Neutral Citation Number: [2021] EWHC 1713 (Ch)

Case No: CH-2020-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane, London
EC 4A 1NL

Date: 24/06/2021

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

GOLDTRAIL TRAVEL LIMITED (in Liquidation)

Appellant

- and –

MALCOLM GRUMBRIDGE

Respondent

- -
- -

MR MARK ARNOLD QC and **MS HILARY STONEFROST** (instructed by **Fieldfisher LLP**) for the **Appellant**
MR PAUL LOWENSTEIN QC and **MISS JOSEPHINE DAVIES** (in writing but did not appear) (instructed by **Brown Rudnick LLP**) for the **Respondent**

Hearing date: 11 March 2021

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Approved Judgment

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

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Mr Justice Adam Johnson:

Introduction

1. Goldtrail Travel Limited ("*Goldtrail*") is in liquidation. Via its liquidators, it issued a claim against the Defendant, Mr Grumbridge, on 24 June 2019, alleging that he had dishonestly assisted in breaches of fiduciary duty by Goldtrail's former director, Mr Abdulkadir Aydin.

2. Goldtrail in fact went into administration as long ago as 16 July 2010, and then into liquidation on 1 November 2010. The allegation that Mr Aydin was guilty of breaches of fiduciary duty to Goldtrail featured in earlier litigation flowing out of that liquidation. So did allegations that other persons dishonestly assisted Mr Aydin in those breaches of duty. But not Mr Grumbridge.

3. Those earlier proceedings were initiated on 6 June 2012, and Amended Particulars (the "*Amended PoC*") were served on 17 April 2013. The trial took place in February and March 2014, and in a Judgment dated 22 May 2014 ([2014] EWHC 1587 Ch) Rose J found that Mr Aydin was indeed in breach of duty, and that certain other Defendants had dishonestly assisted in that breach of duty. Mr Grumbridge gave evidence at the trial, and in her Judgment at [12] Rose J said that she regarded him as a truthful witness although in the end his evidence was of limited relevance.

4. Against that background, when the further proceedings were intimated against Mr Grumbridge in pre-action correspondence in May 2019, he objected and said they were time-barred: the relevant events had occurred more than 6 years before, and nothing new had come to light later which would justify extending the usual 6 year limitation period – indeed Goldtrail's pre-action letter described the new claim as "*the very same or a very similar claim*" to the earlier one.

5. Goldtrail pressed ahead anyway and issued its new claim. In its Particulars of Claim, it chose not to engage with the issue of limitation, on the basis that limitation was a matter for Mr Grumbridge to deal with in his Defence. But Mr Grumbridge did not serve a Defence. Instead, on 18 February 2020, he issued an application for an order that the Particulars of Claim be struck out, or alternatively that the Court grant summary judgment in his favour under CPR, rule 24.2.

6. Chief Master Marsh heard that application, and in his Judgment dated 22 July 2020 ([2020] EWHC 1757 (Ch)), he determined that summary judgment should be entered on Mr Grumbridge's behalf. To put it another way, he determined that Goldtrail had no real prospect of success in relation to its claim and that there was no other compelling reason why the claim should go to a trial (see Judgment at [19]). To put it yet another way, the Chief Master concluded that what he called the "*primary limitation period*" had obviously expired (Judgment at [22]), and that Goldtrail had not shown that it had any real prospect of arguing successfully that the "*primary limitation period*" should be extended (Judgment at [22] and [51]).

7. The Chief Master refused permission to appeal, but permission was later granted by Zacaroli J, and thus Goldtrail seeks to appeal the Chief Master's decision.

Some Background

8. It is helpful to set out some background, since this will help to explain the approach taken by the Chief Master, and also the submissions made by the parties on this appeal. There are some complexities, but I will try to do so as briefly and as straightforwardly as I can.

9. At the heart of it are certain arrangements entered into by Goldtrail in early 2010. At the time, Mr Aydin was the sole shareholder in, as well as the director of, Goldtrail. In the earlier proceedings and in the trial before Rose J (I will refer to the earlier proceedings as "*the First Action*"), these arrangements were referred to as the "*Black Pearl Deal*", for reasons which will become apparent below.

10. As a travel agency, on the face of it Goldtrail had access to customers who wished to purchase airline seats. On the other side of the fence were a number of companies associated with a Mr Philip Wyatt, including a Swedish entity, Viking Airlines AB ("*Viking*"). In 2010, according to the Amended PoC, the majority shares in Viking were held (indirectly) by a Mr Christian Tadjeran, who was also the sole director, but Mr Wyatt had a 40% interest held via a company in Iceland called BPI Iceland ehf. As an airline, Viking had an interest in selling airline seats.

11. The arrangements in question concerned a commitment given by Goldtrail to purchase 100,000 seats per year from Viking for a period of 5 years, between May 2010 and May 2015, together with a further commitment that if it required more than 100,000 seats per year, then Viking would be given the first option to sell those additional seats. The commitment given by Goldtrail was to acquire the airline seats via an intermediary company, Meridian Aviation Limited ("*Meridian*"), which acted as broker.

12. Now comes the catch. Two agreements reflecting these arrangements were entered into on 19 February 2010. The first is entitled "*Share Purchase Agreement*" (the "*SPA*"). Under the SPA, Mr Aydin agreed to sell a 50% shareholding in Goldtrail to a Hong Kong company called Black Pearl Investments Limited ("*BPI*"). BPI agreed to pay £500,000 for the 50% holding in Goldtrail. The commitment in relation to the airline seats was reflected in a Schedule to the SPA – more specifically, in Schedule 2 which is headed "*Commercial Agreement*" – but the SPA said nothing about any payment to Goldtrail in return for the commitment it was giving.

13. On the same day, however, a separate agreement was entered into. This is headed "*Commercial Agreement*" , but has been referred to in the proceedings as the "*Viking Agreement.*" This was an agreement between Viking and a company incorporated in the Seychelles called Morning Light Limited ("*MLL*"). MLL was newly established, and was owned and controlled by Mr Aydin. The essence of the Viking Agreement was that Viking would pay a total of £1.4m to MLL over the period February to June 2010. This was said to be a payment to MLL, which was described as "*the broker*", as consideration for it "*successfully introducing the commercial commitment*" in relation to the airline seats.

14. In fact, as Rose J. was to hold, this was a fiction. MLL had done no such thing. The Viking Agreement was merely a way of diverting away from Goldtrail to Mr Aydin personally a string of payments which should really have been for Goldtrail's benefit, since it was the party giving the commitment to buy the airline seats from Viking. Mr

Aydin had acted in breach of duty in allowing the £1.4m to be paid to MLL (and therefore to himself) rather than to Goldtrail.

15. For present purposes, however, the real point of focus is not so much Mr Aydin, but those who were alleged in the First Action to have assisted in his breaches of duty.

16. Chief Master Marsh set out a summary of the pleaded claim against those parties in his Judgment at [24]-[28]. The structure of the claim was essentially as follows. Viking of course was the counterparty (with MLL) to the Viking Agreement, and was the party which had made the payments to MLL, but Viking was in liquidation and no claim was made against it.

17. Instead, a claim was made against *BPI*, the Hong Kong company which entered into the SPA with Goldtrail on the same day as the Viking Agreement. What was said was that in its dealings with Goldtrail and Mr Aydin, Viking had in fact been directed and controlled by BPI (Amended PoC at para. 7, referred to in the Chief Master's Judgment at [26]).

18. Thus, since BPI had procured Viking's entry into the Viking Agreement, as a means of facilitating Mr Aydin's wrongdoing, it too could be fixed with accessory liability, even though it was not itself a party to the Viking Agreement and even though Viking was the payer of the relevant funds to MLL. In other words, even though the majority shareholder in Viking at the time was Mr Tadjeran, and even though he may have had overall day-to-day control of Viking, when it came to the arrangements negotiated with Mr Aydin, it had been BPI which was calling the shots.

19. As to the human actors standing behind BPI, these were said to be Mr Magnus Stephensen, Mr Halldor Sigurdarson and Mr Philip Wyatt. They were identified as relevant on the basis of certain degrees of association with BPI (Amended PoC at para. 9, referred to in the Chief Master's Judgment at [26]). As the Chief Master pointed out (see again at [26]), the critical points relied on were:

    i) Their directorships either of BPI or of other companies associated with BPI. Thus, at the material time in early 2010, Mr Stephensen was a director of BPI itself, and Mr Sigurdarson and Mr Wyatt were directors of a subsidiary of BPI, BPI UK Limited ("*BPI UK*"). A further subsidiary of BPI was BPI Iceland ehf, the Icelandic company which held shares in Viking (see above at [10]). The directors of BPI Iceland ehf were Mr Sigurdarson and Mr Stephensen.

    ii) The fact that all three of them were believed to be shareholders in a Swiss company, Lakehouse Management AG ("*Lakehouse*"), which was BPI's parent company. Schedule A attached to the Amended PoC (a summary of the shareholdings and directorships in various companies) referred to the Liquidators' belief that Mr Stephensen was a 15% shareholder in Lakehouse, Mr Sigurdarson was a 4% shareholder, and Mr Wyatt the majority 51% shareholder. Mr Wyatt's majority shareholding is consistent with the fact that he seems to have been the principal funder of activities associated with the BPI group. For example, BPI Iceland ehf's purchase of its shareholding in Viking had been financed in part by Mr Wyatt who injected £2.9m into the company.

20. Relying on these matters, para. 9 of the Amended PoC went on to plead:

> "*At all material times, [BPI], in conjunction with [Mr Stephensen, Mr Sigurdarson and Mr Wyatt], effectively had day-to-day operational control of [BPI] and also of Viking, in its dealings with [Goldtrail] and [Mr Aydin].*"

21. In para. 26, the Amended PoC then referred to the steps taken by BPI and Viking, mainly from February 2010 onwards, to effect the agreed payments by Viking to MLL under the Viking Agreement once it had been concluded on 19 February. As Mr Arnold QC who appeared for Goldtrail submitted, the particulars in para. 26 are set out by reference to a series of emails. Those emails are copied to the individual BPI Defendants (Mr Stephensen, Mr Sigurdarson and Mr Wyatt), but none are copied to Mr Grumbridge.

22. More detail of the claims in relation to dishonest assistance were then set out in the Amended PoC between paragraph 46 and 53 (set out in the Chief Master's Judgment at [28]). The essential elements were as follows:

    i) Mr Stephensen, Mr Sigurdarson and Mr Wyatt all knew or should have known that the justification given in the Viking Agreement for the payment of £1.4m to MLL – i.e., that MLL had acted as broker between the Viking and Goldtrail - was a fiction. That was so because Goldtrail and Viking knew each other anyway and had no need of a broker. MLL had done nothing to introduce them, and instead had been set up for Mr Aydin's benefit and was beneficially owned by him (Amended PoC at paragraph 50).

    ii) Mr Stephensen, Mr Sigurdarson and Mr Wyatt therefore also knew that the payments made to MLL were really for Mr Aydin's benefit (Amended PoC at paragraph 51).

    iii) Their knowledge overall was enough to amount to dishonesty (Amended PoC at paragraph 53).

    iv) Such knowledge/dishonesty was to be attributed to BPI (see Amended PoC at paragraph 9).

    v) BPI had nonetheless, via the actions of Mr Stephensen, Mr Sigurdarson and Mr Wyatt, instructed Viking to enter into the Viking Agreement (Amended PoC at paragraph 48), and instructed Viking to make the disputed payments to MLL for the benefit of Mr Aydin (Amended PoC at paragraph 46 and paragraph 48).

23. Thus, Mr Stephensen, Mr Sigurdarson, Mr Wyatt and BPI (I will refer to them as the "*BPI Defendants*"), had knowingly assisted Mr Aydin in breaching his fiduciary duty to Goldtrail. More particularly, they had assisted him in breaching his duty under Companies Act 2006 section 175, not to allow a situation to develop in which his personal interests conflicted with his duty to Goldtrail. That had happened here, since Goldtrail had an interest in receiving payment on its own account of the funds which Mr Aydin had diverted for himself, and Mr Stephensen, Mr Sigurdarson, Mr Wyatt and BPI had helped him in that exercise of diversion.

24. As to Mr Grumbridge, he was not named as a Defendant, but he was mentioned at various points in the Amended PoC. Paragraph 23 said as follows (in fact, the language in para. 23 derived from the original PoC of June 2012):

> *"In an email dated 26 November 2009 (at Sch. C/7), [BPI] gave to [Mr Aydin] the name and contact details of Malcolm Grumbridge to help [Mr Aydin] to 'set up company x for you and give information on a suitable location.' [Mr Aydin] used a contact suggested by Mr Grumbridge to set up MLL."*

25. In addition, Mr Grumbridge was also mentioned in Schedule A (the summary of shareholder and directorship information). He was shown as one of the two current directors (in 2010) of BPI, together with Mr Stephensen, and was also shown as having been sole director of BPI between July 2008 and January 2009. Schedule A also referred to the Liquidators' belief that he was a 15% shareholder in Lakehouse, which held all the issued shares in BPI. It referred to Mr Grumbridge having been a director of BPI UK between October 2008 and December 2011.

26. Nonetheless, Goldtrail's submission both before the Chief Master and on this appeal has been that at the time of the First Action, although there was evidence of Mr Grumbridge being aware of the SPA – including a resolution signed by him and disclosed in November 2013, approving "*the transaction*" and authorising Mr Stephensen to enter into "*all the relevant agreements*" - there was insufficient evidence showing his awareness of *the Viking Agreement* to justify making a plea of dishonesty or fraud against him. It was the Viking Agreement which was the means by which BPI and the other Defendants had knowingly assisted Mr Aydin in his breaches of duty, and without evidence justifying an assertion of knowledge on the part of Mr Grumbridge, there was no properly pleadable claim and thus no properly pleadable cause of action.

27. At the trial before Rose J, a particular focus of attention was a meeting held on 12 January 2010, at which the Viking Agreement was discussed. Mr Grumbridge's evidence at trial was that he did not recall attending the 12 January meeting. In closing submissions by Goldtrail it was submitted that Mr Grumbridge was one of the people invited to the meeting. Rose J. found in her Judgment that the meeting on 12 January 2010 was a general meeting of people involved in BPI, Viking and Meridian, but made no specific finding about Mr Grumbridge.

28. The BPI Defendants' defence at the trial was that the £1.4m paid to MLL was really additional consideration for the Goldtrail shares acquired by BPI, and that therefore it was legitimate for it to have been paid to Mr Aydin. Rose J disagreed. She accepted the proposition that Goldtrail had made a commitment to Viking to purchase airline seats over a five year period, that the £1.4m should therefore have been paid to Goldtrail, that Mr Aydin was in breach of duty in allowing or encouraging that to happen, and that BPI, Mr Stephensen, Mr Sigurdarson, Mr Wyatt had all knowingly assisted in that breach of duty.

29. Enforcement efforts were then undertaken. BPI itself went into liquidation in October 2017. The recovery initiatives undertaken by Goldtrail were only partially successful. As the Chief Master recorded in his Judgment at [37], of the sums transferred to Mr Aydin, approximately £660,000 was not recovered. Goldtrail is also out of pocket in other ways. Costs of the First Action totalling just over £1m are still outstanding,

together with costs of approximately £76,500 incurred in respect of enforcement advice and insolvency proceedings against BPI. It is these amounts which represent the losses Goldtrail now seeks to recover by means of its further action against Mr Grumbridge.

30. Following the liquidation of BPI in Hong Kong, Mr Grumbridge was interviewed by BPI's liquidators on 21 November 2018. As a result of what was said in that interview, the BPI liquidators (who were from PwC) wished to check the email servers of a company called Meridian Aviation UK Limited, a former subsidiary of Meridian, the broker via whom Goldtrail was to purchase the 100,000 seats from Viking pursuant to the Viking Agreement (see above at [11]). Meridian Aviation UK Limited went into liquidation in August 2013 and liquidators from PwC were appointed. Thus, PwC were able to check the email servers, and in late November/early December 2018 certain documents were disclosed which form a critical part of Goldtrail's case on limitation in this appeal. Two particular documents are relied on as having special significance. The first is an email from Mr Wyatt to Mr Grumbridge dated 17 February 2010 which enclosed copies of all the documents comprising the Black Pearl Deal, including not only the SPA but also the Viking Agreement. The second is an earlier document, namely an email from Mr Grumbridge dated 3 January 2010 asking for "*a quiet hour*" with Mr Wyatt before the meeting planned to be held on 12 January 2010. Mr Grumbridge wished to understand Mr Wyatt's thinking and the detail and to ensure that they were both "*singing off the same hymn sheet at the meeting*." Goldtrail says that these and other documents which came to light only in 2018 make all the difference, because they are consistent with Mr Grumbridge knowing about the Viking Agreement, and it is the Viking Agreement which is the critical component of any plea of dishonesty or fraud.

The Approach of the Chief Master

31. As to the substantive legal principles in play, there was no real dispute between the parties either before the Chief Master or before me.

32. At [3] of his Judgment, the Chief Master quoted section 32(1) of the Limitation Act 1980, which provides as follows:

> "***Postponement of limitation period in case of fraud, concealment or mistake***
>
> *(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant …*
>
> *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."*

33. As is clear from [6] of his Judgment, the Chief Master approached the case as one under section 32(1)(b), and so more precisely the question he was required to address was

whether Goldtrail had a sufficiently arguable case that a fact relevant to its cause of action against Mr Grumbridge had been deliberately concealed, such that the limitation period began to run only when that fact was discovered, or could with reasonable diligence have been discovered. Although Goldtrail had also made reference in its Skeleton to section 32(1)(a), the Chief Master observed at [6] of his Judgment that that submission "*was not developed during the course of the hearing.*"

34. At [9], the Chief Master recorded a concession made by Mr Grumbridge that, for the purposes of his application, the Court should assume that there *had* been deliberate concealment. That was said to be for pragmatic reasons, and without any wider admission, purely reflecting the fact that the question of deliberate concealment was a fact sensitive one which absent the concession was not capable of summary determination.

35. As to what constitutes a "*fact relevant to the plaintiff's right of action*", at [10]-[13] the Chief Master quoted first from the judgment of Sir Terence Etherton C in Arcadia Group Brands Ltd v. Visa Inc [2015] EWCA Civ. 883, and then from the judgments of Rix LJ and Buxton LJ in The Kriti Palm [2006] EWCA Civ. 1601. Both authorities emphasise that these words are to be construed narrowly. As Buxton LJ put it in The Kriti Palm, referring to Johnson v. Chief Constable of Surrey (CA, unreported, 19 October 1992) (I adopt the Chief Master's emphasis in the quote below):

> *" ... Johnson stands as authority for the proposition that what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it. The court therefore has to look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material."*

36. In the later case, Arcadia, Sir Terence Etherton C summarised the position as follows, in what is known as the "*statement of claim test*":

> *" ... the following principles [are] applicable ... : (1) a 'fact relevant to the plaintiff's right of action' within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the plaintiff's right of action."*

37. Although it post-dates the hearing before the Chief Master, the statement of claim test has recently been endorsed by the Supreme Court: see Test Claimants in the Franked Investment Income Group Litigation v. Commissioners for Her Majesty's Revenue & Customs [2020] UKSC 47, at [180]-[186].

38. At [16] and [17], the Chief Master drew attention to other authorities dealing more specifically with the requirements for pleading fraud. The Chief Master said that a useful reference point was the judgment of Flaux J (as he then was) in JSC Bank

Moscow v. Kekhman and others [2015] EWHC 3073 (Comm), where at [20] he said the following (again, I adopt the Chief Master's emphasis below):

> *"The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact which 'tilts the balance and justifies an inference of dishonesty.' At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."*

39. In addressing the approach to adopt on an application for summary judgment (his paragraphs [19]-[22]), the Chief Master accepted that overall the burden of proving no real prospect of success rested on Mr Grumbridge as the applicant, but went on to quote a passage from the White Book 2020, paragraph 24.2.5, to the effect that if an applicant for summary judgment adduces credible evidence in support of his application, then the respondent "*becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial*." Applying that general principle to the case before him the Master said as follows at [22]:

> *"As it seems to me where, as here, it is beyond doubt that the primary limitation period has expired, the evidential burden passes to the claimant. It is for the claimant to show on the evidence that it has a real prospect of success, bearing in mind of course that the standard of proof required of the claimant is not a high one. It does not suffice merely to meet the case made by the defendant. The court needs to know what case on limitation the claimant proposes to rely upon to show that the claim has a real prospect of success."*

40. In summary, the gist of the Master's reasoning was that he was not persuaded that Goldtrail had discharged that evidential burden. While accepting the evidence that new materials had emerged in 2018, in the course of BPI's liquidation in Hong Kong, the Master considered that Goldtrail had not sufficiently clearly explained why the information available to it well before then – meaning at the time of inception of the First Action in June 2012, or at latest when the Particulars of Claim were amended in April 2013 – had not been enough to justify a pleading of dishonest assistance against Mr Grumbridge in that Action. The Chief Master thought that Goldtrail's focus on materials which had come to light late in the day, but without proper analysis of the alleged inadequacy of what had in fact been available earlier, was the wrong way of looking at things. Thus, at [50(5)] he said:

> *"The claimant has concentrated upon the facts that it says it did not know before inquiries were made following BPI's liquidation but it has failed to examine what it did know and explain why*

> *those facts were insufficient to plead a case in dishonest assistance within the primary limitation period. As it seems to me, much of this application has involved the court being asked to look through the wrong end of the evidential telescope."*

41. To amplify, the Chief Master's analysis of the claim against Mr Grumbridge is set out in his judgment at [36]-[55]. The essential elements of his reasoning, underlying his conclusion that the claim had no real prospect of success, are as follows:

i) The Chief Master thought it significant that no pleaded case on limitation had been put forward. While accepting that Goldtrail had not been bound to put forward a case on limitation in its Particulars of Claim, he thought that unhelpful (as he had mentioned earlier in his Judgment at [22]). At [39] he said:

> *"No case is alleged concerning any fact relevant to the cause of action having been concealed by Mr Grumbridge or when the claimant says by operation of section 32(1)(b) of the 1980 Act the limitation period started to run."*

ii) He did not consider the pleading at paragraphs 17-20 of the Particulars of Claim against Mr Grumbridge to be sufficient to address the point. Those paragraphs, as the Chief Master pointed out, referenced the documents which came to light as a result of BPI's liquidation. But that exemplified the problem that the Court was being asked to "*look through the wrong end of the evidential telescope*", and moreover there were important deficiencies with the case made out on this later disclosed material.

iii) Those deficiencies arose because the Particulars relied on a schedule of 17 documents. It was said that certain of those documents had been undisclosed in the First Action, and that was the reason Goldtrail had been unable to plead its claim earlier. In fact, on examination, only 11 of the 17 were had in fact been undisclosed, and of those 11 Mr Grumbridge later showed that a further four and two-half documents had also been available in the First Action (Judgment at [41]). Mr Grumbridge said that the remainder had been available in any event on the Meridian server.

iv) The Chief Master did not find helpful the witness statement served by Goldtrail's solicitor, Mr Jarvis. The Master said of this statement:

> "*What is notably absent is an explanation about why the liquidators chose not to pursue Mr Grumbridge in the first claim, and what facts they say are essential to pleading a case which they say they did not possess.*"

v) At [51] of his Judgment, the Chief Master held that no positive case about section 32(1)(b) had been put forward by Goldtrail. That, he considered, was sufficient to determine the application in favour of Mr Grumbridge, because in circumstances where the "*primary limitation period*" had expired, the evidential burden lay on Goldtrail to show why the commencement of the limitation period should be postponed, and it had not discharged that burden.

vi) The Chief Master also concluded that in fact Goldtrail *had* been in a position to plead an adequate case in dishonest assistance against Mr Grumbridge and to include him in the First Claim (Judgment at [52]-[53]). To put it another way, the Chief Master could not himself see what fact essential to the right of action against Mr Grumbridge was missing. That reinforced the conclusion that Goldtrail had failed to discharge the burden of showing that there was one.

42. It is worth at this point setting out in full what the Chief Master said at [51]-[53] of his Judgment, as follows:

> "*51. No positive case about section 32(1)(b) has been put forward by the claimant. The claimant has not set out the facts it possessed and explained which essential facts it was missing. In a claim of this type, it is not just facts that have to be considered and also what inferences may reasonably be drawn from them. The claimant has not explained why Mr Grumbridge, as a director of and indirect shareholder in BPI, was not made a party to the first claim. It is not for the court to speculate why that decision was taken and whether there were objectively justifiable grounds for it. The absence of such a case makes it impossible to assess what essential facts the claimant did not possess that might trigger reliance on section 32(1)(b) of the 1980 Act. In my judgment, the absence of any positive case about limitation is fatal to the claimant because the real prospect of success test is being applied to an issue in relation to which the burden of proof rests on the claimant. The burden is of course on the defendant to establish the grounds of the application, but where the claimant declines to explain its case on section 32(1)(b), the court is entitled to conclude that the usual limitation period applies. This suffices to determine the application in favour of Mr Grumbridge.*
>
> *52. Although it is not an essential part of this determination, I would add that based upon what little information the claimant has chosen to reveal, I consider it was able to plead an adequate case in dishonest assistance against Mr Grumbridge by joining him as a defendant to the first claim. By adequate case I mean one that was not vulnerable to being struck out. The essential facts put Mr Grumbridge firmly in the frame. He was, after all, the person who set up BPI. BPI wholly-owned both subsidiaries, BPI UK and BPI Iceland. For a period he had been the sole director of BPI. At the material time in 2010 he was one of only two directors of BPI. BPI directed and controlled Viking (paragraph 7 of the amended particulars of claim in the first claim).*
>
> *53. Mr Grumbridge later claimed to be the beneficial owner of BPI. However, at the date of commencement of the first claim, the claimant believed he was in minority shareholder. The SPA and the Viking agreement involved a transaction with a substantial value. It is difficult to see how Mr Stephensen could,*

> *as Mr Grumbridge's co-director of BPI, have committed BPI to both the SPA and the Viking Agreement without Mr Grumbridge being aware of the substance of both agreements. The financial implications of the overall deal were significant for BPI and Mr Grumbridge would have been vitally interested in them whether as the beneficial owner or one of several beneficial owners. There was sufficient information in the hands of the liquidators when the claim was issued to plead both that Mr Grumbridge had the requisite knowledge and acted dishonestly based on inference to a level of specificity that is comparable to the case pursued against the BPI Defendants.…* ".

43. At paragraph [54] of his Judgment, the Chief Master then said as follows:

> *"In light of the conclusion I have reached, it is unnecessary for me to consider whether the necessary facts could with reasonable diligence have been discovered by the claimant within the primary limitation period. Were it to have been necessary, I would have determined that the claimant has failed to discharge the burden on it of showing that he has a real prospect of success in bringing itself within section 32(1)(b) of the 1980 Act."*

The Appeal

44. I have been greatly assisted in the appeal by the detailed and careful submissions made both orally and in writing by Goldtrail's counsel, Mr Mark Arnold QC and Ms Hilary Stonefrost. Goldtrail's Grounds of Appeal may be summarised as follows.

45. They say the Chief Master was wrong to conclude that no positive case on section 32(1)(b) had been put forward (Ground 1). One had been put forward. The case was that Goldtrail did not have sufficient facts available to justify a pleading of dishonest assistance against Mr Grumbridge until after the new documents emerged from the BPI liquidation in November 2018. The crucial matter revealed by those documents for the first time was that Mr Grumbridge had knowledge of the dishonest Viking Agreement. Before then, although it was clear he had knowledge of the SPA, it was not sufficiently clear that he had knowledge of the Viking Agreement, and in that regard his position was to be contrasted with that of Mr Stephensen, Mr Sigurdarson and Mr Wyatt, because Goldtrail had available to it at the time of the First Action contemporaneous emails showing that those individuals did know about the Viking Agreement and indeed were involved in the relevant negotiations with Mr Aydin, and in the process of Viking making the disputed payments to MLL.

46. Moreover, by focusing on what was known within "*the primary limitation period*", the Chief Master had applied the wrong legal test, and had therefore obscured the real question and had not adequately dealt with it (Ground 2). The real question was whether Goldtrail had a real prospect of showing that it did not discover Mr Grumbridge's deliberate concealment (and therefore fraud) until November 2018, and could not with reasonable diligence have discovered it any earlier. Mr Grumbridge had certainly concealed evidence of his knowledge of the Viking Agreement, and indeed

for the purposes of his application had not sought to challenge the proposition that he had done so (see above at [34]).

47. The Liquidators only had sufficient material to justify a plea of dishonesty after November 2018, and the Chief Master was wrong to conclude that the Liquidators had been able to do so at the time of the First Action. They had not been so able (Ground 3). The known facts at that time – including the fact that Mr Grumbridge was a practising solicitor - were equally consistent with innocence or negligence, and there was nothing at that stage to "*tilt the balance*" in favour of the more likely interpretation being that Mr Grumbridge was dishonest.

48. The Chief Master had only dealt in his Judgment with Goldtrail's submissions on Limitation Act section 32(1)(b), and had not adequately dealt with Goldtrail's further argument on section 32(1)(a) (the fraud limb) (Ground 4).

49. Finally (Ground 5), the Chief Master erred in law in his conclusion at [54] of his Judgment (dealing with reasonable diligence), both in the sense that he again focused on the wrong time-period (since he referred to "*the primary limitation period*"), and in the sense that he failed to ask himself *when* the facts relevant to the dishonest assistance claim, the deliberate concealment and the existence of the fraud could, with reasonable diligence, have been discovered.

50. In his equally helpful and considered submissions in response, Mr Lowenstein QC for Mr Grumbridge focused particularly on the conclusions expressed by the Chief Master in paragraphs [52] and [53] – i.e., on what Mr Lowenstein QC characterised as a factual finding by the Chief Master that Goldtrail had available at the time of the First Action sufficient information to have justified joining Mr Grumbridge as a Defendant in that Action. Mr Lowenstein QC submitted that that was a perfectly fair factual determination for the Chief Master to have made. He did so without error of law, or failure to take relevant evidence into account, and it was not a conclusion which one could say lay outside the bounds within which reasonable disagreement was possible. In other words, it was a finding which was unimpeachable on an appeal which was in the nature of a review rather than a rehearing.

Discussion and Conclusions

51. For reasons which will become apparent, I will deal with Goldtrail's submissions in the following order:

    i) First, I will look together at Ground 2 (wrong legal test) and Ground 4 (failure to take account of s. 32(1)(a)).

    ii) Second, I will look together at Ground 1 (no positive case) and Ground 3 (facts not revealed until 2018).

    iii) Third, I will consider Ground 5 (failure to address the reasonable diligence question).

Ground 2 (wrong test) and Ground 4 (failure to consider s. 32(1)(a))

52. To begin with, I am not persuaded that the Chief Master adopted the wrong legal test. The criticism of his reasoning on this point centres on his use of the phrase, "*within the primary limitation period*", and seems to proceed in the following way.

53. First, looking at the claim made against Mr Grumbridge, this was both a civil action in fraud (dishonest assistance) falling within the Limitation Act section 32(1)(a), but also, simultaneously, a claim in respect of which a fact relevant to the right of action had been concealed, thus engaging section 32(1)(b). Second, Mr Grumbridge had effectively conceded the question of concealment, on the basis that that was not a matter suitable for summary determination. Third, and this is really at the heart of the criticism, the Chief Master should therefore have focused his attention on when the admitted concealment was, or could, have been uncovered. In such a case, where a fact relevant to the right of action in fraud has been concealed, the uncovering of the concealed fact must necessarily coincide with the discovery of the fraud, and so focusing attention on that question was needed both to resolve the issue under section 32(1)(a) and that under section 32(1)(b).

54. It was therefore a mistake for the Chief Master to have focused on what was known "*within the primary limitation period*." That was the wrong orientation and the wrong focus. If the Chief Master had focused instead on when the admitted concealment was uncovered, or could have been uncovered, then he would have concluded there was a real prospect of Goldtrail showing it was not until 2018, in the course of the BPI liquidation, and that in turn would have led to the conclusion that the limitation period did not begin to run until that point, thanks both to section 32(1)(a) and 32(1)(b).

55. I agree that the phrase "*within the primary limitation period*" is not entirely apposite and has the potential to confuse. After all, the fact that Goldtrail may have been able to plead a case against Mr Grumbridge "*within the primary limitation period*" does not automatically debar a claim brought against Mr Grumbridge in June 2019. It depends on precisely when during that period it became possible to plead a case. If one assumes (for example) that the "*primary limitation period*" came to an end in June 2016 (six years from the final payment to MLL under the Viking Agreement), then if Goldtrail were able to plead a case against Mr Grumbridge before June 2013, that *would* lead to the conclusion that its claim brought in June 2019 was time-barred. But that would not be because it was able to plead a case against Mr Grumbridge "*within the primary limitation period*" (although it was). Instead, it would be because it was able to plead a case more than six-years before it actually chose to do so.

56. What matters for present purposes, however, is whether the use of this language in fact led the Chief Master into error in the way he approached his analysis. I think not, for the following reasons.

57. The phrase appears to have had its origins in the exchanges between the parties. It is referred to for example in Goldtrail's letter before action dated 13 May 2019, when it said:

> "*Having taken counsel's advice … Goldtrail's Liquidators accept that the primary limitation period for bringing this claim has expired*."

58. The letter then went on to refer to Limitation Act, section 32(1)(b), and to say that in cases falling within that subsection:

> *"… the period of limitation does not start to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it.*"

59. This letter was then referred to by Mr Grumbridge's solicitor, Mr Toms, in his First Witness Statement (para. 25). In that Witness Statement, Mr Toms took issue with Goldtrail's case in its Particulars of Claim that new documents had come to light as a result of the BPI liquidation which showed "*that the documents disclosed in the first instance trial were incomplete*" (PoC in the present action at para. 18, quoted by the Chief Master at para. [39]). As noted above, Mr Toms showed that of the 11 documents Goldtrail relied on as not having previously been disclosed, in fact 5 (or more accurately, four and two half documents) had been disclosed. At paragraph 43, Mr Toms then said that even assuming the remaining documents (and possibly others) had not been disclosed, still they:

> *"… do not amount to a body of material which Goldtrail can fairly and reasonably claim was essential to its ability to plead a complete and coherent cause of action against Mr Grumbridge prior to the expiry of the relevant limitation period. Or, to put it the opposite way, Goldtrail had available to it within the primary limitation period sufficient material to advance its (bad) claims against Mr Grumbridge; and there is nothing in the [new documents] that Goldtrail required to be able to plead a claim against Mr Grumbridge, but did not have earlier"* (Emphasis in original).

60. At paragraph 47, he said:

> *"On the basis of the material thus far provided, it appears that at the time of the First Action was possible for Goldtrail to plead its case."* (Emphasis in original).

61. Reading it fairly, it seems to me that what Mr Toms was effectively doing here was challenging the basic proposition that the start of the relevant limitation period – which Goldtrail accepted had expired - could be postponed at all. Thus, when he said that Goldtrail "*had available to it within the primary limitation period sufficient material to advance its (bad) claims against Mr Grumbridge*", what he meant was that the limitation clock started ticking against Mr Grumbridge at the same time it started ticking against the other Defendants, and thus had long expired by June 2019.

62. It also seems to me that the Chief Master simply adopted this shorthand. In doing so he was not, I think, asking whether Goldtrail were able to plead a case at any point in the six year period between (say) June 2010 and June 2016. Instead, he was directing his mind to the question whether enough was known before (say) June 2010 to mean that the limitation period ("*the primary limitation period*") started running at the point, without any postponement.

63. That was just the point Mr Toms had put in issue, in response to Goldtrail's acceptance that "*the primary limitation period*" had expired, and its submission that that did not matter because in the case of Mr Grumbridge its commencement could be postponed. The focus of attention at the hearing, and indeed of the Chief Master's Judgment, was on whether there was any sufficiently arguable case for such postponement. I therefore reject the contention that by referring to "*the primary limitation period*" the Chief Master was applying the wrong legal test. He was merely asking whether any basis had been shown for delaying the start of the "*primary limitation period*."

64. There is a related point (in fact, it may be the same point), namely Goldtrail's argument that in light of Mr Grumbridge's concession that he would not put in issue the question of deliberate concealment (see above at [34]), the Chief Master was wrong not to have focused simply on the question of when that concealment was, or could, have been uncovered.

65. In my judgment, however, this line of argument is reading too much into Mr Grumbridge's concession. The Chief Master thought so too. He expressed his view of it in his Judgment at [9], as follows (emphasis added):

> *"The application is not pursued on the basis that there was no deliberate concealment for what are said to be pragmatic reasons. Mr Grumbridge denies any concealment but, as Mr Lowenstein put it in his skeleton argument, it does not form a basis for the application ' ... simply because this element of the statutory provision gives rise to a factual enquiry not immediately suitable for a strikeout/summary judgment application'. It is however for the claimant to explain what fact or facts it says were concealed and why they are relevant to its right of action. Absent such an explanation, there is no basis for alleging that the limitation period did not start running until a date that is later than the normal commencement date."*

66. To my mind, this dovetails with the Chief Master's later observation, which I have already referred to, that Goldtrail's submissions involved looking through "*the wrong end of the evidential telescope.*" His approach was to say that despite the concession, it was not enough to focus on the later question of when and how any new fact or facts came to be uncovered. Before getting to that point, there was still an anterior question to be addressed, namely what was known earlier that might have required a claim to be made against Mr Grumbridge during "*the primary limitation period*". It was only if the answer to that question was that nothing was known (or nothing sufficient) that it became relevant to look at what emerged later. That is what the Chief Master meant by Goldtrail's submissions looking through the wrong end of the evidential telescope. He thought that Goldtrail had focused its attention only on later question, and had not sufficiently (or indeed at all) addressed the anterior question.

67. In my judgment, the Chief Master was correct to approach matters in this way, and indeed his approach reinforces the view I have taken that the real focus of his attention was on whether there was any sufficiently arguable basis for saying that the start of the "*primary limitation period*", which otherwise had already expired, should be postponed. Indeed, that is exactly the formulation used at the end of paragraph [9] of his Judgment, quoted at [65] above.

68. The concession made by Mr Grumbridge for the purposes of his application was that the Court should assume there had been concealment. But he made no concession about what had been concealed or, to put it more precisely, he made no concession that it included the concealment of any fact necessary to have required a claim to be brought against him during the (unextended) "*primary limitation period*". On the contrary, his approach was to put Goldtrail to proof on that point, and that is the approach the Chief Master endorsed, to my mind for entirely understandable reasons. Where earlier proceedings in relation to a fraud have been brought against a number of actors, and then later proceedings are sought to be brought against another actor, said to have been involved in the same fraud, it is perfectly proper to say it is up to the claimant to explain why. And all the more so in a case where, as it appeared to the Chief Master, there *had* been a basis for joining Mr Grumbridge to the First Action (see his paragraphs [52] and [53]).

69. It is true that in taking the approach he did, the Chief Master was addressing himself only to the test under Limitation Act section 32(1)(b), because of his view that the case under Section 32(1)(a) had not been developed. I do not see that that matters, however, because the cases under the two provisions run in parallel, and in truth are just different ways of compartmentalising the same facts in terms of legal analysis. Goldtrail itself said the following in its Skeleton on this appeal at paragraph 79:

> *"The argument as to when the facts could reasonably have been discovered (deliberate concealment having been assumed) was the same for both section 32(1)(a) and section 32(1)(b) because discovery of the facts relevant to the dishonest assistance claim would also constitute discovery of Mr Grumbridge's fraud for these purposes."*

70. I agree with that analysis, but the converse must also be true – i.e., if sufficient facts were known at the time of the First Action to justify a pleading of dishonest assistance against Mr Grumbridge for the purposes of section 32(1)(b), then it must also follow that his fraud had already been "*discovered*" at that stage for the purposes of section 32(1)(a). I think the Chief Master was therefore entirely correct to ask what was known at the time of the First Action. He could not sidestep that inquiry in reliance on the concession made by Mr Grumbridge, because Mr Grumbridge's whole point was that even assuming concealment, enough was known that it did not matter.

<u>Ground 1 (no positive case) and Ground 3 (facts not revealed until 2018)</u>

71. I move on then to consider whether the Chief Master was correct to say that no positive case for postponement of the limitation period had been made out (Ground 1), and to conclude, as he did at paragraphs [52]-[53] of his Judgment, that in fact enough had been known at the time of the First Action to justify a pleading in dishonest assistance against Mr Grumbridge at that stage (Ground 3).

72. To my mind, these points run together and reinforce each other. That is to say, the Chief Master plainly thought that what had been needed from Goldtrail was a clear analysis of what facts it did possess when the other BPI Defendants were sued, and why such facts were insufficient to allow a cause of action to be pleaded against Mr Grumbridge at the same time. That analysis had not been provided, and that failure enabled the Master to conclude on his own analysis of the facts that there *was* enough

before (at the latest) April 2013 (the date of Amendment of the PoC in the First Action) for Goldtrail to have pleaded a claim. That conclusion, in turn, reinforced the view that the case put forward for postponement was inadequate, and in any event was determinative because April 2013 is more than six years before the date of issue of the present claim in June 2019.

73. In considering these points, I agree with Mr Lowenstein QC's submission that unless there is a proper basis for challenging the Chief Master's conclusions in his Judgment at [52]-[53] (Ground 3), then the appeal must fail. That is because, if the Chief Master was correct to find there *was* a sufficient basis to plead fraud against Mr Grumbridge in April 2013 (Ground 3), it matters not whether he was also correct to say that no positive case about section 32(1)(b) had been put forward (Ground 2). Even if one had been, it would have no real prospect of succeeding. In this part of the analysis, it is therefore convenient to focus principally on Ground 3, as the parties did during the hearing before me.

74. This takes us directly to the heart of the issue between the parties. The essential fact which Goldtrail says it was missing until late 2018 was the fact that Mr Grumbridge had *knowledge* of the dishonest Viking Agreement. Looking at the account given in the Witness Statement of the Liquidator's solicitor Mr Jarvis, this is the point which he says emerged for the first time from the new documents disclosed following the BPI liquidation, principally because they show clearly Mr Grumbridge's attendance at the meeting on 12 January 2010 (see above at [27]), and his involvement in certain matters surrounding that meeting.

75. As to such new documents, I have already mentioned two above at [30], namely the email from Mr Grumbridge to Mr Wyatt dated 3 January 2010, asking for "*a quiet hour*" with him, in advance of the planned meeting on 12 January 2010, and the email from Mr Wyatt to Mr Grumbridge dated 17 February 2010 enclosing copies of all the agreements comprising the BPI Deal before they were due to be executed, including the Viking Agreement.

76. Other of the new documents relied on at the hearing before the Chief Master were (1) a series of emails dated 5, 6 January 12 and 14 January 2010, all of which were consistent with Mr Grumbridge having attended the meeting on 12 January 2010; (2) an email dated 11 January 2010 showing Mr Grumbridge assisting with the agenda for the 12 January 2010 meeting; and (3) an email exchange between Mr Grumbridge and Mr Stephensen dated 17 July 2010, shortly after Goldtrail had gone into administration, in which Mr Stephensen asked about possible claims against Mr Aydin including money laundering, and Mr Grumbridge replied: " … *we could become involved as co-conspirators!*"

77. I accept the proposition that such materials, provided for the first time in late 2018, are *direct* documentary evidence of a number of matters consistent with Mr Grumbridge having had knowledge of the Viking Agreement in 2010. That is not enough to overturn the Chief Master's conclusion, however, because his reasoning depended not on what could be shown directly from contemporaneous documents, but instead on what could be inferred about Mr Grumbridge's state of knowledge from the facts known at the time of the First Action. As he said at [51]: "*In a claim of this type, it is not just the facts that have to be considered but also what inferences may reasonably be drawn from them*." And his overall conclusion at [53] was that: "*There was sufficient information*

in the hands of the liquidators when the claim was issued to plead both that Mr Grumbridge had the requisite knowledge and acted dishonestly based on inference to a level of specificity that is comparable to the case pursued against the BPI Defendants."

78. The critical question is whether, whatever may have come to light later in terms of documentary evidence, that finding made by the Chief Master can successfully be challenged. With some reluctance and after some hesitation, I have come to the conclusion that it cannot. That is for the following reasons.

79. As Mr Lowenstein QC reminded me, and as in any event was obvious, the appeal before me was in the nature of a review rather than a re-hearing. That prompted some discussion as to the status of the Chief Master's findings in [52] and [53] of his Judgment. Mr Lowenstein QC's perspective was that they represented straightforward findings of fact, and that accordingly in order to succeed on its appeal Goldtrail had to show that the Chief Master reached a conclusion which was "*plainly wrong*", because he "*plainly failed to take evidence into account, or arrived at a conclusion which the evidence could not on any view support*", or his "*finding lies outside the bounds within which reasonable disagreement is possible"*: see Walter Lilly & Co Ltd v. Clin [2021] EWCA Civ 136 at [83]-[85]. Walter Lilly was a case where the relevant findings were made in a trial judgment, but Mr Lowenstein QC referred to two further authorities where the same basic approach was applied on appeals from orders resulting from non-trial hearings, namely Haringey LBC v. Ahmed & Ahmed [2017[EWCA Civ 1861 at [31], and Ingosstrakh-Investments v. BNP Paribas [2012] EWCA Civ 644 at [63].

80. Mr Arnold QC submitted that the proper approach was more nuanced. He referred me to the observations of May LJ in E.I Du Pont de Nemours & Company v. S.T Du Pont [2003] EWCA Civ. 1368, at [92]-[94], where May LJ made the point that Rule 52 of the CPR draws together a wide range of possible appeals; that accordingly Rule 52.11 requires and contains a degree of flexibility necessary to enable the Court to achieve the overriding objective of dealing with cases justly; and thus, as regards the scope of an appeal by way of review:

> *"A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former Rules of the Supreme Court. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the local court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of all evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material … "*

81. Mr Arnold QC submitted that the Chief Master's findings in [52]-[53] of his Judgment go beyond mere findings of fact, and instead are an evaluation of the available facts against a legal standard – i.e., the legal standard which justifies a pleading of fraud. Mr

Arnold QC submitted that the Chief Master had misapplied the law – i.e., he had the right test in mind (essentially, whether there was enough to tilt the balance in favour of the dishonesty being the more likely inference), but came to the wrong conclusion.

82. Although there is a legal component to that analysis, in substance it is really a submission that the Chief Master misconstrued the facts. In evaluating the submission in a manner which accords due weight to the Chief Master's findings, it does seem to me appropriate to ask the questions posed in Walter Lilly & Co Ltd v. Clin, as Mr Lowenstein QC suggested.

83. I do not consider that the Chief Master failed to take evidence into account, or arrived at a conclusion which was insupportable, or that his finding lies outside the bounds within which reasonable disagreement is possible.

84. In terms of what could reasonably be inferred, it seems to me the question the Chief Master was addressing, which reflected the submissions made to him, was essentially this: would it have been proper in pleading terms at the time of the First Action to have inferred that Mr Grumbridge was in fact part of the inner circle involved in concluding the Black Pearl Deal, or (as Goldtrail submitted) would that have been an improper inference, because the primary facts were more likely consistent with Mr Grumbridge having been kept at arms' length and therefore having been merely innocent or negligent?

85. On the side of Mr Grumbridge having been kept at arms' length, and therefore having been ignorant of the Viking Agreement, are the facts that the arrangements put in place with Mr Aydin were intended to insulate the SPA from the Viking Agreement, and to present the SPA as a self-standing document which could be looked at in isolation. There is also, I accept, the fact that at the time Mr Grumbridge was a practising solicitor. That is consistent with the idea that he was a legal adviser whose role was a limited one and who therefore might not have been informed of certain aspects of the overall Black Pearl Deal which others determined were not relevant to him.

86. As I interpret the Chief Master's conclusion at his [52] and [53], however, it is really that the primary facts were more likely consistent with the idea that Mr Grumbridge *was* part of the inner circle or coterie gathered around Mr Wyatt, and that therefore it was reasonable to infer (and so would have been proper to plead) that he *did* know about the Viking Agreement, and participated in the efforts to bring it to fruition and to implement it.

87. Goldtrail challenges that conclusion, on the basis that the primary facts relied on by the Chief Master do not support the inference. It seems to me, however, that they do, or more accurately, I do not think it possible to say that the Chief Master got his evaluation wrong.

88. Goldtrail's criticism is really that the Chief Master read too much into the facts he summarised at [52] of his Judgment, and at [53] relied on points which were taken out of context or were wrong. In summary, Goldtrail said it was not enough at [52] of his Judgment for the Chief Master to have relied on Mr Grumbridge's functions (he set up BPI but for Mr Wyatt; he was a director of BPI; he was a shareholder in BPI); and at [52] he had been incorrect to rely on the financial importance of the Black Pearl Deal, which the Chief Master exaggerated.

89. But this is to take a very narrow view of things, and in my judgment the Chief Master was right to say that the accumulation of factors taken together justified the inference he drew. Mr Grumbridge may have set up BPI principally as an investment vehicle for Mr Wyatt, but the fact that he apparently had an indirect shareholding in it (as the Liquidators themselves believed at the time of the First Action: see above at [25]) suggested that he was more than someone providing limited and discrete legal services, and on the contrary suggested he was someone whose financial interests were linked with those of Mr Wyatt.

90. Likewise, when the Chief Master referred at [52] to BPI owning the two subsidiaries, BPI UK and BPI Iceland ehf, and to Mr Grumbridge's directorship of BPI, it seems to me he was drawing attention to the fact that the interests of those involved in the business of the BPI group were closely interconnected and closely aligned.

91. To put it another way, here was a small group of companies with common shareholders and directors, including Mr Grumbridge. It was more likely in such circumstances that those shareholders and directors were all part of the same inner circle or coterie, rather than that Mr Grumbridge, who shared the same roles as the others and had the same or similar interests, was an outsider kept at arms' length from the real commercial operations of the group. Or at any rate, in pleading terms that was an entirely reasonable inference to draw.

92. There is then the Chief Master's reliance at [52] on Goldtrail's pleaded case that BPI was the party controlling Viking. Goldtrail criticise that reliance on the basis that the Chief Master did not fully reflect the case pleaded in the Amended PoC, which was that BPI controlled and directed Viking "*in its dealings with [Goldtrail] and [Mr Aydin]*". With respect, I think this criticism is misplaced. For one thing, the Chief Master plainly had in mind the full text of para. 7 of the Amended PoC, because he had referred to it at para. [26] of his Judgment. For another, I agree with Mr Lowenstein QC's submission that the additional point of context, said to have been missing, only strengthens rather than weakens the pleadable inference against Mr Grumbridge. The idea that BPI was being used to control Viking in its dealings with Goldtrail and Mr Aydin, which included the illegitimate Viking Agreement, makes it more not less likely that Mr Grumbridge, who was a director of BPI, was in the know about what was going on. Had the objective been to keep him at arms' length, some vehicle other than BPI would have been used. To put it another way, the facts are consistent with the idea that Mr Grumbridge was not simply a solicitor who occasionally provided discrete and limited legal services to Mr Wyatt and the companies associated with him. Instead they are consistent with the inference that he was a respected adviser who had been involved in aspects of Mr Wyatt's affairs for some time, who was integrated in the management of those affairs via his directorships, who was interested in the success of those affairs given his own shareholding, and who could therefore be trusted as part of the close group of individuals surrounding Mr Wyatt.

93. For that same reason, I do not agree with Goldtrail's separate criticism that the Chief Master overlooked the fact that BPI itself was not a party to the illegitimate Viking Agreement. I am not persuaded that he did. It seems to me he had the structure of the two key agreements well in mind, and was properly focused on the question of what it was appropriate to infer for pleading purposes as regards knowledge of the Viking Agreement, notwithstanding the fact that BPI was not a party to it and notwithstanding the efforts apparently made to portray the SPA as a self-standing document.

94. I also note that the Chief Master made no specific mention in his Judgment of the pleading at para. 23 of the Amended PoC (see above at [24]), which referred expressly to Mr Aydin being given the contact details for Mr Grumbridge who was to help "*set up company x for you and give information on a suitable location.*" That again is consistent with him playing a wider role in putting in place the arrangements underpinning the Black Pearl Deal than simply authorising execution of the SPA by Mr Stephenson, and was known at the time the claim in the First Action was issued in June 2012, prior to its later amendment.

95. As to Goldtrail's submission that the Chief Master had no basis for concluding that the SPA and the Viking Agreement involved a transaction with a substantial value (Judgment at [53]), again I do not agree. What is said is that because the £500,000 paid for the Goldtrail shares was funded by Mr Wyatt, and because on other occasions Mr Wyatt had invested even larger sums in his business ventures, and because BPI itself did not pay any of the £1.4m paid to MLL under the Viking Agreement, it was not open to the Chief Master to conclude that the transaction as a whole had been a substantial one without the benefit of full disclosure and oral evidence. Again, I think that is going too far. None of Goldtrail's points suggests to me it was inappropriate or inaccurate for the Chief Master to have treated the Black Pearl Deal as a whole as a substantial one, and therefore one it would have been natural for Mr Grumbridge to have known about. Even looked at in isolation, it seems to me that BPI's commitment under the SPA to pay £500,000 for the Goldtrail shares was a substantial one. Even if ultimately the funding did come from Mr Wyatt, the arrangement involved a company of which Mr Grumbridge was a director giving its own undertaking, and it is reasonable to infer he would have wanted to know about the broader commercial arrangements underpinning that undertaking.

96. In any event, and more importantly, it seems to me that in paragraph [53], the Chief Master had in mind not only the commitment given by BPI but also, on the other side, what financial benefits might be expected to flow to BPI in the future as a result of the Black Pearl Deal being implemented. I think that is what the Chief Master meant when he referred to the "*financial implications of the overall deal*." It is the same point already made above. As someone with an ownership interest in BPI, it is reasonable to infer that Mr Grumbridge would have wanted to know what the deal meant for him; and therefore reasonable to infer he would have been told about the wider commercial framework of the Black Pearl Deal. At any rate, it seems to me the Chief Master was correct to say that was at least a *pleadable* inference at the time of the First Action.

97. Finally, there is the point made by Goldtrail that the position of Mr Grumbridge was not actually comparable to that of Messrs Stephensen, Sigurdarson and Wyatt (as the Chief Master held at the end of para. [53]), because they were copied in on, and therefore specifically named in, the various emails referred to at para. 26 of the Amended PoC in the First Action, and Mr Grumbridge was not. The emails at para. 26 show clearly the involvement of Messrs Stephensen, Sigurdarson and Wyatt in the making of payments to MLL, and nothing comparable was available in relation to Mr Grumbridge until late 2018 at the earliest.

98. I agree that this is a point of distinction between Mr Grumbridge on the one hand, and Messrs Stephensen, Sigurdarson and Wyatt on the other. But still I am not persuaded that the Chief Master was wrong to conclude as he did. He did not conclude that the position of Mr Grumbridge was the same as that of Stephensen, Sigurdarson and Wyatt,

only that it was comparable. Looking at the core allegations in paras 7 and 9 of the Amended PoC (see above at [17]-[19]), it was comparable, because the allegations there rested on the close association between Messrs Stephensen, Sigurdarson and Wyatt in relation to the affairs of BPI, arising as a result of their inter-related directorships and ownership interests, and following on from that, on the degree of control said to have been exercised by them, using BPI as a vehicle, on the affairs of Viking. I think the Chief Master was saying that something like that same case could equally well have been made at the time against Mr Grumbridge, and I find that proposition impossible to disagree with.

99. For all the above reasons, therefore, I have concluded that Goldtrail's Ground 3 is not made out. It follows, since I therefore endorse the Chief Master's view that Goldtrail had available to it a pleadable case against Mr Grumbridge by (at latest) April 2013, that I also endorse his overall view that Goldtrail has no real prospect of showing that commencement of the limitation period as regards Mr Grumbridge was postponed, at any rate beyond that point.

100. That makes Ground 2 academic, but I will comment on it briefly. Here, Goldtrail challenged the Chief Master's finding that that it had put forward no positive case on section 32(1)(b).

101. I agree that at a high level Goldtrail did put forward a positive case, i.e. that insufficient information was available to it prior to late 2018 to justify a proper pleading of fraud against Mr Grumbridge. That may not have been spelled out in its pleading, but it was obvious. But that was not I think the Chief Master's complaint. His real complaint, it seems to me, was that in advancing its position Goldtrail had not proactively and clearly explained why the information it had available at the time of commencement of the First Action (whether in June 2012 or later in April 2013) was not good enough to have permitted a claim against Mr Grumbridge. The evidential burden was on Goldtrail in relation to that point, and it had not sufficiently engaged with it. One can see that this was the Chief Master's real concern from the second sentence of his para. [51], when he said: "*The claimant has not set out the facts it possessed and explained which essential facts it was missing*."

102. Although now academic, it seems to me that was a fair point for him to have made. The deficiency is no doubt explained in part by the way in which the case developed procedurally, with Mr Grumbridge serving his summary judgment application rather than a Defence, and thus Goldtrail not having the opportunity to set out its case in a Reply. But that is only part of the explanation. The other part is the stance taken by Goldtrail in its evidence, the scheme of which was to focus largely on an analysis of the materials which were disclosed post the BPI liquidation in 2018, without clear engagement on the question of what was known in 2012 and 2013 and why that was inadequate. The idea that what was available before had been inadequate was rather assumed, perhaps because of Mr Grumbridge's concession. Yet it was that end of the evidential telescope the Chief Master was principally interested in, and understandably so, since it is only if the claimant can show there was a factual deficiency to begin with that the question of when the deficiency was rectified becomes relevant. *That* point was not conceded. In the event, the Chief Master decided that Goldtrail had not made out any proper case as to why there was a factual deficiency to begin with. For reasons which will be apparent from my analysis above, I consider he was correct to have reached that decision.

Ground 5 (failure to address the reasonable diligence question)

103. This can be dealt with briefly, in light of my earlier conclusions.

104. I have already rejected the idea that in referring to "*the primary limitation period*", the Chief Master was looking at the wrong time period (above at [62]). In my judgment he was not. Instead he was asking himself just the right question, namely whether there was any proper basis for the commencement date of the relevant limitation period, which Goldtrail conceded had otherwise already expired, being postponed.

105. It will also be apparent from my reasoning above that I think the Chief Master was correct to say that the question whether any concealed fact could with reasonable diligence have been discovered did not arise. That was because, as the Chief Master saw it, there was no relevant fact (i.e., one necessary for Goldtrail to be able to state a cause of action) which had been concealed. That also gave rise to the result that the fraud alleged against Mr Goldtrail had already been discovered (see above at [70]). That being so, the question of what otherwise might have been discovered by the exercise of reasonable diligence was irrelevant.

Conclusion & Disposal

106. I said above at [78] that I had reached the essential conclusions expressed in this Judgment after some hesitation and with some reluctance. That is because, on one view, they have the consequence that the victim of a fraud, some aspects of which were hidden from it, will be left with no remedy. There is obviously a public interest in the victims of fraud being afforded redress, and in those who have engaged in fraudulent conduct being answerable for that conduct. On the other hand, there is also public interest in achieving finality in litigation, which finds expression in the present case in the provisions of section 32 of the Limitation Act. It is that interest which, reluctantly, I find should prevail in the circumstances of this case. I therefore dismiss the appeal.

Postscript

107. In a letter to the Court after a draft of this Judgment was circulated for corrections, Mr Arnold QC and Ms Stonefrost invited me to consider what they said was an additional point developed during their submissions, namely the particular significance to be attached in pleading terms to the fact that Mr Grumbridge was a practising solicitor in early 2010, which gave rise to the natural expectation that he would act honestly.

108. In fact, as the letter also fairly acknowledged, Mr Grumbridge's status as a practising solicitor is mentioned expressly at [85] above. Implicit within that, and indeed in all that follows, is the expectation referred to. I do not consider it an additional point. As well as being a practising solicitor, however, Mr Grumbridge also had the other roles, and performed the other functions, summarised by the Chief Master in his Judgment at [52]-[53]. What tilts the balance and justifies an inference of dishonesty is the apparently close association Mr Grumbridge had with Mr Wyatt and his companies, going beyond the mere provision of occasional legal advice, which emerges from an analysis those factors. That is the conclusion already expressed above (see, e.g., at [89] and [92]), and it already takes account of the fact that Mr Grumbridge was a solicitor.