Neutral Citation Number: [2024] EWHC 3277 (KB)

Case No: KA-2023-000215/
KA-2023-000217

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE ORDER OF MASTER DAGNALL DATED 25 JULY 2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2024

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

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Between :

IN MEDIA TRUST SPA **(a company incorporated under the laws of Italy)** **AS TRUSTEE FOR THE JACARANDA TRUST**	**Claimant/ Respondent**
- and -	
(1) BGB WESTON LIMITED **(2) LORENZO GALLUCCI** **(3) GENNARO PINTO**	**Defendants/ Appellants**

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David Phillips KC and David Fisher (instructed by **Pini Franco Solicitors**) for the **Claimant/Respondent**
Hugh Miall (instructed by **Morgan Rose Solicitors**) for the **First and Second Defendants/Appellants**
The Third Defendant/Appellant did not appear and was not represented

Hearing dates: 11th and 12th November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday, 19th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Martin Spencer :

Introduction

1. In this matter, the Appellants, who are the Defendants in the action, appeal against the Order of Master Dagnall dated 25 July 2023 granting the Respondent permission to amend its Particulars of Claim. Permission to appeal from that decision was granted by the Master himself.

2. To grant permission to amend was not a mere case management decision. The effect of the Master's Order was to deprive the Appellants of the ability to argue that they had a limitation defence, the amendment incorporating new claims being brought outside the limitation period. The amendments would, if allowed, date back to the date that the original proceedings were issued, and this was in time. This is by reason of s. 35(1)(b) of the Limitation Act 1980 ("the Act") which provides:

> 35.— New claims in pending actions: rules of court.
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b**) in the case of any other new claim, on the same date as the original action.** [Emphasis added]

3. The reason that the Master allowed the application was that he considered that the Respondent had an unanswerable argument that s. 32 of the Act applied. This provides:

> 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. [emphasis added]

A central issue before the Master and on this appeal has been the correct interpretation of the words "or could with reasonable diligence have discovered it".

4. It is the Appellants' case that the Master fell into error in making a summary determination of factual matters which were clearly the province of a trial, in conducting a "mini-trial" (or not so "mini" – the hearing took place over 10 days and the Master's judgment extends to almost 200 pages and 457 paragraphs), in misunderstanding the importance of key documents, in failing to understand the potential significance of disclosure and cross-examination and, in the case of the First and Second Appellant, finding that the Third Appellant was, beyond reasonable argument to the contrary, their agent. It is further the Appellants' case that, in order for them to be able to argue their limitation defence, the only appropriate course was for the Master to refuse the application to amend: this would have meant that the action would be dismissed or abandoned, the Respondent conceding that it could not succeed in the claim as originally pleaded, leaving the Respondent to bring fresh proceedings within which the limitation defence and section 32 of the Act could be pleaded and whereby there would be full discovery and cross-examination, and the issues then determined upon a full consideration of the evidence.

5. The judgment of the Master is to be found at [2023] EWHC 1491 (KB). This sets out the detailed facts behind these applications, including the *personae dramatis* and the procedural background. I am grateful to the learned Master for his industry in setting these matters out so fully and, in such detail, making repetition in this judgment unnecessary.

The Background Facts

6. In summary, the facts (in so far as they are agreed) were as follows (which I have largely taken from the Respondent's skeleton argument on this appeal):

i) The Respondent, ("IMT") is the present trustee of the Jacaranda Trust ("Jacaranda") which was established by Paolo Baiani for the benefit of his family. In the autumn of 2014, the sole trustee of Jacaranda was Private Trustees Ltd ("PTL"), a Luxembourg financial services company. Dr Paolo Panico is and was a director of PTL and was the person with day-to-day control of Jacaranda's affairs.

ii) IMT was appointed as a joint trustee (with PTL) of Jacaranda on 4 March 2016 with its responsibility at that stage being limited to fiscal reporting to the tax authorities in Italy. On 27 September 2021 IMT was appointed a co-trustee of Jacaranda with joint responsibility with PTL for the administration of Jacaranda's affairs. PTL resigned as a trustee of Jacaranda on 5 May 2022 and IMT became the sole trustee.

iii) Massimo Gentile was, until the events giving rise to this action, a trusted advisor to Mr Baiani and was appointed as the protector of Jacaranda on 4 March 2016. He was replaced as protector by Mario Carella on 2 December 2021. Michele Amari was PTL's account manager at CBP Quilvest (a Luxembourg bank) ("CBP").

iv) In November 2014 Jacaranda's assets consisted of approximately €9.6 million in an

account with CBP and a 100% shareholding in a construction company.

v) The First Defendant, BGB Weston Ltd ("BGB"), is and at all material times was a financial services company based in London and regulated by the Financial Conduct Authority. The Second Defendant, Lorenzo Gallucci ("Mr Gallucci") is and was at all material times the managing director of BGB. It is Jacaranda's case, and was accepted by the Master, that at all material times the Third Defendant, Gennaro Pinto ("Mr Pinto"), was, and was held out to be, the lnvestment Manager of BGB with authority to transact business on behalf of BGB with PTL. That is disputed by BGB and Mr Gallucci, and whether it is arguable on behalf of the First and Second Appellants that Mr Pinto was not an agent of BGB is one of the issues on this appeal, being a matter which the Appellants would want to explore at trial.

vi) Interactive Brokers Inc ("Interactive Brokers"), which has its headquarters in Greenwich, Connecticut, USA, are stockbrokers offering self-administered online trading accounts.

vii) At all material times JG Global Growth Fund Ltd ("JG Global") and Gryffon Fund Ltd ("Gryffon Fund") were financial services companies located in the British Virgin Islands operating various private mutual funds ("Mutual Funds"). They were wholly owned by JG Capital Management Ltd, a BVI company. BGB was, by delegation from JG Capital Management Ltd, the manager and investment adviser to class E of the JG Global fund and to class E of the Gryffon Fund. It is the Respondent's case that Mr Pinto was, by virtue of his position as Investment Manager of BGB, the de facto investment manager of class E of the JG Global fund and class E of the Gryffon Fund.

viii) In late 2014 PTL wished to invest the liquid funds of Jacaranda in a low-risk investment. It appears from correspondence that PTL initially intended to invest through a Discretionary Managed Account ("DMA") to be held with and managed by CBP.

ix) By an email dated 16 September 2014 Mr Gentile introduced Dr Panico to Mr Gallucci and Mr Pinto. Dr Panico met Mr Gallucci and Mr Pinto in Luxembourg on 3 October 2014. At that meeting Dr Panico, Mr Gallucci and Mr Pinto discussed PTL's investment aims regarding Jacaranda. Mr Gallucci and Mr Pinto explained how they could assist in achieving those aims. It is the Respondent's case, in particular, that they assured Dr Panico that any of Jacaranda's funds placed under their management would be invested in a low-risk portfolio that BGB would create for PTL. Mr Gallucci and Mr Pinto were at all material times aware that PTL was seeking a low-risk investment prioritising the return of capital over large returns on investment.

x) Subsequently Mr Gallucci and Mr Pinto corresponded with CBP about obtaining a mandate to enable BGB to have access to Jacaranda's accounts and about the risk profile of the DMA. It is the Respondent's case, disputed by the Appellants but accepted by the Master, that they would not have acted in that way if there had not been a contractual retainer.

xi) By an email dated 3 November 2014 Mr Pinto informed Dr Panico that BGB was close to receiving the various authorisations necessary for "the product exclusively designed built and dedicated…to the trust so as to be as much as possible in order to meet the expectation of results" (the documents cited are, in almost every case, translations from

the Italian, hence the occasionally stilted language to English ears).

xii) During November and December 2014 Mr Gallucci made recommendations to CBP as to the investments wherein Jacaranda's funds should be invested. Those recommendations culminated in a recommendation to invest €6.7 million in JG Global E shares, €1.4 million in Gryffin Fund E shares, and €600,000 in the Gryffon Fund F shares ("the Gryffon F Fund").

xiii) Mr Amari at CBP referred BGB's recommendation to CBP's Risk Management Department on 15 December 2014. By an email dated 17 December 2014, Mr Amari informed Mr Gallucci that CBP's Risk Management Department rejected those recommendations, stating

> "In particular, the fact of investing a large part of the portfolio in illiquid hedge securities - securities that would be present only in the portfolio in question and not in the others managed by the Bank - would create problems in the light of the latest indications received from the CSSF. Among other things, we will be under inspection at the beginning of the year and therefore our colleagues in Risk Management are currently taking a stricter attitude."

The solution adopted by CBP and BGB which was recommended by CBP to PTL was that the investments recommended by Mr Gallucci and Mr Pinto should be purchased through an "administered account" (an execution only account) for which CBP would have no responsibility.

xiv) On 18 December 2014, acting on the advice of BGB given through Mr Gallucci and Mr Pinto, PTL authorised the investment of €6.7 million in the JG Global E Fund, €1.4 million in the Gryffon E Fund and €600,000 in the Gryffon F Fund (EB/115). PTL also authorised the investment of €500,000 in the Millenium Fund.

xv) On 19 January 2015, by an email to Mr Amari and Mr Gallucci, Mr Pinto requested that Jacaranda invest a further €350,000 in the JG Global E Fund. That request was passed on to PTL by an email from Mr Amari dated 23 January 2015. Dr Panico authorised the further investment by an email dated 26 January 2015 to Mr Amari.

xvi) By an email dated 9 February 2015 to Mr Amari, Mr Gallucci, apparently acting on the recommendation of Mr Pinto, instructed Mr Amari to sell Jacaranda's holding in the Millennium Fund. By an email of 11 February 2015 to Mr Gallucci, Mr Amari stated that it had been possible to reallocate the holding in the Millennium Fund without penalty to Jacaranda.

xvii) By an email of 17 February 2015 to Mr Amari and Mr Gallucci, Mr Pinto requested Mr Amari to transmit a purchase order for shares in the JG Global E Fund to a value of €500,000. By an email dated 23 February 2015 Dr Panico instructed Mr Amari to invest a further €500,000 in the JG Global E Fund.

xviii) Thus, between December 2014 and March 2015 PTL, acting on the advice and recommendations of Mr Gallucci and Mr Pinto, invested €9,550,000 of Jacaranda's funds as follows:

Fund	Date of subscription	Price per share at subscription	Total invested
JG Global Growth Fund Class E shares	01/01/2015	€1.00	€6,700,000
	01/02/2015	€1.0097	€350,000
	01/03/2015	€1.0749	€500,000
Gryffon Fund Class E shares	01/01/2015	€0.0829	€1,400,000
Gryffon Fund Class F shares	01/01/2015	€1.3143	€600,000

xix) By an email dated 29 April 2015 Mr Gallucci requested Mr Amari to "pass a [provisional] full sell order on the JG Global Fund class E" by the next day (30 April 2015). Mr Gallucci explained that the sell order was provisional so that the sell order could be cancelled up to 30 May 2015. adding that it was about "a change of strategy to implement". By an email of 1 June 2015 Mr Amari enquired of Mr Gallucci whether the redemptions had been successful, to which Mr Gallucci replied by email dated 1 June 2015 that "We have decided to confirm them for the end of June…". On 24 June 2015 Mr Pinto emailed Mr Amari and Mr Gallucci asking them not to proceed with the redemptions.

xx) During the month of August 2015, the value of Jacaranda's holding in the JG Global E Fund fell by just over 57% and the value of its holding in the Gryffon E Fund fell by 58%.

xxi) By an email dated 3 September 2015 to Dr Panico, Mr Pinto asked Dr Panico to sign "an appendix for one of the funds used in the management." He went on to state "In fact, it is a better presentation of the management techniques used and does not substantially change any of the contractual aspects." The attachments to that email were what purports to be an email dated 3 September 2014 from JG Capital Management to Mr Pinto, and the appendix referred to by Mr Pinto, which was the "new investment policy approved in March 2015" referred to in that email.

xxii) Mr Pinto's statement that the new investment policy was "a better representation of the management techniques and does not substantially change any of the contractual aspects" was a misrepresentation. The new investment policy was in fact very high risk. Mr Pinto sent another email to Dr Panico on 8 September 2015 in which he said

that there was no urgency in returning the signed investment policy as it was "for administrative purposes only". Dr Panico signed the new investment policy and returned it to Mr Pinto by email on 16 September 2015.

xxiii) In September 2015 Dr Panico was informed by CBP that the value of Jacaranda's holdings in the Mutual Funds had fallen by over 50%. As will become apparent, this is centrally important for the Appellants' case because they contend that this constituted a "trigger" for the purposes of discovery of Mr Pinto's fraud by reasonable diligence for the purposes of section 32 of the Act.

xxiv) By an email dated 16 September 2015, Dr Panico asked Mr Gallucci and Mr Pinto for an explanation of the reduction in value. By email dated 16 September 2015 Mr Pinto falsely responded that the issue was "exclusively technical factor of valuation of certain assets. No worries ...." On 5 October 2015 Dr Panico again emailed Mr Gallucci and Mr Pinto seeking an explanation for the reduction in value of Jacaranda's holdings. Mr Gallucci states that upon receiving that email he asked Mr Pinto "to explain to Dr Panico the facts of the Fund's losses which he said he would do". On the same day (5 October 2015) in the course of a telephone conversation between Dr Panico and Mr Pinto the latter falsely informed Dr Panico that –

a) In addition to the investment in the Mutual Funds there existed a private equity investment which CBP did not have sight of and therefore could not report on.

b) The aggregate value of the Mutual Funds investment and the private equity investment meant that the value of the original investment was and would be maintained.

c) The purchase of the private equity investment had been funded with funds removed from the Mutual Funds' investments.

On the same day (5 October 2015) Dr Panico wrote to Mr Gallucci and Mr Pinto saying, "After the telephone exchanges with Gennaro, I would say that we have clarified: all that remains is to "realign" the bank too."

xxv) A week later, on 13 October 2015, Mr Pinto sent an email to Dr Panico in which he confirmed that in addition to the Mutual Funds' investments there existed a private equity investment with a value of €7,150,000 and that the total value of Jacaranda's investments was in the region of €9,500,000 to €9,600,000. Mr Pinto attached to that email a statement from Interactive Brokers showing holdings to a value of €7,148,753.79, together with 38 pages of supporting financial data. The explanation given by Mr Pinto was false and the Interactive Broker documents were forgeries.

xxvi) On numerous occasions between October 2015 and early 2020 Mr Pinto falsely reported to Dr Panico and Jacaranda affirming the continuing existence and satisfactory performance of the private equity investment. Those reports comprised false statements by Mr Pinto as to the existence and value of the private equity investment as well as forged account statements for an account in the name of Jacaranda Trust at Interactive Brokers. The material supplied consisted of hundreds of pages of supporting records, together with other documents apparently verifying the existence and value from time to time of the private equity investment.

xxvii) It is the Respondent's case, accepted by the Master on the evidence before him, that Dr Panico believed the explanations that he had been given, and believed the Interactive Broker accounts to be genuine. In the course of the appeal hearing, Mr Miall indicated that, at a trial, the Appellants would want to explore this assertion by Dr Panico, given that he later colluded with Mr Pinto in producing a forged IMA (see paragraph xxx) below). Be that as it may, the Respondent contended, and the Master accepted, that Dr Panico was satisfied that the explanation for the apparent loss in the value of the Mutual Funds' investments was that that there existed a separate private equity investment about which CBP did not have knowledge which had been funded by monies removed from the Mutual Funds. The Respondent conceded before the Master, and conceded on appeal, that a full audit of the position by Dr Panico would have revealed that Mr Pinto was lying and that there was no such separate private equity investment with Interactive Brokers. Indeed, a simple enquiry with Interactive Brokers would have revealed that position (as occurred when the Respondent found out the true position, a number of years later), but no such enquiry was made. It was the Respondent's case before the Master, which the Master accepted and which is a critical question for decision on this appeal, that Dr Panico's enquiries of Mr Pinto and their reasonable reliance on Mr Pinto's reassurances effectively cancelled the "trigger" created by CBP informing Dr Panico in September 2015 that the value of Jacaranda's holdings in the Mutual Funds had fallen by over 50% (see paragraph xxiii) above). It is the Appellants' case that it did not, that there is no such concept in law, and that, having been put on enquiry by CBP, the Respondent gained constructive knowledge of the fraud by virtue of the provisions of s.32 of the Act, resulting in time starting to run from the autumn of 2015 (and running out in late 2021).

xxviii) It is the Respondent's case that between September 2016 and 7 March 2020, Mr Gallucci also gave tacit and express assurances to Dr Panico about the existence and value of the private equity investment. It is not clear to me to what extent that is accepted by Mr Gallucci, but it doesn't matter for present purposes: if he did, I presume he will say that this was because he was equally hoodwinked by Mr Pinto.

xxix) On 1 May 2017 Jacaranda redeemed part of its holding of shares in class F of the Gryffon Fund. On 1 March 2018 Jacaranda's entire holding of shares in class E JG Global was redeemed. Jacaranda received €83,068.10. On 1 March 2018, Jacaranda's entire holding of shares in class E of the Gryffon Fund was redeemed. Jacaranda received €73,647.21. On 1 April 2018 Jacaranda redeemed the remainder of its holding of shares in class F of the Gryffon Fund. Jacaranda received €134,245.69.

xxx) In January 2018, Dr Panico and Mr Pinto conspired together to create a written Investment Management Agreement ("IMA") which was backdated to 30 November 2014 and which purported to give BGB control over monies invested by the Trust into the Funds, and containing a written investment strategy pursuant to which the assets had to be managed. It is the Appellants' case that the IMA was created in order to placate the beneficiaries of the Trust, and it was an important document for the purposes of the Respondent's claim as originally formulated: see paragraph 7 below.

xxxi) ln about April 2018 Dr Panico requested the partial redemption of the private equity investment to produce cash of €1 million. Following that request, on 11 April 2018 the sum of €1 million was transferred to PTL's account at CBP. That sum was not paid by BGB but by Blue Anchor Advisory Ltd, a company that is now known to have been owned by Mr Pinto and his wife but which, in an email to Dr Panico dated 26

November 2018, Mr Pinto described as "the Group's special purpose company and traceable to me". It would appear that Mr Pinto was prepared to pay €1m of his own money (or, at least, money to which he had access) to maintain the pretence that there was a separate private equity investment with Interactive Brokers.

xxxii) Following enquiry by PTL, by a letter dated 26 May 2020 Interactive Brokers informed PTL that there was no account held with Interactive Brokers in the name of Jacaranda Trust and that the account numbers that had been provided to PTL by Mr Pinto were not account numbers at Interactive Brokers. In fact, there never was any private equity investment nor had there been any transfer of funds out of the Mutual Funds to fund the acquisition of any private equity investment.

xxxiii) All that was recovered by Jacaranda of the original €9,550,000 invested by BGB was the sum of €333,180.54 being the aggregate of the sums received on the redemption of Jacaranda's holdings in the Mutual Funds, and the "redemption" of €1 million from the supposed partial liquidation of the non-existent private equity investment. The balance of the investment was apparently lost due to adverse market movements.

The course of proceedings

7. Following the revelation by Interactive Brokers on 26 May 2020, the Respondent obtained a worldwide freezing injunction from Saini J on 3 September 2020, supported by an affidavit from Dr Panico, sworn on 28 August 2020. The claim form was issued on 4 September 2020 supported by Particulars of Claim. The central allegation in the claim as issued, and which was used to obtain the ex parte freezing order, was that from about September 2014 each of the Defendants conspired with the others to injure PTL by unlawfully misappropriating €8,700,000 from the Trust. The claim asserted that: (1) In November 2014, PTL (through its director Dr Panico) was fraudulently induced by the Defendants' misrepresentations to enter into the "IMA" on 30 November 2014. (2) The €8,700,000 invested pursuant to the IMA had been intentionally misappropriated by the Defendants in breach of trust, or otherwise remained unaccounted for. Of course, Dr Panico knew these allegations to be false because he knew that the IMA had not been entered into at all on 30 November 2014, but rather that the document had not been created until January 2018. He was thus a party to a deception practised on the court in order to obtain the injunction.

8. By their defence, the First and Second Appellants disputed the claim, asserting that (1) the IMA was a false document created in January 2018 but backdated to November 2014; and (2) PTL's investment was made by acquiring shares in open-ended investment companies, which shares were held by or through CBP and remained in existence until they were redeemed by, and their value paid to, PTL. Thus, there had not been and could not have been any misappropriation of PTL's assets. These assertions were subsequently admitted by PTL, and this led to the consensual discharge of the freezing order by Stewart J on 6 January 2021 together with an order that PTL pay the First and Second Appellants' costs in the sum of £190,639.

9. By its application dated 14 January 2022, the Respondent applied for an order that: (1) they have permission to add MIT as a Claimant and (2) they have permission to amend

the Particulars of Claim in the form attached to the application. The proposed amendments put forward a new claim, namely that:

i) At some unspecified time between September and December 2014, BGB and PTL entered into an express oral, or alternatively an implied, agreement by which BGB agreed to act as an investment advisor to PTL. It was alleged that BGB breached its duties under this agreement by advising it to invest in the Funds which were unsuitable by reason of their high-risk and illiquid nature. That was alleged to have caused PTL to suffer loss when the Funds lost value.

ii) A conspiracy had been entered into by the Appellants to make false representations to PTL on separate occasions (3 October 2014 and 3 November 2014) that PTL's investment would be made into a low-risk portfolio, with the intention of inducing PTL to invest and thereby cause it harm and whereby PTL was induced to invest in the Funds and suffered loss as a result ("the First Conspiracy").

iii) A conspiracy had been entered into by the Appellants by which the Appellants conspired to make false representations to PTL between September 2015 and May 2020 that its investments were contained in a separate portfolio held by Interactive Brokers the purpose of which was to stop PTL investigating the fate of its investment into the Funds and taking action in respect of the losses it had suffered, whereby PTL was so deceived and suffered loss accordingly ("the Second Conspiracy"). It is the First and Second Appellants' case that whilst Dr Pinto did indeed make such false representations to PTL, he was not doing so as their agents and it was not pursuant to any agreement or conspiracy.

10. I note that, the application being made in January 2022, it was by this time arguably too late to start fresh proceedings if the Appellants are correct that time started to run in late 2015 and ran out in late 2021: see paragraph 6 xxvii) above. If that is right, then, by January 2022, the only way for the Respondent to avoid the limitation defence was by a successful application to amend the existing proceedings.

11. So far as the First and Second Appellants are concerned, the amendment application, when it came before the Master, focused on two broad issues: firstly whether the Amended Particulars of Claim disclosed a real prospect of success; and whether the proposed claims were arguably brought outside the relevant limitation periods. The Master concluded both of those issues in favour of the Respondent. In relation to the first, he concluded that the contractual claim passed the threshold test, albeit narrowly. In relation to the second, he concluded that the Appellants had no reasonably arguably limitation defence because section 32 applied, and it was not reasonably arguable otherwise by the Appellants. The reasoning of the Master will appear as the grounds of appeal are considered.

12. The grounds of appeal on behalf of the First and Second Appellants focus on the two broad issues referred to above. In relation to the first, it is contended that the Master was wrong to conclude that the three new claims had a real prospect of success. In relation to the second, it is contended that the Master was wrong to conclude that the First and Second Appellant did not have a reasonably arguable limitation defence to each of the claims proposed in the amendment application by reason of the application of s.32 Limitation Act 1980. It is contended that the Master ought to have found that it

was reasonably arguable that the Claimant could not rely on s.32 of the Limitation Act 1980. In particular:

i) The Master was wrong to conclude that it was beyond reasonable argument that a fact relevant to each of the Claimant's proposed causes of action had been deliberately concealed from PTL.

ii) The Master was wrong, and it was unfair, to conclude (and make a finding) that the Third Defendant was the First Defendant's agent on the basis of ostensible authority for the purposes of s.32 (1) Limitation Act 1980 and that there was no reasonably arguable case to the contrary.

iii) The Master was wrong to conclude that the Claimant had established that it was not reasonably arguable that PTL could with reasonable diligence have discovered facts relevant to the claims being advanced, and therefore any alleged concealment or the alleged fraud.

Limitation

13. I shall consider the point arising from s.32 Limitation Act first, and it is convenient to set out the agreed legal principles. These were set out in the Appellants' skeleton argument and are not generally contested:

i) The Respondent was required to establish, beyond reasonable argument to the contrary, that:

(1) A fact relevant to its cause(s) of action had been deliberately concealed from PTL (or the case was one which arose by reason of fraud);

(2) The deliberate concealment of the fact, or the relevant fraud, was carried out by the defendant or its agent; and

(3) PTL did not discover, or could not with reasonable diligence have discovered, the concealment or fraud prior to the relevant date.

The relevant date in this case is 6 years before the Order of the Master allowing the amendment (25 July 2023), namely 25 July 2017: see *Welsh Development Agency v Redpath* [1994] 1 W.L.R. 1409 at 1419G (per Glidewell LJ giving the judgment of the court): "A new claim cannot be "made" by amendment until the pleading is actually amended, so unless a case comes within one of the exceptions leave cannot be given after the time limit has expired. This applies even if the limitation period had not expired at the date when the application for leave to amend was made."

ii) Any concealment under s.32(1)(b) must be of a "fact relevant to the Plaintiff's right of action". That fact must be a constituent part of the cause of action and not merely facts which improve prospects, or which are not necessary ingredients of the cause of action: *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 at [49].

iii) The Court should not determine seriously disputed questions of fact on an interlocutory application: *Ballinger v Mercer* [2014] 1 WLR 3597. The

application of this principle to the present context is shown by the decision in *Chandra v Brooke North* 151 Con. L.R. 113 [2013] where Jackson LJ said:

> "**[66]** If a claimant seeks to raise a new claim by amendment and the defendant objects that it is barred by limitation, the court must decide how to proceed. There are two options. First the court could deal with the matter as a conventional amendment application. Alternatively, the court could direct that the question of limitation be determined as a preliminary issue.
>
> **[67]** If, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a 'reasonably arguable case on limitation': see *WDA* (1994) 38 Con LR 106 at 138, [1994] 1 WLR 1409 at 1425. If so, the court will refuse the claimant's application. If not, the court will have a discretion to allow the amendment if it sees fit in all the circumstances.
>
> **[68]** If the court refuses permission to amend, the claimant's remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under s 35(1) of the 1980 Act."

The Appellants argue that the situation described there by Jackson LJ is exactly the situation here.

iv) The principle in (iii) above extends to issues of law which are not straightforward, clear or obvious; or issues of law or fact (or both) which require detailed argument and mature consideration: *Sullivan v Ross* [2020] EWHC 2200 (Comm) at [3].

v) The question is not whether a claimant <u>should</u> have discovered the concealment or fraud, but whether they <u>could</u> with reasonable diligence have done so. That requires a claimant to establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. The Court will consider how a person carrying on the same sort of business would act if he had adequate staff and resources, and was motivated by a reasonable sense of urgency: *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400.

vi) It is also inherent in s.32 Limitation Act that "there must be an assumption that the claimant desires to discover whether or not there has been a fraud" and that the concept of reasonable diligence carries with it "the notion of a desire to know, and, indeed, to investigate.": *Law Society v Sephton & Co* [2005] QB 1013 at 1044.

vii) Once a person knows of a fact, they cannot unlearn that fact: *Ezekiel v Lehrer* [2002] EWCA Civ 16 at [2]. Further, as the Master rightly held, even if a victim

of a fraud is persuaded by the fraudster that the fact does not exist (or does not mean what it appears to mean), that does not stop the victim having the relevant knowledge for the purposes of s.32: See paragraph 250 of the judgment where the Master said:

> "I do accept that, if a victim learns of a fact, the situation of the victim being persuaded by the defendant that that fact does not exist does not stop the victim having their knowledge still attributed to them so that the Section 32 time period continues to run with regards to the cause of action of which that fact is the key element."

The Appellant's submissions on Limitation

14. Applying these principles, Mr Miall submitted that the learned Master erred and misdirected himself in law when he said that the doctrine that further concealment cannot exclude section 32 of the Act only applies to actual knowledge or discovery of the fraud, not constructive discovery within the words "could with reasonable diligence". He submitted that the Master was wrong to decide that where, when put on notice, a victim

> "is persuaded not to investigate further, and the victim is acting altogether reasonably in both consulting the Defendant and accepting what they say so that the victim does not investigate further, and it would be unreasonable in those circumstances for the victim to enquire further, [the victim is not] deemed to have and to be saddled with the further knowledge which the victim could have acquired at the earlier point of time to those further actions on the part of the Defendant." (Judgment, at paragraph 252)

In so submitting, Mr Miall referred to and relied on the judgment of Peter Smith J in *Bocardo SA v Star Energy UK Onshore Ltd* [2008] EWHC 1756 (Ch). See paragraph 25 below where this is considered in full. Mr Miall submitted that the Master confused two situations: (i) where the victim (objectively) reaches a stage where they could with reasonable diligence discover the true position but is subsequently prevented from doing so by the wrong-doer; and (ii) where the victim never in fact reaches that initial stage because of steps taken by the wrong-doer. He submitted that, in the former case, time starts to run, but in the latter case it does not: the decision of the Court of Appeal in *Collins v Brebner* [2000] Lloyds Rep PN 587 is an example of the application of the latter.

15. Applying these submissions to the facts of this case, Mr Miall submitted that:

i) Given that the only fact which was alleged to have been concealed was the loss on the shares, the Master was wrong to conclude that this was deliberate concealment of a relevant fact because loss is not a relevant fact in a claim for

breach of contract: in the case of contract, the cause of action lies in the breach, not in the damage (in contradistinction to a claim in tort, where the cause of action lies in the damage). The Appellants have a strong *prima facie* case, and certainly one which is reasonably arguable, that PTL knew from the outset (and did not have concealed from it) the following:

a) The nature (and risk profile) of the Mutual Funds and therefore of the risk of investing in those Funds;

b) The refusal of CBP to include the Funds in its Managed Account; and

c) The fact and level of losses sustained (in about September 2015).

ii) The Master was wrong to make a summary finding that Mr Pinto was BGB's agent for the purposes of concealment;

iii) The Master was wrong to conclude that it was not reasonably arguable that PTL could, with reasonable diligence, have discovered the relevant facts;

iv) The Master adopted an erroneous approach by seeking to decide summarily matters which were seriously in dispute; and

v) The Master applied the wrong test in law.

The Respondent's arguments on limitation

16. For the Respondent, Mr Phillips KC submitted that what the Master did (in deciding the issues before him summarily) and how he did it was in accordance with principle, and that he did not misdirect himself in law.

17. In respect of the complaint that the Master had made findings of fact, Mr Phillips submitted that, once a court embarks upon the task of deciding such an application summarily, then it is necessary for the court to make an assessment of the evidence. The Master was alive to the difficulty of making a decision which did not bind the court at trial, hence one of the preambles to his Order stating:

> "**AND UPON** the Court having determined that any findings made in the Judgment were for the purposes of the Amendment Application only and shall not affect or bind the Defendants in any way in the remainder of the proceedings, or prevent or estop the Defendants from arguing a contrary position in their defences to the amended claim or at trial"

Thus, as the Master made clear, he was only determining the limitation issue, and, in order to do so, he had to determine matters which would potentially arise in the full action. He also made this clear in his judgment, the Master stating at paragraph 282:

> "These are decisions for my purposes only of the application to amend. They do not amount to findings for substantive purposes, but are based on what the defendants have chosen to put before me and where they have had the fullest opportunity in the circumstances to add to it, if they had so chosen. They do not involve my drawing any inferences, including from the fact that further evidence is not being adduced. Rather, it is my simple conclusion on what, on the evidence before me, is beyond reasonable argument."

He reiterated this at paragraph 287 where, after finding that the Interactive Brokers documents and the related communications from Mr Pinto as to both the Interactive Brokers documents and their contents, were deliberate known inventions of Mr Pinto (a finding with which the First and Second Appellants do not quarrel), he stated:

> "I am conscious that I am coming to that conclusion on summary judgment, and that it is somewhat equivalent to fraud, albeit only of deliberate wrongdoing, and that I am deciding it for the purposes of an amendment application; but it seems to me that I need to proceed on the basis of the evidence before me where the parties have had full opportunity to adduce evidence and address me on this limitation issue."

18. Mr Phillips conceded that, had Dr Panico carried out what he described as an "audit", Mr Pinto's deception would have been discovered. However, he submitted that there was no "trigger" for Dr Panico to carry out such an audit or to carry out any further investigation, submitting that the reassurances made by Mr Pinto and reasonably relied upon by Dr Panico made any such further investigation unnecessary. In this regard he referred to, and relied on, the decision in *OT Computers v. Infineon Technologies AG* [2021] 3 W.L.R. 61, an appeal from a decision of Foxton J, where Males LJ said:

> "47 .. 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."

Mr Phillips submitted that this supported and justified the approach of the Master in determining whether it was sufficient for Dr Panico to have raised questions with Mr Pinto and to have been satisfied with the answers he was given. That approach is evidenced at, for example, paragraph 313 of the judgment where the Master said:

> "I have considered Mr Miall's submission that if Dr Panico and PTL had closely analysed the Nerine/UBS material, they could and should have asked Mr Pinto as to precisely how such material was consistent with the trust money having been withdrawn to be put into safer investments. It seems to me that raising such questions is precisely what is not reasonable diligence for a person in the position of the trustee to pursue with the person who is in the position of the regulated fund manager. I do not see why even a very well-resourced professional trustee should question the regulated expert, or ask them as to whether they are actually not telling the truth but a lie. It seems to me that much more is required for it to be reasonable to make that sort of enquiry than is before me, where a distinctly close and questioning analysis would be required to identify apparent inconsistency, and I am only concerned with reasonable diligence."

Mr Phillips thus identified the right question as the one which the Master identified and asked himself, namely: did Dr Panico exercise reasonable diligence in directing his enquiries at Mr Pinto and going no further? He invited me to look at the facts and ask myself the question: given the facts, was there anything to put the Respondent on notice that there was something that needed to be investigated? In this regard, he referred to the evidence of Dr Panico contained in his First affidavit of 28 August 2020 where he said:

> "27. …Monies had ([Mr Pinto] said) been moved out of the 3 feeder funds and into the low-risk portfolio, as had been agreed and all that remained was for the situation to be 'realigned' with the bank, so that they had all of the relevant information on the totality of the investments. Immediately after Mr Pinto's call to me, I emailed Mr Gallucci and Mr Pinto on 5 October 2015 at 8.06pm thanking Mr Pinto for his immediate response and stating that now matters had been 'clarified' all that remained to be done was to 'realign' the bank (i.e. CBP).
>
> "28. In keeping with that explanation provided on the telephone on 5 October, on 13 October 2015 Mr Pinto confirmed by email that no loss had been suffered by the Jacaranda Trust. Mr Pinto attached to his email dated 13 October 2015 a statement purporting to be from Interactive Brokers in the name of JG Capital Management Ltd which accounted for the investments made and their value. The last column on page 81 (the statement dated 12 October 2015) showed that the 'Valore finale' [final valuation] was very slightly higher than the 'Valore iniziale' [initial valuation]. I did not know at the time that this and the

> other Interactive Brokers' statements which the Respondents provided to me were likely to be forgeries."

19. Relying on the above, Mr Phillips submitted that there was no "trigger" for any further investigation. He endorsed the Master's judgment in this regard at paragraph 317 where he said:

> "317. Looking at everything together, it seems to me that this is simply the financial fund manager equivalent of the Court of Appeal's points made in *Collins* with regards to the effect of a solicitor/client relationship. It seems to me that the defendant's position is effectively that the client, here the claimant, should know that the regulated professional, here the fund manager, Mr Pinto, is lying to them and producing forged, fraudulent documents, or at least that the client is under some duty as a matter of reasonable diligence to ask questions about it. It seems to me that it is simply unreal to say that these clients could have discovered the truth simply by the exercise of reasonable diligence. It seems to me that what they did by posing the questions repeatedly to Mr Pinto, and in circumstances where Mr Pinto continually repeated that the trust assets existed and produced apparently genuine statements to that effect, was, clearly, exactly the carrying out of reasonable diligence."

Discussion on Limitation and section 32

20. In my judgment, the Master misdirected himself as to the correct approach to be taken in relation to the application of s.32 of the Act and that this has led him into making a decision which was wrong. In particular, he misinterpreted the meaning of the expression "could with reasonable diligence" and his decision has had the effect of making those words do more than is warranted, with the effect of transforming what could have been done into what should have been done, which is precisely not what the statute says.

21. In my judgment, the starting point is the judgment of the Court of Appeal in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 418 where Millett LJ (as he then was) says:

> "The first plaintiffs submit that they acted reasonably throughout. They cannot be criticised for their decision to concentrate on the repossession actions in the first instance, nor for their delay in instructing their present solicitors until October 1991. There was no need for urgency; they had almost six years in which to bring proceedings.
>
> In my judgment this reasoning is misconceived. 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.
>
> As Chadwick J observed in the *Thakerar case*, it is not easy to believe that a solicitor acting for the borrower in this kind of mortgage fraud can be ignorant of the fraudulent nature of the mortgage application. It is very difficult to believe when he has acted for several such borrowers. In my judgment Timothy Lloyd J should not have been satisfied on the material before him, in summary proceedings in the absence of discovery and without the benefit of cross-examination, that the plaintiffs could not with reasonable diligence have discovered the fraud before the relevant date. This is not to say that he should have reached a concluded view. He should have refused leave to amend and left all to play for in fresh proceedings."

This passage is strongly relied on by the Appellants, and rightly so. It shows that the words "could with reasonable diligence" are not to be watered down so as to read as "should": just as Timothy Lloyd J was wrong to use the 6 year limitation period as a yardstick to judge the actions of the plaintiffs in that case, so, here, the Respondent could not use its trust in, and reliance on, Mr Pinto as a yardstick to judge its actions, and in my judgment the Master was wrong in law effectively so to decide: this is to water down the strict test and wording of section 32.

22. Furthermore, echoing Millett LJ's words above, I consider that the Master here, as in *Paragon*, "should not have been satisfied on the material before him in summary proceedings in the absence of discovery and without the benefit of cross-examination, that the [Respondent] could not with reasonable diligence have discovered the fraud before the relevant date. This is not to say that he should have reached a concluded view. He should have refused leave to amend and left all to play for in fresh proceedings." In fact, I would go further and suggest that the Master should have decided, on the facts of this case, that the Respondent could, with reasonable diligence, have discovered the fraud before the due date, but it does not matter: either way, he should have refused permission to amend. Also, the fact that it may have been too late for the Respondent to commence fresh proceedings by January 2022 is neither here nor there: the position had been clear since Stewart J's Order of 6 January 2021, giving the Respondent ample time to issue a new Claim Form, and the subsequent delay is its own fault.

23. Turning to the correct interpretation of the decision of the Court of Appeal in *OT Computers v. Infineon Technologies AG* [2021] 3 W.L.R. 61, Mr Phillips submitted that the judgment of Males LJ is support for the existence of some kind of double-trigger, or perhaps for the neutralisation of what was an original trigger putting a Claimant on notice that there is something to be investigated. In my judgment, it is no such thing.

On the contrary, what Males LJ was saying was that, in relation to whether there is an initial trigger, a Claimant must act with reasonable diligence. This seems to me to be clear from paragraph 47 of his judgment, cited at paragraph 18 above. What the court was saying was that a Claimant cannot be completely passive when it comes to the question whether there is an initial trigger prompting him to make enquiries. Hence the words: "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." This is not a qualification of the strict wording of the statute once a claimant is put on notice.

24. In the present case, it is common ground that there was an initial trigger, namely the notification by CBP in September 2015 that the value of Jacaranda's holdings in the Mutual Funds had fallen by over 50%. That this is to be taken as the trigger is proved by Dr Panico's reaction which was to ask Mr Pinto for an explanation of the reduction in value, by his email of 16 September 2015. The error which the Master then fell into was to look at what Dr Panico did rather than to look at what he did not do: if he had asked himself whether Dr Panico could, exercising reasonable diligence, have carried out an audit, or could have compared the number of shares which the documents which Mr Pinto produced showed had been held with the documents already within PTL's possession (or which they could have obtained, from IMT), he would have discovered the fraud. The work being done by the words "with reasonable diligence" at this stage is shown by considering: could discovering those matters have been achieved by exercising reasonable diligence, or would they have required exceptional measures? Given that a simple enquiry to Interactive Brokers would have revealed that the documents were forgeries and that they did not hold accounts with the account numbers cited on the forged Pinto documents, the answer would have to be: "yes". An enquiry to Interactive Brokers did not require more on Dr Panico's part than reasonable diligence. To ask whether it was reasonable for Dr Panico not to have made an enquiry of Interactive Brokers is to ask the wrong question.

25. An example of the correct approach is provided by the decision of Peter Smith J in *Bocardo SA v Star Energy UK Onshore Ltd* [2008] EWHC 1756 (Ch). In that case, which centred on onshore oil-drilling rights in the area of Oxted, Surrey, the fact which was concealed from the Claimant was that oil had already been extracted from the site for a period of 9 years. The judge said:

> "Star Onshore and its representatives …made a deliberate decision to conceal from Bocardo that the oil had already been extracted for 9 years. There can be no justification for the charade of talking about future collaborative joint exploration when the oil had already been studiously removed by Cairn Energy then Star Onshore. That point was not seriously argued against by Star Onshore in its closing submissions.
>
> 69. However it is also clear (and Bocardo conceded this in closing) that the information about the drilling for the pipelines had been in the public domain before the discussions in 2001/2002 started. PW5 came in the public domain in 1997 and PW8 and PW9 in August 2001. The latter date is at the start of the commencement of the discussions/meetings. Bocardo accepted that the material could have been discovered by it using

> the expertise of somebody like Mr Zappaterra to carry out research on the publicised documents available at the Department. …"

Then considering the position under s.32 of the Limitation Act 1980, Peter Smith J went on to say:

> "119. …It seems to me plain that Bocardo could have discovered with reasonable diligence which carries with it "the notion of a desire to know, and, indeed, to investigate" (Neuberger LJ as he then was) in Law Society v Sephton [2005] QB 1013 (C.A) long before Bocardo's claim that it did not have the requisite knowledge until 2006.
>
> 120. In my judgment it had the requisite knowledge by 1997 when the details of PW5 were made public. Time ran against Bocardo therefore from 1997. Any claim before 1997 became statute barred in 2003 i.e. 6 years after it could have discovered the claim with reasonable diligence. It follows therefore that it had requisite knowledge for the purposes of suing Star Onshore from 1997. It follows therefore that its claim is for 6 years to 22nd July 2000 and any earlier claims are statute barred.
>
> 121. Mr Gaunt QC in his closing submissions submitted that the actions of Star Onshore in 2001 was a fresh deliberate concealment. This he submitted had the effect of "starting the clock again" so that any claims did not become statute barred until at the earliest 2007. Mr Gaunt QC submitted that this proposition which involves reviving the cause of actions which are already statute barred is to be derived from the House of Lords in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd & Ors* [1996] AC page 102 at page where Lord Brown Wilkinson said this
>
> "For myself, I do not find it absurd that the effect of section 32 (1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding the concealment; if he knew of them, no subsequent act of the defendant can have concealed them from him. If the defendant then deliberately takes a step to conceal relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to be absurd that a plaintiff who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six−year period from the date of the discovery of such concealment to bring his action. Certainly, that consequence is far less bizarre that the result of the construction favoured by the majority of the Court of Appeal [1994] 2 WLR 999 under which a plaintiff's right of action can become time barred before he

> even becomes aware of the relevant facts, his ignorance being due to the deliberate concealment of such facts by the defendant."
>
> 122. I do not accept that Lord Brown−Wilkinson's judgment had the effect contended for by Mr Gaunt QC. It has no application in my view to a situation where a Claimant has knowledge of the relevant facts already. That much is clear from page 144A. If a Claimant has the requisite knowledge time runs from him inexorably when he had the full knowledge enabling him to bring the action. As Lord Brown Wilkinson says, if he knew of those facts "no subsequent act of the Defendant can have concealed them from him". What the decision says is that the Claimant has a full 6 years from the time when he could have discovered the facts even if the concealment is after the accrual of the cause of action. Until the discovery of the concealed matters he does not know he can sue. That is not the case here for the reasons that I have set out above.
>
> 123. I therefore reject Mr Gaunt QC's submissions based on the *Outhwaite* case.
>
> 124. For those reasons I am of the view that Bocardo's claim in respect of any trespass before 22nd July 2000 fails because it had enough knowledge had it employed proper experts to discover that the pipelines were under its land from 1997 onwards."

This decision is direct authority contrary to the argument of the Respondent in this case because the decision of Peter Smith J was made in the context of constructive knowledge, not just actual knowledge. I consider that the decision in that case was correct.

26. In his judgment, the Master referred to the decision of the Court of Appeal in *Collins v Brebner* [2000] Lloyds Rep PN 587 where it was alleged that a solicitor, Mr Collins, had deliberately concealed from his client, Mr Brebner, that a sum of money had been paid to a Mr Ibanez and not to a Mr Mendez, which was a fact which it was necessary for Mr Brebner to prove in order to establish a prima facie case. At first instance, the judge made the following findings:

> "In the event I have concluded that the Plaintiff did not 'discover' the concealed fact until the filing of the Defence. It is true that he strongly suspected that the money had been paid to Ibanez — Mr Mendez always insisted that was so — he may even have thought that likely. However, his solicitor repeatedly asserted in writing — in his report on case, in correspondence, in dealings with other solicitors and the Law Society, that the money had been paid to Mr Mendez. I think it entirely reasonable to hold that one has not 'discovered' a fact whilst precisely the opposite is asserted by the solicitor who acted for you in the relevant transaction and there is no independent documentary evidence sufficient to gainsay that assertion."

Having cited this passage, Tuckey LJ, giving the judgment of the court, said:

> " 45. On this part of the limitation defence, as with the other issues I have so far considered, the defendant lost on the facts before the judge. I can see no basis on which this court can or should interfere with the judge's findings. The defendant's submissions include the assertion that the claimant knew that he was lying to him. Such a submission from a solicitor is startling and it is not surprising that the judge rejected it."

27. Drawing on this decision, the Master said at paragraph 317 of his judgment:

> "Looking at everything together, it seems to me that this is simply the financial fund manager equivalent of the Court of Appeal's points made in *Collins* with regards to the effect of a solicitor/client relationship. It seems to me that the defendant's position is effectively that the client, here the claimant, should know that the regulated professional, here the fund manager, Mr Pinto, is lying to them and producing forged, fraudulent documents, or at least that the client is under some duty as a matter of reasonable diligence to ask questions about it. It seems to me that it is simply unreal to say that these clients could have discovered the truth simply by the exercise of reasonable diligence. It seems to me that what they did by posing the questions repeatedly to Mr Pinto, and in circumstances where Mr Pinto continually repeated that the trust assets existed and produced apparently genuine statements to that effect, was, clearly, exactly the carrying out of reasonable diligence."

Mr Phillips, for the Respondent, commends this passage to me, saying that it lies at the heart of the Master's decision. However, in my judgment, the situation faced by the master in the present case was not analogous to the situation in *Collins* at all. There, the judge had found that there was no initiating trigger putting the Claimant on notice and the Court of Appeal agreed on the basis that there was no material, documentary or otherwise, to indicate to Mr Brebner that Mr Collins was not telling him the truth. That was not a case where constructive knowledge under s.32 arose at all. Here, we do have a trigger leading us to the consideration of constructive knowledge and the wording of s.32. It was not suggested in *Collins v Brebner* that there is any principle that lies told by a trusted person can qualify the words of s.32 so that even if the fraud could have been discovered with reasonable diligence, a Claimant is excused for not doing so by the trusted person's lies.

28. Whilst the above discussion is sufficient to decide the limitation issue (and this appeal) in favour of the Appellants, it is also necessary for me to deal with the other grounds arising from the limitation issue, namely:

i) whether the Master was wrong to conclude that it was beyond reasonable argument that a fact relevant to each of the Claimant's proposed causes of action had been deliberately concealed from PTL; and

ii) whether the Master was wrong, and it was unfair, to conclude (and make a finding) that the Third Defendant was the First Defendant's agent on the basis of ostensible authority for the purposes of s.32 (1) Limitation Act 1980 and that there was no reasonably arguable case to the contrary.

These grounds can be dealt with relatively briefly, without, I hope, doing injustice to the industry of counsel on both sides in relation to their written and oral submissions.

29. Usually, on an interlocutory application where the Master has not heard oral evidence and cross-examination, it suffices for the Master to note that any findings of fact are for the purposes of the application only, and do not – and cannot – bind the court at any subsequent substantive trial. However, in the present case, what the Master said at paragraphs 282 and 287 (see paragraph 17 above) has something of an empty ring to it where the effect of such findings is to deprive a party of a limitation defence, an effect which is permanent and cannot be remedied at trial. For this reason, it seems to me that the Master would need to be very sure that his findings of fact are sound and that there is no conceivable argument that evidence at trial could lead the trial judge to reach a different conclusion: in a case such as this, there is no safety net. Thus, the bar is lowered for a party such as the Appellants in this case to argue and persuade the court that the factual matrix is sufficiently in issue for their resolution in summary proceedings to be inappropriate.

30. In my judgment, the Master erred in embarking upon the task that he did: the issues arising in this case were never suitable for summary disposal. As Mr Miall submitted, and I accept, it was

"incumbent on the Master only to reach a decision which denied Ds a limitation defence with utmost care. That was particularly so given that (i) the claims against Ds were in a draft pleading, and no defences to them had been filed; (ii) the disclosure process had not taken place; and (iii) through Dr Panico, PTL had acted dishonestly, both in relation to its dealings with the trust and its beneficiaries, and in relation to the claims made and evidence given in this case."

31. As Mr Miall further submitted, there was documentary evidence before the court which made it arguable that PTL knew, and did not have concealed from it:

"(1) The nature (and risk profile) of the Mutual Funds and therefore of the risk of investing in those Funds.

(2) The refusal of CBP to include the Funds in its Managed Account.

(3) The fact and level of losses sustained (in c. September 2015). Indeed, IMT accepted this, and the Court found that IMT knew about the significant negative change in value of its investments in the Funds."

If that is right (and the Master's findings were not that it was not right) those three points, both together and individually, raised serious issues to be tried about PTL's state of knowledge and therefore the effect (if any) of the fraud upon them.

32. The other aspect relied upon by the Appellants relates to agency: for the First Appellant to be liable for Mr Pinto's fraud, it was necessary for him to have been their agent vis

a vis PTL. It is in relation to this issue that the Master's suggestion that his findings were only for the purposes of the application to amend comes into the sharpest focus. As Mr Miall submitted, by qualifying his findings in that way, it could be thought that the Master was implicitly accepting that a different finding could be made at trial and if that is right it is difficult to understand how the contrary position is beyond reasonable argument. Furthermore, I accept Mr Miall's submissions that the Master's finding that Mr Pinto was BGB's ostensible agent was arguably wrong for the reasons he sets out, and in particular:

- The Respondent has not even pleaded, let alone sought to prove, that PTL could and did reasonably rely upon the alleged authority of Mr Pinto: this is a necessary pre-condition to a finding of ostensible authority;

- Mr Pinto had a prior personal relationship with the Trust and its officers, making it plausible that Dr Panico never placed any reliance on Mr Pinto's role within BGB at all;

- Full disclosure could well throw further and better light on the relationship between Mr Pinto and Dr Panico at the material time; and accordingly

- It was not open to the Master to seek to evaluate all the evidence and reach a finding on this issue as if it was a trial, particularly since the existence of ostensible authority is a complicated issue of fact and law, which depends not only on BGB's alleged representations but also on PTL's understanding, reliance and actions.

33. For all the above reasons, in my judgment the Master was wrong to find that the Appellant had no arguable case that the Respondent could not rely on a limitation defence by reason of s.32 and he erred in embarking on the enquiry that he did in advance of the pleading of the defence and discovery of documents.

The Contractual Claim: Real Prospect of Success

34. The other ground of appeal that remains to be considered is whether the Master was wrong to find that the claim for breach of contract had a real prospect of success. It is the Appellants' position that there was not sufficient evidence upon which the Master could be satisfied that a contract existed at all, whether oral or implied (it is common ground that there was no written contract between the parties).

35. The Master, at paragraph 204 of his judgment, acknowledged that the Respondent's case on the existence of a contract (whether oral or implied) was "distinctly thin" and he recognised that it might well become clear, following disclosure, that it was not sustainable. However, he concluded that it (just) passed the "real prospects of success" test to permit amendment in principle, giving twelve reasons for that decision in the subsequent paragraphs of the judgment. He distilled those reasons, at paragraph 217 of the judgment, as follows:

> "The particulars which are given are thin in relation to the oral contract and I do accept that necessity is a high test for an implied contract. However, for all the reasons which I have given and where it seems to me that the most important ones are that: firstly, there are factors which point towards a contract or at least the potential for one; secondly, that BWB are likely to have material documents; and, thirdly, that the last thing which I am supposed to be doing is carrying out any sort of mini-trial - it seems to me that the claimant does have real prospects of success."

36. On this appeal, Mr Miall marshalled the same arguments that he had used before the Master. These were, in relation to the existence of an express oral agreement:

i) no witness statement evidence suggested one had been made at all;

ii) no document referred to such;

iii) if there had been an agreement one would have expected these parties to have put it in writing;

iv) the trustee resolution purportedly dated 15 November 2014, even if genuine, envisaged an entry into a written agreement in the future, not an existing oral agreement;

v) Dr Panico asked Mr Pinto to produce a written agreement without referring to any oral agreement and signed one with many terms in 2018, which terms could not have been agreed in 2014;

vi) it was simply unclear what conversations were relied upon;

vii) Dr Panico would be the logical source and witness for IMT to base a claim of an oral contract upon but, there is in fact no relevant evidence from Dr Panico about any oral agreement;

viii) there is no reason to believe that the claimant's case would get any better, for two reasons: firstly, Dr Panico is not apparently cooperating with the claimant and secondly, any suggestion that BGB might hold some meeting notes of the relevant meetings or other useful documents, was, "pure Micawberism" without any real basis for any such hope;

ix) PTL, when it intended to have a contract with a party, would make sure that it made one in writing; see, for example, the DPMA entered into with the bank and copied to Mr Gallucci in December 2014.

37. Strong as these arguments were, in my judgment the Master was right to conclude that they were premature and that the correct position was likely to emerge after full disclosure. It cannot be said that the Master applied the wrong test and it seems to me that his decision to allow the amendment was one to which he could reasonably come at this stage of the litigation. Mr Phillips KC, for the Respondent, recognised that, for an oral agreement, the particular conversation should be set out and that as far as a

contract by conduct is concerned, the particular conduct should be set out and identified, acknowledging that that is required by CPR 16.4(1)(e) which incorporates in effect paragraph 7.4 and 7.5 of the Practice Direction. However, he submitted that the Claimant needs disclosure before the matter can be fully pleaded and, as the Master rightly recognised, disclosure might well lead not to the matter being fully pleaded but in fact abandoned.

Conclusion

38. The appeal is dismissed in relation to the contract claim but is allowed in relation to the point arising out of s.32 Limitation Act 1980. The consequence is that the Master was, in my judgment, wrong to allow the Respondents' application to amend and that the claim should have been dismissed, leaving the Respondents to bring fresh proceedings, if they are still able to do so.