



Neutral Citation Number: [2022] EWHC 1022 (Comm)

Case No: CC-2019-BRS-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 12/05/2022

Before :

HH JUDGE RUSSEN QC

(sitting as a judge of the High Court)

Between :

DEBORAH GIDDENS

Claimant

- and -

(1) BRIAN FROST

Defendants

(2) THE FROST PARTNERSHIP

(3) GEORGE RONALD FROST

John Virgo (instructed by **Wards Solicitors LLP**) for the **Claimant**
Andrew Dinsmore (instructed by **Greenberg Traurig LLP**) for the **First and Second**
Defendants

Hearing date: 11 April 2022
(draft judgment circulated 3 May 2022)

Approved Judgment

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

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HH JUDGE RUSSEN QC

INTRODUCTION

1. This is my judgment following the trial of a preliminary issue on 11 April 2022. That issue is directed to the question of whether or not all the claims, alternatively the claims based upon negligent advice, made by the Claimant (“**DG**”) against the First and Second Defendants (“**BF**” and “**TFP**” respectively) are statute barred.
2. DG’s claims against BF, TFP and the Third Defendant (“**GF**”, who is BF’s brother) arise out her transfer in 2012 to a small self-administered pension scheme (**SSAS**) of the cash equivalent transfer value of the benefits she had accrued in a Royal Mail occupational pension scheme. Allowing for the cash sum of £36,099 which DG received on the day she made the onward investment, the SSAS was used as the vehicle for the investment of £90,000 in what was said to be a truffle plantation scheme.
3. The truffle plantation scheme was offered by Viceroy Jones New Tech Limited (“**VJNT**”), a company controlled by GF. VJNT’s brochure for the scheme described the investment as involving a 15-year lease of trees which were to be inoculated with spores so as to promote truffle growth. Yields were expected to come on stream from year 5 onwards.
4. The truffle plantation scheme was a scam affecting approximately 100 investors whose experience was similar to and followed the same pattern as that experienced by Mrs Giddens. The nature of the scam was summarised in the judgment of ICC Judge Barber in *Secretary of State v Viceroy Jones New Tech & others* [2018] EWHC 3404 (Ch) by which she made orders for the compulsory winding up of VJNT (and four other companies including Westcountry Truffles Limited, a company of which BF had been a director) on petitions presented by the Secretary of State on public interest grounds.
5. TFP is a partnership between BF and his wife, Alison Frost, which in 2012 used the trading name “The Mortgage Shop”. At that time, the partnership shared an address with a company called Somerset PRP Limited (of which BF was a director) which was advertising a service designed to “*release up to half your frozen pension value*”. A document advertising that service showed that company’s phone number altered to refer the reader to the office number of The Mortgage Shop.
6. DG’s claim against BF, TFP and GF is advanced under two main heads: a claim in fraud and a claim based upon defective advice. The fraud claim is based upon a conspiracy to injure (the alleged conspirators being BF or TFP, GF and/or VJNT) and the defective advice claim is based upon alleged breaches of a common law duty of care, an implied contractual duty of care and a duty to comply with certain provisions of the Conduct of Business Sourcebook Rules (COBS Rules) promulgated by the Financial Conduct Authority.
7. BF and TFP deny liability to DG. They say that she was not one of their clients, that they never advised her, that they referred her to a third party called pensionpractitioner.com (“**TPP**”) who administered her SSAS, and that she was advised by HDIFA (the trading name of one Heather Dunne, an Appointed Representative of Berkshire Financial Advisers Limited). In her judgment in the public interest proceedings, ICC Judge Barber rejected BF’s attempt to distance himself from the truffle plantation scheme and VJNT. She found that he lied repeatedly in cross-

examination and concluded that he had no plausible explanation for a pattern of referrals which resulted in a client, who had been referred to an IFA or a pension adviser, then purchasing truffle trees through VJNT. She noted that GF had accepted in his evidence that BF was an ‘introducer’.

8. However, although Judge Barber gave an example of BF receiving a commission of £48,103 on the introduction of an investment of £167,000 with VJNT by a Mr Giddens (not DG) and one of £53,937 on an investment by a Mr Grice, if the present claim is to continue then the issues of fact and law which arise on the defence to DG’s claim will fall to be decided on the evidence in these proceedings.
9. GF has taken no part in these proceedings and a default judgment was entered against him, for damages to be assessed, on 5 July 2021.
10. At this stage I should mention a point made by DG’s counsel, Mr Virgo, in his skeleton argument. He submitted that the absence of any evidence from BF or TFP on the preliminary issue of limitation, coupled with the default judgment against GF, meant that the court must proceed on the basis of an assumption that DG’s claim in fraud will – subject to any limitation defence – succeed. However, Mr Dinsmore, counsel for BF and TFP, was right to respond that I should make no assumptions about the merits of DG’s claim in determining the preliminary issue. To illustrate the point, he referred to an email which DG had sent to the Insolvency Service on 26 October 2018 in which, responding to a question as to whether BF stated he was offering independent financial advice in respect of the transfer of her pension, she answered “*Not that I recall.*” Whether or not that answer is harmful to DG’s case, as pleaded, would be a matter for trial. Making assumptions about the merits of DG’s claim would also involve me ignoring the terms of the Order, mentioned below, directing the trial of that issue.

EVENTS LEADING TO THE PRELIMINARY ISSUE

11. The monies in DG’s SSAS were paid into the truffle investment scheme on or about 17 October 2012. The Claim Form was issued on 21 November 2019.
12. BF and TFP aver that the claims are time-barred pursuant to section 2 of the Limitation act 1980 on the basis that the relevant events took place in 2012. DG relies upon sections 14A and 32 of the Limitation Act 1980 to postpone the limitation period.
13. On 25 September 2020, the court directed a trial of a preliminary issue identified by this question: “*Are the Claimant’s claims statute-barred pursuant to the Limitation Act 1980?*”
14. Paragraph 5 of the Order dated 20 September 2020 made provision in respect of the facts to be assumed or established for the purpose of deciding the preliminary issue. Paragraph 5.2 says:

“For the purposes of the preliminary issue, it is assumed that the First and Second Defendants’ alleged advice was so unsuitable that it is to be inferred that they chose to commit the breaches of duty complained about deliberately where the same were not likely to be discovered for some time (as pleaded at Particulars of Claim, §

41.2; Defence, § 50.2; Reply § 50). This assumption is entirely without prejudice to the First and Second Defendants' case that the Claimant was not a client, that no advice was ever given and that there was no deliberate concealment."

15. Allowing for the assumption which underpins the requirement of "deliberate concealment" for the purposes of section 32 of the Limitation Act 1980 (addressed below) no wider assumption should be made about the merits of DG's claim.
16. DG says the answer to the preliminary issue is "no". Her case is that she first had cause to become concerned about the supposed investment in the truffle scheme in November 2016 when she then contacted GF. Far from admitting participation in the scam, GF sought to pacify her and, she says, it was only in May 2017 that she acquired full knowledge of the fraud that had been perpetrated against her.
17. BF and TFP, on the other hand, say the answer to the question is "yes". They say all of DG's claims are time-barred or, alternatively, that the claims based on negligent advice are barred.
18. Their position is that the reasonable diligence to be expected of a claimant who is the victim of fraud (see the discussion of section 32 below) means that DG cannot prove she could not have discovered the alleged fraud prior to November 2016. They say DG either knew of or should have known of it from the moment she made the investment in the truffle plantation scheme in October 2012 or certainly by May 2013 when she was told she had been sent her Government Gateway User ID enabling her to access the details of her investment. They rely upon a further fall-back date (outside the 6 year period prior to the issue of the Claim Form) of September 2013 when she received the Government Gateway details in the context of her having queried certain pension administration fees. On the basis that DG should have known of the alleged wrongdoing prior to November 2013 it is said that all her claims are time-barred.
19. Alternatively, in relation to the claims based on negligent advice, BF and TFP contend that facts which were observable or ascertainable prior to that date (see the discussion of section 14A below) justified DG embarking on the preliminaries to the claim which was in fact issued more than 3 years later. They rely upon the fact that DG did log in to the Government Gateway on 24 July 2014 and, as a fall-back, the date of September 2016 when an article about the truffle investment scheme scam (which DG printed off on 24 November 2016) was first published. On the basis that DG knew or should have known of the allegedly negligent advice prior to November 2016 it is said that the claims framed in negligence are time-barred.
20. As appears from my analysis of the evidence below, the arguments raised in response to DG's reliance upon sections 32 and 14A of the Limitation Act 1980 do not just rest upon what BF and TFP say was a series of missed opportunities to discover the alleged wrongdoing. Their resistance to DG's reliance upon those provisions also extends to a direct challenge to the honesty and reliability of her evidence that she only became concerned about her investment in November 2016. This challenge rests principally upon what they describe as DG's deliberate deletion in October 2019 of almost all her emails prior to 10 January 2018. Their deletion took place one month before the issue of the Claim Form. Related to that point are other points of criticism about DG's disclosure in these proceedings (also addressed below and which led to her solicitor also giving evidence before me) and the fact that Ms Alison Beatty, with whom DG

had communications in November 2016 and who it had been proposed would give evidence on behalf of DG, was not called as a witness to corroborate DG's case on limitation.

THE LAW

Limitation

21. Section 32 of the Limitation Act 1980 operates to postpone the commencement of the limitation period in cases of fraud, concealment or mistake.

22. Section 32 provides, so far as is material for present purposes, as follows:

“(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; 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.

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

23. DG relies upon both the fraud and (see the terms of the Order dated 20 September 2020 noted above) the deliberate concealment limbs of section 32(1).

24. Section 14A of the 1980 Act provides for an alternative to the 6 year limitation period from the accrual of the cause of action where the facts relevant to the cause of action are not known to the claimant at the date of accrual. The commencement of an alternative 3 year limitation period is fixed by reference to the date when the claimant acquires the knowledge required for bringing an action for damages and a right to bring such an action. Section 14A provides as follows:

“(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under sub-section (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with sub-section (4) below.

(4) That period is either – (a) 6 years from the date on which the cause of action accrued; or (b) 3 years from the starting date as defined by sub-section (5) below if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under sub-section (4)(b) above is the earliest date on which the plaintiff or any person in which the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In sub-section (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both – (a) of the material facts about the damage in respect of which damages are claimed; and (b) of the other facts relevant to the current action mentioned in sub-section (8) below.

(7) For the purposes of sub-section (6)(a) above the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in sub-section (6)(b) above are – (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence and (b) the identity of the defendant and (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not as a matter of law involve negligence is irrelevant for the purposes of sub-section (5) above.

(10) For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire – (a) from facts observable or ascertainable by him or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek, but a person shall not be taken by virtue of this sub-section to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and where appropriate to act on) that advice.”

25. The 3 year period is therefore a special limitation for negligence claims (other than personal injury claims) which displaces the 6 year period under section 2 of the Act. However, by reason of section 32(5), where there has been deliberate concealment of the breach of duty (constituting negligence) for the purposes of section 32(1)(b) then section 14A does not apply. In such cases, the period is 6 years (from the start date identified by section 32(1)) without any further qualification by reference to section 14A.
26. Under both section 32 and section 14A a claimant’s actual knowledge of the wrongdoing (ie. his actual “discovery” of it for the purposes of section 32(1) or his actual “knowledge” for the purposes of section 14A(5)) will set the clock running for limitation purposes. However, both sections also make it clear that the limitation period

can be triggered by attributing the claimant with constructive knowledge of what, by way of a shorthand summary of the principles addressed below, I would describe as grounds for embarking upon the preliminaries to the issue of proceedings. Whereas in this regard section 32 imposes upon the claimant the standard of a person exercising “reasonable diligence” in the discovery of the wrongdoing, sub-sections 14A(6)-(10) expand at some length both upon what is meant by “the knowledge required for bringing an action for damages in respect of the relevant damage” and the circumstances in which the claimant might be attributed with such knowledge.

27. Addressing section 32 first, there have been a number of recent decisions upon its meaning and the approach to be adopted in applying it.
28. In *OT Computers Ltd (In Liquidation) v Infineon Technologies AG* [2021] EWCA Civ 501; [2021] Q.B. 1183 the Court of Appeal followed an earlier decision of the court in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339; [2022] Q.B. 1.
29. In *Canada Square*, the Court of Appeal rejected the submission that the section 32 should be interpreted restrictively on the basis that the court should not encourage or facilitate stale actions. Rose LJ (as she then was) said, at [29] that the 1980 Act did not pursue an unqualified goal of barring stale claims and said that objective is “tempered by an acceptance that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action.”
30. In the same case, Males LJ said of section 32, at [167]:

“The first step is to identify the facts which are relevant to the claimant’s right of action. That expression has been narrowly interpreted to refer to a fact without which the cause of action is incomplete (Arcadia Group Brands Ltd v Visa Inc [2015] Bus LR 1362). It is in accordance with the statutory purpose that there should be such a narrow interpretation: if the claimant can plead a claim without needing to know the fact in question, there is no good reason why the primary limitation period should not apply. But it does not necessarily follow that the section as a whole should be narrowly interpreted. It should be given its natural meaning without a predisposition to interpret it either narrowly or broadly.”

31. Males LJ returned to the point in the *OT Computers* case in which he noted the observation of the Supreme Court in *FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2020] UKSC 47; [2020] 3 WLR 1369 that the section must be interpreted in a way which gives effect to, rather than defeats, its statutory purpose. As section 32 aims to strike a balance and its purpose is to avoid unfairness, he said, at [25], that “[I]t is therefore necessary to interpret the section so as to give effect to this purpose and not to defeat it.”
32. In explaining his approach to section 32, Males LJ said, at [59]:

“The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant - the actual claimant and not a

hypothetical claimant - is not disadvantaged by the concealment. In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests.”

33. The *FII Group Litigation* case was concerned with a claim based upon monies having been paid under a mistake of law and the impact of section 32(1)(c) in postponing the limitation period for an “*action for relief from the consequences of a mistake*”. The issue was from what point could it be said that the claimant had discovered a mistake of law. As Mr Virgo recognised, the Supreme Court indicated that time should begin to run from the point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. In *OT Computers*, at [26], Males LJ observed that this may mean that time begins to run somewhat earlier than it would applying the so-called ‘statement of claim test’. As he observed, the ‘statement of claim’ test had been generally applied in earlier cases to assess the claimant’s position (in relation to when he should have “discovered” the fraud, concealment or mistake) by reference to his knowledge of matters which would enable him to plead a claim. In the *FII Group Litigation* case, the majority recognised that test had been applied to cases involving alleged fraud and said, at [191], “[T]his is not the occasion on which to review the formulation used in the fraud cases, which reflects the special standards applicable to the pleading of fraud.”
34. By his recent decision in *Bilta (UK) Limited v SVS Securities Plc* [2022] EWHC 723 (Ch), at [32]. Marcus Smith J considered the decisions in the *FII Group Litigation* and *OT Computers* cases. He described the ‘reasonable diligence’ test under section 32 as acting as something of a long-stop when considered alongside the earlier trigger of actual knowledge acquired by a claimant before that objective standard even needs to be applied. Citing *Paragon Finance v. Thakerar* [1999] 1 All ER 400, at 418, he observed that, as the section constitutes an exception to the ordinary regime, the burden of proof is on the claimant wishing to avail himself of its provisions.
35. Marcus Smith J went on to consider a significant number of other authorities (as well as *OT Computers* and *Paragon Finance*) in addressing, at [32(7)], what the standard of reasonable diligence required of a claimant. From these he drew the following propositions:
- i) the claimant must establish he could not have made the discovery without taking measures that he could not reasonably have been expected to take (described accordingly in *Paragon Finance* as “*exceptional measures*”). For a claimant in business, 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 was motivated by a reasonable but not excessive sense of urgency;
 - ii) there is an assumption that the claimant desires to discover whether or not a fraud has been committed, and that there must therefore be an anterior “something” to put a claimant on notice of the need to investigate if there has been a fraud, concealment or mistake;

- iii) the distinction between (i) whether there is anything to put the claimant on notice of the need to investigate and (ii) what a reasonably diligent investigation would then reveal is a helpful analytical structure to adopt, but it is important to note that this is not the statutory test;
 - iv) the words “*could with reasonable diligence*” obviously refer to an objective standard (i.e., what the claimant could have learned/done, not merely what he or she in fact did learn/do). The objective standard is informed by the position of the actual claimant, and not by reference to some hypothetical claimant;
 - v) reasonable diligence can require a claimant to undertake investigatory measures, including instituting legal proceedings to obtain disclosure; and
 - vi) adopting the statement of claim test, the test as to when the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered the same must be referable to what is needed properly to plead out the claim. By this is meant an ability to plead a viable claim, that is one that will not be struck out because a necessary element of the cause of action cannot be asserted or because the necessary particularity cannot be pleaded. A viable claim does not require the claimant to need to know or have been able to discover all of the evidence which it later decides to plead. But it does require the putative claimant to be able to plead the precise case that is ultimately alleged.
36. On that last point, Marcus Smith J preferred to adopt what he described as the ‘viable statement of case test’ over that identified in the *FII Group Litigation* case which is directed to establishing the point in time when a putative claimant is in a position to recognise that he or she has a worthwhile case to pursue a claim. The claims in *Bilta* which were being scrutinised against the provisions of section 32 were ones based upon dishonest assistance in a breach of fiduciary duty. The judge thought that alternative test was redolent with difficulty, when asking what is a “worthwhile” claim raised a somewhat uncertain and rather subjective standard when compared with the general understanding of what is meant by a pleadable statement of case is clearly understood, even where that case involves allegations of fraud or dishonesty.
37. Turning to section 14A, its subsections (6) to (10) expound upon the broad equivalent of the objective standard of ‘reasonable diligence’ under section 32. Because they explain in some detail the circumstances in which a claimant will (and, in one particular scenario covered by subsection (10), will not) be treated as having acquired the requisite knowledge to start the 3 year period running - the acquisition of which would be equivalent to a discovery for the start of the 6 year period under section 32 – the need for judicial elaboration upon the objective standard which section 14A requires of a claimant is less obvious.
38. It is for the claimant to make out the case that section 14A applies in place of the primary limitation period of 6 years from the accrual of the cause of action. As I observed in *Davy v 01000654 Ltd* [2018] EWHC 353 (QB), at [65]-[66], by reference the decisions of the House of Lords in *Haward v Fawcetts* [2006] 1 WLR 682 and the Court of Appeal in *Gravgaard v Aldridge & Brownlee* [2005] PNLR 19, the knowledge

required to start the 3 year period running does not need to be such as would satisfy the ‘statement of claim test’. Instead, section 14A(10) covers the situation where the claimant knows enough to make it reasonable for him (by himself or with expert advice where it reasonable to seek it) to acquire further knowledge of matters which would provide an understanding, in broad terms, of the complaint upon which the claim is based. As with section 32, the objective standard underpinning this concept of constructive knowledge is informed by the actual position of the claimant. The court must have regard to the characteristics of someone in the position of the claimant, as opposed to characteristics peculiar to the claimant.

39. In *Kays Hotel Ltd v Barclays Bank Plc* [2014] EWHC 1927 (Comm), adopting the defendant’s summary of the applicable legal principles, Hamblen J (as he then was) referring to the approach under Section 14A, at [15], said that:

“firstly that the claimant must have actual or constructive knowledge that he suffered some damage; secondly he must have actual or constructive knowledge that that damage was suffered as a result of relying upon advice given by the defendant; thirdly he must have actual or constructive knowledge sufficient to cause him to investigate whether there was some flaw or inadequacy in the advice given; fourthly he must have actual or constructive knowledge of the flaw or the inadequacy to a high level of generality — he must know of the essence of the claim, not all its particulars; fifthly, he does not need to know that the advice was negligent or in breach of duty or that he has a cause of action.”

Destruction of Evidence

40. The claim by BF and TFP that DG has been guilty of deliberate destruction of evidence, by deleting most of her emails, is one to be determined through an assessment of DG’s evidence.
41. On the basis that DG was guilty of deliberately deleting her emails, Mr Dinsmore cited the recent decision of Calver J in *E, D & F Man v Come Harvest* [2022] EWHC 229 (Comm).
42. In that case, one of the witnesses for the tenth defendant (a Ms He) had said the WeChat account on her personal mobile phone had been deleted by her 2 year old son (at a point in time which was some 3 months after dismissal by the Court of Appeal of the tenth defendant’s jurisdiction challenge in the proceedings). The judge had found to be untruthful statements, made in connection with disclosure, to the effect that employees such as Ms He had not used their mobile phone for work-related purposes connected with the matters in dispute. In relation to the deletion of the WeChat messages, he said: *“I consider it far more likely that and I find as a fact that, as MCM put to her in cross-examination, she herself deliberately deleted the app in order to ensure that incriminating or unhelpful messages passing between her and Mr Kao were deleted for all time and that she knew that that would be so”*. The judge also found a number of the answers given by Ms He to the central questions in the dispute to have been untruthful answers.

43. Having made the finding, Calver J made a number of observations, at [125]-[137], about the procedural implications of a deliberate destruction of documents. These included the following:

“[125] The starting point in a case of deliberate destruction of documents is that if a fair trial of the action cannot then take place, the destroying party’s case should be struck out. And of course, the later that the destruction takes place, the worse the position; it may make a fair trial of the action less likely.”

“[130] The Court must always consider[, therefore,] whether a fair trial is possible and to this end have regard to the defaulting party’s ECHR art.6 rights of access to the Court, and whether the remedy of a strike out would be proportionate and fair in all the circumstances of the case (which is much less likely in a case where the trial has concluded and the Court is in a position to assess the effect of the destruction of the documents and/or failure to call relevant witnesses), or whether some other remedy will safeguard the position of the innocent party.”

“[133] Accordingly, if a fair trial is still possible, or if (as here) the trial has concluded, the next question is how should the Court approach the issue of the deliberate destruction of documents and a deliberate void of evidence.”

“[134] As was stated in *The Ophelia* [1916] 2 AC 206, PC at 229-230, “*the strongest possible presumption arises that if it had been produced [the documents] would have told against [the destroyer]*”. Deliberate destruction, creating an evidential void, is “*wholly inexcusable*”; the Court should refuse to give the destroyer the benefit of any doubt or draw any inference in its favour: Hollander on Documentary Evidence (13th ed.), 11-23 to 11-27.”

“[136] It follows that if there is no evidence on a particular point, the Court can rely on the inferences drawn from the destruction of documents or the failure to call relevant witnesses to provide evidence which is otherwise absent.”

EVIDENCE ON THE PRELIMINARY ISSUE

44. Unsurprisingly, given the nature of the inquiry on the preliminary issue, the evidence of DG is central to the question of when she actually discovered the alleged wrongdoing, for section 32 purposes, and actually acquired knowledge sufficient to embark upon further investigation of the claim against BF and TFP for the purposes of section 14A. In that connection, a finding that DG had deliberately deleted her emails would, in my judgment, carry an unassailable presumption against her because there would be no escape from the conclusion that she had done so in order to destroy earlier contemporaneous evidence of her knowledge.
45. Even if the allegation of deliberate destruction of evidence is not made good, it is still open to the court to conclude that DG is to be imputed with the relevant discovery or knowledge at a time which leads to the claims, or some of them, being statute barred.
46. In this regard, as well as in support of their challenge to the credibility of DG’s denial that it was not until November 2016 that she was given cause to embark upon

investigating her claim, BF and TFP also point to the particular aspects of DG's disclosure in these proceedings. With that point in mind, it is sensible to address first the evidence given by DG's solicitor, Mr James Taylor, before turning to DG's evidence

Mr Taylor

47. Mr James Taylor was an unexpected witness for DG even though he had, on 19 March 2021, made a witness statement which addressed certain aspects of DG's disclosure under the Order dated 25 September 2020, including the fact that IT specialists had confirmed that DG's emails were irrecoverable.
48. Mr Taylor gave evidence in circumstances where Mr Dinsmore had made it clear in his opening remarks at the hearing that his clients would be inviting the court to draw adverse inferences against DG's case on the preliminary issue as a result of certain failings in her disclosure since the Order. One of them related to the production, only as recently as 4 April 2022, of emails from DG to Ms Alison Beatty in November 2016. I have already mentioned that BF and BFP also relied upon the DG's failure to call Ms Beatty as a witness (an evidential omission also highlighted in *E, D & F Man v Come Harvest* at [136]) in support of their challenge to the credibility of DG's case.
49. As Mr Taylor was criticised in connection with the suggested failings, it seemed to me appropriate that he should be given an opportunity to provide his own explanation of these matters in the interests of resisting any such inference. Mr Virgo agreed and tendered Mr Taylor for cross-examination.
50. Mr Taylor confirmed (as DG's own witness statement had volunteered) that he advised DG in April 2019 of the need for her to preserve all documents relevant to the dispute, including computerised records. He was challenged in cross-examination upon the accuracy of his March 2021 witness statement and in connection with certain correspondence written on behalf of DG.
51. At paragraph 5 of his witness statement, Mr Taylor had said:

“Mr Firm, on instructions from the Claimant, gave full disclosure of all documents discovered after she had conducted an extensive search of her residence and electronic documents in November 2020. The Claimant had, prior to instructing my firm, kept a folder of relevant documents which was provided to my firm in April 2019.”
52. In his paragraph 7, he referred to a 2½ hour Zoom screen sharing session in which he supervised DG's search of four locations where electronic documents might be found. He said:

“This search had, as expected, revealed no documents which had not already been disclosed which were relevant to the issues to be decided in the Preliminary Issues hearing as set out in the Order.”
53. In a letter dated 28 January 2021, Wards Solicitors LLP wrote to Greenberg Traurig LLP had referred to the need to “correct a misapprehension on our part” when they had previously (in an earlier letter dated 14 December 2020) stated “[O]ur client has

not deleted emails – she simply has no access to older emails by the effluxion of time”. In a response to the DRD questionnaire dated 25 November 2020 they had also said “[T]he Claimant does not presently have access to these emails on her Hotmail webmail account due to their age.”

54. The later letter clarified that DG had:

“...accidentally deleted approximately 2 years of emails in October 2019. She was trying to submit an online form and was told to delete her browser history to enable the form to be submitted. Accidentally, 2 years of emails were deleted instead. The time period concerned is from 2016 and 2017.”

55. Mr Taylor was the author of those two letters. The second one also referred to DG having had “a Dropbox account” which was not one of the four search locations later identified in his witness statement.

56. Mr Taylor was challenged by Mr Dinsmore about the accuracy of paragraph 5 of his witness statement in circumstances where two emails sent by DG to Alison Beatty (on 24 November and 25 November 2016 respectively) had not been disclosed to the defendants and had only been produced shortly before the hearing. Ms Beatty had forwarded those emails to Mr Taylor on 11 March 2021, shortly before he made his witness statement.

57. In responding to the suggestion that his paragraph 5 was inaccurate, Mr Taylor said that, in that paragraph, he was focussing upon the steps that had been taken in relation to the documents obtained from DG for the purpose of giving the defendants a disclosure list on 20 November 2020. He pointed out that paragraph 6 of his witness statement referred to matters after that date.

58. However, Mr Taylor accepted that the November 2016 emails should have been disclosed in March 2021 and apologised to the court for the fact they had not been. By way of explanation but not justification for their non-disclosure he said that he had prepared a witness summary for Ms Beatty, for the purposes of the trial of the preliminary issue, and had it in mind that the emails would have been exhibited to that summary. It was seeing the reference to them in DG’s witness statement (dated 19 March 2021) which caused him to realise, shortly before the April 2022 hearing, that they had not been disclosed.

59. Subject to what I say in the next paragraph, I accept that this was a case of regrettable oversight on the part of Mr Taylor and DG. On the face of them, the dates and (brief) content of the two emails, which I address below in the context of DG’s evidence, are not unhelpful to DG’s case on limitation. There was no reason for them to be held back. Whether there were earlier communications between DG and Ms Beatty, on which the two emails were perhaps following up, is a different point and not one which Mr Taylor could have addressed. That was a point for DG to address, and to do so in circumstances where Ms Beatty had not been called as a witness.

60. That is my assessment of the position as it was assumed to be at the date of the hearing. However, I think it right to point out that in the course of preparing this judgment I have

come across a letter dated 18 March 2021, without attachments, which Mr Taylor sent (by email only to three representatives of the firm and “*sent without signature to avoid delay*”) to the defendants’ solicitors. That letter was dated one week after Ms Beatty had sent Mr Taylor the two emails and the day before he made his witness statement. It said:

“We have received and now attach certain emails from a potential witness, Alison Beatty, which are forwarded to you by way of disclosure. Please let us know if you require us to forward the emails as received from the witness.”

61. That letter was included in a trial bundle prepared by the defendants’ solicitors. On the face of it, and although he himself appears to have forgotten about it and it was overlooked by counsel and solicitors at the hearing, it seems to me that the cross-examination of Mr Taylor on this point may have been based upon a false footing. It may well be the case that there was no cause for either criticism or an apology.
62. In relation to paragraph 7 of his witness statement, Mr Taylor said he could not recall why his screen sharing session with DG had not extended to the Dropbox account mentioned in the letter dated 28 January 2021. He said that the Zoom session would have taken place by the date of that letter. Mr Taylor said he had included the Dropbox account within DG’s electronic storage locations when instructing Mr Alistair Ewing, the forensic examiner who was instructed by Wards in July 2021 to attempt the recover of DG’s emails. Mr Ewing had inspected the Dropbox account. Mr Taylor recognised the possibility that DG may have deleted material from her Dropbox account.
63. I note that Mr Ewing’s Report dated 13 October 2021 (in its revised form) said that no emails were recovered from the Dropbox account and that he said Dropbox only holds deleted items for 30 to 180 days.

Mrs Giddens

64. DG said in her witness statement that she first discovered the defendants’ alleged breaches and that she had been the victim of a fraud on or about 26 November 2016.
65. She says that this discovery was prompted by her thinking that the truffle trees were to be harvested about 5 years after her investment, and there was therefore about a year to go under her investment of 2012, and being keen to find out the price of truffles. She says she did a Google search on 24 November 2016, entering a phrase along the lines of “*what are truffles selling for?*” and, amongst other material, this produced an article about one Wendy Smart (“*aka Wendy Jeffery*”). The article was about how Wendy Smart had operated in Spain a bogus truffle investment scheme and had died leaving investors an estimated €4m out of pocket.
66. That evening, 24 November 2016, DG emailed her friend, Alison Beatty, asking “[*H*]ave you got Brian Frost’s email address?”. Ms Beatty is an accountant who had introduced DG to Brian Frost before she made her investment in 2012.
67. In her testimony, DG explained that the name Wendy Smart had rung a bell with her: “*I thought, I know that name*”. The documents relating to her investment in 2012, and

forwarded by VJNT, included a Registration Certificate showing that DG had acquired 168 hazel trees on a plantation in Spain. The certificate was signed by Wendy Jeffery-Smart.

68. The next day, 25 November 2016, DG says she did some further internet research in relation to VJNT. This led her to come across GF's name. That day, she sent a further email to Ms Beatty saying: "*The news item is attached. Name was Wendy Jeffery Smart.*"
69. DG said she was sufficiently concerned about her investment that she asked Ms Beatty if they could speak about it. She says they met and it was only through speaking to Ms Beatty on 26 November 2016 that she discovered GF was BF's brother. DG said in her witness statement that Ms Beatty told her that she had then phoned BF about the scheme. She said Ms Beatty told her that BF had responded by saying that he knew nothing about it and that DG should contact GF direct.
70. On 26 November 2016, DG sent an email to GF (at enquiries@viceroynjones-newtech.co.uk). The email was marked as being of "high" importance. It said:

Dear George,

I have come across some disturbing information regarding the management co that were assigned to my investment – Parkview Management Wendy Jeffrey-Smart.

Please can you confirm that my £126k investment has been protected according to your guarantees and has been assigned to another managed plantation? Do I need a new registration document to show this?

Can you give me some statistics as to the yields so far and confirm when my registered trees will start to produce a yield?

Many thanks

Debbie."

71. GF responded by email on 29 November 2016 as follows:

"Dear Debbie

Thank you for your email.

As you may well be aware Wendy Smart passed away in September. Obviously, as you know, information has now come to light regarding the plantation & at present we are waiting for her estate to be settled & will advise you further as soon as we are able.

Kind regards

George

For an on behalf of

Viceroy Jones New Tech Ltd.”

72. In her evidence, DG explained how she had no reason to believe before this point that there was any problem with her investment; and also how, even at this stage, she took some comfort from statements in the FAQ section of VJNT’s website that her investment would be secure. She said she had not contacted either BF or GF about her investment in the period between October 2012 and the email of 26 November 2016.
73. In her statement, DG explained how Ms Beatty provided accountancy services to West Country Truffles Ltd. DG said how, in May 2017, Ms Beatty phoned her to say that the Department of Trade and Industry had sent her a box of papers relating to that company, suggesting that DG might like to have a look at them. DG said she went with an assistant to Ms Beatty’s offices. Looking through the papers, she noticed discrepancies between the registration certificates on the files and those issued to investors: “*the cost per tree in the file copies had been massively reduced.*” Ms Beatty let DG make a photocopy of a bank statement of Credit Free Limited which related to her own investment. It was this statement which appeared to show the payments out of her £126,000 investment which are summarised in paragraph 26 of the Particulars of Claim. Aside from the sum of £36,099 paid to DG, the statement indicated two payments of £24,051 each to BF, a payment of £20,160 to Truffle Sales Limited and £20,000 to Viceroy Jones Limited. I note here that Truffle Sales Limited was one of the other companies ordered to be wound up by ICC Judge Barber. Her judgment (see paragraph 4 above) also recorded that Viceroy Jones Limited had traded between February and November 2012, selling carbon credits as investments to members of the public, and had been wound up on public interest grounds on 27 January 2017.
74. DG was tested in cross-examination by Mr Dinsmore about her claim not to have had suspicions about her investment prior to November 2016.
75. Two matters were relied upon in support of the suggestion that DG had actual awareness and knowledge (for section 32 and section 14A purposes) well before that time.
76. The first was that DG had deliberately deleted emails from her computer records in order to conceal evidence of such knowledge prior to November 2016.
77. I have introduced this topic in addressing Mr Taylor’s above. In her witness statement DG explained how, in early 2019, she was trying to raise a loan from HSBC Bank. This was to pay a significant tax bill which she was facing because she had not been eligible to receive a tax-free cash sum when cashing in her occupational pension. I have referred above to the sum of £36,099 which DG received from her SSAS at the time she invested the remainder of her pension proceeds in the truffle investment scheme. Within the trial bundle was correspondence between HMRC and DG, beginning with a letter dated 21 February 2019 from HMRC referring to what they believed to be that unauthorised payment and a tax liability of £19,864 (at 55% tax). An assessment of £18,178 and late payment interest of £3,384 was raised on 17 October 2019. DG said she had “self-reported” to HMRC when she realised she had not reached the age of 55 when she received the cash payment in 2012.

78. DG says that she was filling out an online application form for HSBC late one evening in October 2019. She said the form would not submit successfully and she was offered assistance through an online chat-box. In response to DG saying her application form would not submit, the advice was that there was a known glitch with the system and if DG removed her browser history then the application should go through. She said that, in fact, clearing the history still did not lead to a successful submission of the form the next day. To quote from DG's witness statement:

“Eventually, I found somewhere on my computer a box to tick to remove the history, but I did not know the difference between the browser history and the general history, and as a result I seem to have deleted more than I intended. Since then I have been unable to access large amounts of online emails. My inbox emails begin from 10.01.18 with only 7 odd emails in 2017 and a couple in 2002. My sent box only goes back as far as 26.08.19.”

79. DG went on in her statement to explain that she did not save emails to the hard disk of her computer and they were instead stored either by Hotmail or Outlook in the cloud. The contents of the hard disk on her previous Acer laptop (used between November 2016 and March 2019) had been uploaded, using a portable hard disk, to her current Dell laptop which she has been using since March 2019. DG said she cannot access any emails through her Hotmail account which are older than 2018. As summarised in a letter from Wards LLP dated 5 November 2021, Mr Ewing's Report confirmed that his search of the cloud items and the computer disks, using key word search terms for the period 1 August 2012 to 26 November 2016, produced no documents which were relevant to the preliminary issue.

80. DG acknowledged in her witness statement that she had been advised in April 2019 to preserve relevant documentation. She said: *“I confirm that neither before nor since receiving that advice have I done anything deliberately to put any relevant or documents out of reach.”*

81. In cross-examination DG said she did not know what had caused her older emails to have become lost. She said in testimony *“I assumed it was deleting the browser history”* but, consistent with her witness statement, was unable to explain what it was in fact that she had done to lose them. She referred to *“always having my email open”*.

82. DG is a qualified accounting technician and provides accountancy services for clients. She referred to having around 8,000 to 9,000 emails relating to clients. She did not think her emails would have been backed up to the Dropbox as she only used that for certain Excel documents and client payroll records. DG said the limited number of emails that had been preserved would have been saved in *“side folders”* as she would sometimes save an email to a separate folder relating to a client.

83. DG firmly resisted the suggestion that she had deliberately deleted the emails. Her answers on the point included the following:

“I have never hid anything. There is no point in hiding anything. I do not lie. We tried to recover as much as we could.”

“There was no reason for me to delete anything. I would not have held anything back.”

and

“I did not delete documents which would have helped me with my own clients.”

84. In support of his submission that this was a case of a deliberate destruction of evidence, Mr Dinsmore pointed to the earlier inaccurate explanation for DG not having access to emails (because of their age) upon which he had cross-examined Mr Taylor. DG accepted in cross-examination that it was misleading for Wards LLP to have referred to emails having become lost through effluxion of time and they may have misunderstood the position. As for the statement in their letter dated 28 January 2021 that the accidental deletion related only to the years 2016 and 2017, she said *“I don’t think it was easy for the solicitors to understand it until they saw what had gone.”*
85. The second matter relied upon by BF and TFP in challenging DG’s lack of cause for concern about her investment prior to November 2016 was the suggestion that she was implicated in the scam which she says she only discovered at that time. This was based upon DG having received the cash sum of £36,099 when, not having reached the age of 55 at the time, she was not eligible to do so. DG said she only realised this later, in 2018, which led her to report it to HMRC. She said that, although she deals with the tax affairs of her clients, she is not experienced in pension matters and that BF should have told her in 2012 that she was not entitled to receive the money.

ASSESSMENT OF THE EVIDENCE

86. My assessment of the evidence given on behalf of DG should begin with the conclusion to be drawn from the fact that Alison Beatty was not called to give evidence to corroborate DG’s position that the November 2016 emails marked (so far as Ms Beatty was aware) the point in time when DG first became concerned about the fate of her investment in the truffle plantation scheme.
87. Mr Virgo offered as possible explanation for Ms Beatty not being called as witness her likely concern that, as an accountant, she would have been concerned that she had given DG access to documents relating to West Country Truffles Ltd (including the Credit Free Limited bank statement) in May 2017. However, I agree with Mr Dinsmore’s response that her concern that she might face an uncomfortable cross-examination is not a good reason for her not giving evidence. He said the fact is that a witness summary had been provided but Ms Beatty had not been prepared to testify in corroborating DG’s version of events.
88. In my judgment, that last observation really sums up the position. It correctly highlights the point that the soundness of DG’s position, in relation to the November 2016 date, rests entirely upon DG’s credibility as a witness. BF and TFP have been denied the opportunity of questioning Ms Beatty in relation to any earlier communications with DG and whether she might have been selective in the choice of emails she forwarded to Mr Taylor on 11 March 2021. That said, the brief content of those two emails does have a revelatory flavour to it.

89. DG's credibility as a witness is therefore key to my determination of the preliminary issue and whether she can avail herself of section 32 or section 14A.
90. I say that because I regard the evidence given by Mr Taylor to be neutral on the question. I found him to be a straightforward witness, including in his recognition that the two emails to Ms Beatty should have been disclosed promptly (assuming they were not) and I do not conclude that anything said by him in his witness statement or in his firm's correspondence should be taken as undermining DG's case on limitation.
91. Instead, the soundness of that case turns in my judgment upon the veracity or otherwise of DG's account. In particular, it turns upon me deciding whether or not DG's protests that she did not deliberately delete emails (see paragraph 83 above) are to be accepted as truthful ones.
92. Before returning to that crucial question, I address BF's and TFP's case that DG should have embarked upon inquiries preliminary to her claim well before November 2016.
93. In paragraphs 18 and 19 above I have identified the various alternative dates by which BF and TFP say DG is to be attributed with knowledge sufficient to set the clock ticking for limitation purposes.
94. The essence of the argument in support of the trigger dates in 2012 and 2013 is based upon the fact that DG had received £36,000 in cash when her pleaded case is that she understood the entirety of the value of her pension had been invested in the truffle investment scheme and her loss was £126,000.
95. Therefore, BF and TFP say, DG had sufficient information to prompt a reasonable person in her position (an accountant) to make further inquiries from the moment she made the investment in October 2012. I am invited to infer that, had she done so, she would have discovered enough detail to be able to plead her claim. Their fall-back dates of 13 May 2013 and September 2013 respectively relate to when DG was sent and accepts she received the login details for her Government Gateway account. I was invited to infer that DG would have logged in once she received them. The further alternative date of 24 July 2014 is when she says she did log into that account.
96. The significance of these dates, BF and TFP say, is that by accessing the account DG would have discovered that her investment was recorded in a significantly greater sum than the £90,000 odd (i.e. £126,000 less £30,099 cash) which she knew she had invested. The printouts which DG made when she accessed the account on 24 July 2014 show that TPP made submissions which suggested that DG's investment in the scheme was worth £129,388 as at 14 June 2013 (the question as to whether an investment greater than £100,000 in the 2012-13 tax year being answered "yes") and worth £128,706 as at 21 July 2014. Both sums were in excess of £126,000. As the sums took no account of the cash payment to DG and she was not expecting a return on the investment in the first 5 years, this accessible record of her investment is said by the defendants to have contained observable or ascertainable facts sufficient to justify DG embarking on preliminary steps towards making her claim.
97. As ICC Judge Barber noted in *Secretary of State v Viceroy Jones New Tech*, at 25(2) managing a SSAS is not a regulated activity for the purposes of the Financial Services and Markets Act 2000 provided that the person doing the managing is a trustee of the

scheme, all trustees are beneficiaries of the scheme and the scheme has fewer than 12 members. By a Trust Deed dated 16 August 2012 made between DG as trustee, TPP and Perfectly Balanced Books Limited (“**PBBL**”, DG’s company), PBBL was appointed as the administrator of DG’s SSAS. By that deed, TPP was appointed as agent (or “practitioner”) of DG and PBBL “*in connection with any matters within the responsibility of HMRC and to view information held on HMRC Pension Scheme Service in relation to the Scheme.*” On 13 May 2013, Brad Davis on behalf of TPP wrote to DG to tell her that TPP had completed the set up and tax registration of the SSAS. That letter stated that DG had been sent her Government Gateway User ID so that she could “*view details of the scheme and the work we carry out for you on line.*” An enclosed Fact Sheet advised DG to “[P]lease only rely on information we provide you (or in conjunction with your appointed advisor). Our information will only ever be sourced directly from HMRC or the Regulator.”

98. DG explained in her witness statement how, in 2013, she had questioned the basis on which she was incurring charges to TPP. She wrote to TPP on 6 September 2013 in relation to quarterly charges of £228 which had been paid to TPP by direct debit from her bank account, saying she could not see from her paperwork that she had authorised this or was aware of their fees. TPP responded by a letter dated 16 September 2013 enclosing certain documentation saying they “*should have all been given to you by your adviser at the time. Some of them would have been in your Welcome Pack.*” TPP said they would resign if DG did not want them to continue administering her scheme but advised she would need to appoint another firm to continue its administration. One of the documents enclosed was an invoice for TPP’s “*Pension Administration Services*” for the year ended 14 August 2013 in the VAT inclusive sum of £912. Another was TPP’s ‘Fee Menu’ which explained the services covered by that annual administration fee.
99. DG responded to the letter by an email dated 18 September 2013. Amongst other matters, she said her welcome pack had not contained the invoice or details of TPP’s fees. She went on:

“Your letter of the 13th May 2013 mentions I would be receiving the Government Gateway User ID and password.

I do not have these and would like to be able to view details of the scheme and the work you carry out on line.

How do I go about setting this up again?”

100. DG said it was then that she was provided with the Government Gateway login details. However, she said she did not login to the gateway until July 2014 when she was prompted to do so as a result of TPP writing to her in relation to outstanding fees. At some point afterwards she dispensed with the services of TPP and thereafter made her own returns to HMRC. She said “[F]or future returns I made the declaration myself stating in good faith that nothing had changed.” It was only in 2018 that she contacted the Pension Regulator and HMRC to inform them there were apparently no funds left in her SSAS.

101. I accept DG's evidence that she did not use it to access details of her scheme until July 2014.
102. That said, I also accept Mr Dinsmore's point that, looking at matters with an expectation of reasonable diligence on DG's part and what she might reasonably have been expected to establish, she should have accessed details of her scheme once she was provided with her login details in September 2013. DG's own email of 18 September 2013 supports that conclusion.
103. However, I do not accept Mr Dinsmore's further point that by doing so, either then or in July 2014, DG would have made the discovery or acquired the knowledge necessary to set time running under section 32 or section 14A.
104. What DG did discover in July 2014 is not that her investment had been denuded of value, in the way that has led to the present claim, but that the value shown for it failed to reflect her cash receipt of £36,099. In cross-examination, DG explained that TPP had probably obtained the figure of £129,405.05 (in their filing with HMRC on 14 June 2013) from DG's bank statement. In re-examination she identified the bank statement which showed that sum being credited to her 'Pension Cheque Account' with Investec on 16 October 2012. An inquiry by DG of Royal Mail in December 2016 had confirmed that the sum paid out of her occupational pension scheme was £129,405.
105. In my judgment it can be fairly inferred that in their filing with HMRC (for the "accounting period 6 April 2012 to 5 April 2013") TPP took the transfer value of the old pension without taking account of the cash payment made to DG on 17 October 2012. In circumstances where TPP's filing for the following year seems to have reflected only payment of their charges, it seems that their oversight of the cash payment received by DG (and any other deductions suggested by the Credit Free bank statement) continued.
106. I asked DG whether TPP had provided her with an "Annual benefit statement" as their Fee Menu suggested. She said they had not. Such services as TPP did provide therefore did not result in DG being alerted to the depletion of her investment.
107. In cross-examination DG said she thought the overstatement of the value of her SSAS in the HMRC filings "would have been corrected in the end". She said she had no reason to doubt TPP and denied that she had deliberately misled HMRC. In re-examination she mentioned that BF had visited her at her home and talked about a "difference" between the sum she had received from her Royal Mail pension and the amount invested in the truffle scheme. She said: "I thought he was going to correct it."
108. In my judgment, imputed or actual awareness on DG's part that her SSAS investment was recorded in the HMRC filings in the sum realised from the Royal Mail scheme (subject to TPP's administration charges) was not sufficient to cause her to investigate further whether or not she might have been the victim of a fraud or the giving of negligent advice in relation to the truffle investment scheme. It did not begin to reveal what she actually discovered in May 2017.
109. The September 2016 date relied upon by BF and TFP is based upon the online article about Wendy Smart which (in its revised version dated 2 November 2016) DG accessed through the internet and printed off on 24 November 2016. In my judgment, it cannot

be said that DG failed to exercise due diligence or failed to take reasonable steps to discover the article in the initial two months following publication. In support of this conclusion I note that BF and TFP were sceptical as to why DG would have been doing any research into her truffle scheme investment before the first 5 years had elapsed and also her own answers that it was only by become “*side-tracked*” in the process of searching the internet that she came across the article.

110. As I have concluded DG should not be attributed with section 32 or section 14A knowledge before November 2016, it is necessary to consider whether she nevertheless had actual knowledge, sufficient to set the clock ticking for limitation purposes, before that date.
111. I therefore turn to what BF and TFP say was DG’s deliberate destruction of evidence through the deletion of emails which is at the heart of that inquiry.
112. When DG gave the answers referred to in paragraph 83 above, they struck me at the time as being the answers of an honest witness protesting genuinely that she had not deliberately destroyed evidence. Overall, DG’s testimony comprised answers which I regard as being spontaneous and frank ones rather than ones built upon a calculated decision to mislead the court.
113. The question is whether or not, in reflecting upon the answers she gave, I should now be more attuned to the risk that she was being disingenuous and untruthful. In addition to the failure to call Ms Beatty to support her version of events, which I have addressed above, two further matters were relied upon by Mr Dinsmore in saying I should not believe DG’s denial that she had destroyed potentially incriminating evidence.
114. The first matter was not directly related to DG’s account of how she lost her emails but instead went to her explanation as to how she began to unearth the scam in 2016. I have mentioned above how she says this began with a Google search along the lines of “*what are truffles selling for?*”. Within the trial bundle were printouts of searches undertaken by the defendants’ solicitors using those same search terms (and also adding “*Spain*” which was where Wendy Jeffery-Smart had operated). These searches were provided to DG’s solicitors on 8 March 2022. They did not produce any reference to a truffle investment scheme scam.
115. In response to the suggestion that she did not, therefore, discover the scam through an internet search, DG said that “*like all searches, you get side-tracked – that is how I got the name Wendy Smart.*” I understood DG to be saying that an initial search over the price of truffles led her, through subsidiary searches, to the article on Wendy Smart. I find that to be a reasonable explanation which I am not inclined to doubt by reference to the fruitless searches which the defendants’ solicitors carried out 5 years or so later.
116. The second matter relied upon by BF and TFP went directly to DG’s explanation (to the extent she understood how it may have happened) as to how the emails had become lost. I have found this aspect of her evidence much more troubling. Part of the reason for that lies in the fact that, as I have explained in addressing Mr Taylor’s evidence, the fact that the explanation that emails had been deleted took some time to emerge. A greater part rests upon my uncertainty as to how the deletion could have happened by accident.

117. Mr Dinsmore suggested in his closing submissions that I could take judicial notice that the clearing of an internet history cannot delete thousands of emails. This prompted me to make two points in response.
118. The first was that, although my layman's view of things did lead me to think such inadvertent mass deletion of emails would be unlikely to be achieved as easily as DG suggests, even on the basis that she had managed to delete something more than just her browsing history, an IT expert (such as Mr Ewing) *might* read any judgment which adopted Mr Dinsmore's submission and conclude I had gone too far. I noted that there was no expert evidence on this point - the feasibility of such inadvertent mass deletion of emails - as opposed to evidence from Mr Ewing to the effect that they had become irretrievably lost by the time he was instructed. Although Mr Ewing's Report was directed to the question of what could be recovered in July and August 2021, I note that he mentioned that one generally only sees live files on a cloud-based account such as DG's Hotmail account. He referred to only being able to access the 'recoverable items' folder using a web browser. This *might* have a bearing on the ease of inadvertent deletion point.
119. In response to my point, Mr Dinsmore remarked that DG had initially been reluctant to engage with the idea of expert evidence even over the recoverability of data, so the absence of expert evidence about the means as opposed to the consequences should not be held against CF and TFP. However, the fact is that I have no expert evidence to guide me on this aspect.
120. My second point was to suggest that, if this was a case of deliberate deletion of emails by DG, then presumably the court might also need to attribute to DG a degree of knowledge or belief that they would not be capable of being retrieved using the resources of an IT forensic expert. In response, Mr Dinsmore said the most likely explanation is that DG panicked and deleted the whole lot, including client emails (allowing for those few emails separately saved in client folders), instead undertaking a surgical removal of particular ones. Accordingly, BF and TFP do not need to go so far as suggesting that DG also addressed her mind to the possibility that they might nevertheless be subsequently recovered (assuming sufficiently prompt action was taken to retrieve them). In my view, that was a good response if I am persuaded that DG did make a conscious decision to get rid of them. Her own evidence suggests that she was not sophisticated in the use of computers and, on that scenario, she may well not have cast her mind ahead to the lasting effectiveness of any such deliberate action.
121. The criticisms of DG's account were powerful ones. I have been left feeling puzzled as to how, through one or more clicks of the keyboard, emails held on a server can have been so easily and irretrievably lost by accident.
122. However, I am not persuaded her account of events is untrue. Ultimately, and in the absence of convincing expert evidence demonstrating her explanation is not credible, my decision on this point rests upon my assessment of her as a witness. As Mr Virgo pointed out, the contrary conclusion would involve DG attempting to hoodwink the court with a false narrative. DG did not come across to me as a witness who was perjuring herself.
123. Again, I bear in mind that the November 2016 emails to Ms Beatty have about them the tenor of a recent significant discovery. Mr Dinsmore made it clear that he was not

suggesting that DG had constructed documents to suit her case of a discovery in November 2016. The tenor of those emails also militates against the conclusion that DG chose to create a “*deliberate void of evidence*” (to adopt the expression of Calver J in *E, D & F Man v Come Harvest*) in which unhelpful signs of a discovery at an earlier point in time would otherwise have been present.

124. A further attack upon the credibility of DG’s evidence generally involved the suggestion that she was somehow implicated in the truffle investment scam. Mr Dinsmore submitted that DG knew that this was not a “vanilla” investment scheme and that her receipt of £36,000 in cash was too good to be true. The Defence relies DG’s pleaded claim that her investment was paid to “*other participants in the Investment Scam*” and her receipt of a cash sum from the account with Credit Free Limited to say that she must have been a party to any conspiracy, and that BF and TFP “*rely on illegality as complete defence to the Claimant’s claims.*”
125. This line of defence would therefore be a matter for trial. Regardless of any evidential deficiencies on DG’s side, one might on this point perhaps expect the defendants to be able to offer some evidence that DG knew from the outset that the truffle investment scheme was not what she now says she believed it to have been, (at least until November 2016). Whilst recognising that the gist of the BF’s and TFP’s defence is that the investment in the truffle investment scheme was nothing to do with them, I do not think it is unreasonable to assume that GF might have lent some brotherly assistance to them on the present issue if there was some information to support the case for saying that DG knew it was a scam at an earlier point than she claims.
126. Whether or not that is a reasonable assumption, I am not at all persuaded by this particular attack on DG’s credibility so far as it bears upon her evidence on the preliminary issue. When she was asked about the cash receipt, she said she did not know it was taxable until 2018 when she decided to close her Government Gateway account having come to terms with the fact that the investment was a complete scam. She said that about a month before she had reflected upon the position of one of her clients (who had received a cash free lump sum out of a pension having reached the age of 55) and thought “*I wasn’t 55 at the time*” (i.e. at the time of the £36,000 cash payment). In response to the general point that she must have realised her investment was too good to be true, she responded: “*Why would anybody want to pay 55% tax and pay £90,000 to someone else – just to get some money out?*”
127. That, in my judgment, was also the response of an honest witness. I am mindful that there is no obvious answer to DG’s rhetorical question. DG accepted that one of the motivations of setting up her SSAS was to obtain some funds (she said that was “*perfect*”) and she said her husband had done a similar thing a couple of weeks previously. Although she was keen to obtain money to make some payments, she said she was in no urgent need of money. She said she relied on BF who should have told her that she was not entitled to a tax-free cash sum.

CONCLUSION

128. It is for DG to make out the case for either section 32 or section 14A applying to relieve her of the consequences of the ordinary 6 year limitation period.

129. If prior to 22 November 2013 DG either did discover matters which justified her making preliminary inquiries with a view to bringing proceedings, or could have discovered them with reasonable diligence, then all her claims are time-barred and not saved by section 32. If she either had or is to be attributed with acquiring knowledge of such matters in the period after that date but before November 2016 then her claim based upon negligent advice is time-barred, and not saved by section 14A, even if the claim in fraud is not.
130. For the reasons explained in the previous section of this judgment, on my assessment of the evidence I am satisfied on the evidence that DG has proved that she did not discover the alleged breaches and would not have discovered them though the exercise of reasonable diligence prior to 26 November 2016 and that, until that date, she lacked constructive knowledge of those breaches by reference to facts observable or ascertainable by her.
131. On that basis, the answer to the preliminary issue identified in paragraph 13 above is “no” in relation to all of DG’s pleaded claims.
132. This judgment has been handed down remotely by email circulation to the parties. The handing down is adjourned for the purpose of extending the time for any application for permission to appeal by BF and TFP and also for the determination of any consequential matters which cannot be agreed by the parties. Any such application for permission should be made to me in writing by 4pm on 26 May, with any written submissions in opposition being filed by 4pm on 9 June 2022. Written submissions on any consequential issues should be made by the same deadlines, with DG going first. In the absence of any further direction for an oral hearing (whether attended or remote) any application for permission to appeal and other outstanding consequential matters will be determined by me on the papers. In my decision on any application for permission to appeal I will make provision for the date for filing an Appellant’s Notice under CPR 52.12(2).