherick's preliminary point, albeit now surfacing as a conclusory point. Should I, notwithstanding my decision on the merits, nevertheless defer any final determination until after trial? There would be no saving in time in doing so. And nor, on my analysis, is it necessary to have regard to any factual circumstances. The only outstanding question, as I see it, is whether the prospect of an appeal should dissuade me from making a final determination. That would be a peculiar outcome as it would mean that the entire hearing was redundant and the argument would have to be commenced afresh at trial. Given my clear conclusions, it must follow that I consider the prospects of an appeal are slim. But, even if one were to be pursued, it would be on a short and discrete point which would not interfere with the rest of the action. And, without being privy to any of the detail, I can see potential benefit to the parties in knowing where they stand on what is at present a significant element of the damages claim. Hence, reverting to the wording of CPR 24.2(b), I conclude that there is no other compelling reason why this claim for interest should be disposed of at trial.

45. In the circumstances, I strike out the offending parts of the pleading, which no doubt can be conveniently identified in the resultant order, alternatively and if necessary grant equivalent summary judgment.