

Claim number: QB-2020-003127

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION (KBD)**

**NCN: 2023 EWHC 1491 (KB)**

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Monday, 22 May 2023 (continued Wednesday 24 May 2023)

BEFORE:

**MASTER DAGNALL**

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BETWEEN:

**IN MEDIA TRUST SPA (A COMPANY INCORPORATED UNDER THE LAWS OF  
ITALY) AS TRUSTEE FOR THE JACARANDA TRUST**

Claimant

- and -

**(1) BGB WESTON LIMITED**  
**(2) LORENZO GALLUCCI**  
**(3) GENNARO PINTO**

Defendants

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**DAVID PHILLIPS KC and DAVID FISHER** (Instructed by Pini Franco Solicitors)  
appeared on behalf of the Claimant.

**HUGH MIALL** (Instructed by Morgan Rose Solicitors) appeared on behalf of the first and  
second Defendants.

**CHRISTOPER LANGLEY** (Instructed by Wilmer Hale Solicitors) appeared on behalf of  
the third Defendant.

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**APPROVED JUDGMENT**

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No of folios: (Monday – 1010) (Wednesday- 110) (Combined 1,120)

No of words: (Monday- 72,721) (Wednesday- 7,933) (Combined 80,654)

**MASTER DAGNALL:**

1. This is my judgment in relation to various applications in this matter, being firstly an application by the first defendant, who I will call BGB, and the second defendant, who I will call Mr Gallucci, to strike out or for reverse summary judgment on the claim that was made by notice of application of 29 April 2021. That application has two parts. Firstly, it is based on a contention that the then claim was bound to fail. Secondly, it was based on assertion that the then claimant, Private Trustees Limited, whom I will call PTL, had committed such an abuse of process that I should strike out the claim. Secondly, there is a responsive application made now by the substituted claimant In Media Trust SPA, who I will call IMT, to amend the particulars of claim, the original application to do so having been made by PTL by notice of application of 14 January 2022.
2. The proposed amendments have undergone numerous iterations during the hearing of these applications, which, following initial applications and hearings, took place on 14 to 17 June 2022; and on 31 October and 1 and 2 November 2022; November 27; and 29 March 2023.
3. That application is resisted on similar grounds to those advanced in the first and second defendant's application but also on the basis that it would confer an inappropriate limitation advantage on the claimant prohibited by statute in the Civil Procedure Rules. That resistance is not only by the 1<sup>st</sup> and 2<sup>nd</sup> defendant but also by the 3<sup>rd</sup> defendant.
4. The essential history and dramatis personae are as follows in summary. PTL was the trustee of a Jersey trust called the Jacaranda Trust, which I will call, "the trust", whose settlor and beneficiaries are located in Europe, and in particular in Italy. The trust deed contained provisions for a protector who was a Mr Masimo Gentile, whom I will call "Mr Gentile". The guiding mind of PTL was and may still be a Dr Pablo Panico, who I will call "Dr Panico", who is a Scottish and Luxemburg, at least, qualified lawyer

and a specialist in international trust law and author of books on the subject. The assets of the trust in 2014 amounted to at least €10 million and were held by a custodian bank, CBP Quilvest SA, whom I will call, “the bank”, one of whose officers was Mr Michele Amari, whom I will call “Mr Amari”. The bank held those trusts in a discretionary management account, which I will call “the DMA”.

5. BGB in 2014 and thereafter carried and still carries on a financial business, the precise nature and extent of which is in dispute. Its guiding mind is and was Mr Gallucci, who was also associated with it, and again the precise nature of the association is in dispute. The third defendant is Mr Gennaro Pinto, whom I will call “Mr Pinto”. His practice, clearly known to and not dissented from by BGB and any evidence before me, was to send emails and documents and use business cards headed and carrying the logo of BGB and giving its physical address in London and an email address, gennaro.pinto@bgbweston.com and describing himself as “investment manager”.
6. In autumn 2014 and onwards there were meetings involving Dr Panico, Mr Gallucci and Mr Pinto and communications involving them and Mr Amari. Many of the emails and documents were in Italian, which is the first or at least a fluent language of them and many others involved. They had the result that the bank was to transfer in early 2015 out of the DMA a total of €9,550,000. The trust was to receive back in due course €1,333,180.54 and so it had suffered an apparent capital loss of €8,216,819.46. It is now common ground and in any event clear on the evidence that there was no written agreement made in 2014 or 2015 for BGB to manage the trust monies; but also that in January 2018 Dr Panico asked Mr Pinto to produce a template written investment management agreement, which I will call “the written IMA”, which Dr Panico completed and dated 13 November 2014. Dr Panico then signed it and then passed it to Mr Pinto, who signed it, his signature being so close physically to the date that Mr Pinto must have seen it when signing and returning the document. The written IMA has in it Appendix 2, Provisions for an Investment Strategy to be followed.
7. It is also common ground and clear on the evidence that from 2015 to 2018 Mr Pinto sent various documents to Dr Panico indicating that millions of euros of trust assets were held through an entity called Interactive Brokers in secure Italian Government and other bonds, but also that that was not in fact the case, the real Interactive Brokers

having denied that they hold any such assets and that any of the purported documents emanate from them. Mr Pinto, though, asserts that at the time he believed such matters to be the case and such documents to have been genuine.

8. On 7 September 2020, PTL issued the claim form in this case with the original particulars of claim, and, before then, it had also on 3 September 2020 applied for and obtained a worldwide freezing order, which I will call “the WFO”, from Mr Justice Saini, a High Court judge; which order froze the assets of the defendants, and required them to disclose details of all their assets, and which they at least purportedly then did. The application for the WFO was supported by the first “affidavit” of Dr Panico of 28 August 2020. That “affidavit” was not sworn before a solicitor and was supplemented and verified by the third affidavit of Dr Panico sworn before a solicitor of 16 November 2020. The WFO contained the usual cross-undertaking by PPL to pay any damages the court might conclude that PTL should pay regarding any losses suffered by the defendants as a result of it, that is in the event that the court concluded that the WFO should not have been granted.
  
9. The claim then advanced by PTL was set out both the particulars of claim and the affidavits, but is best seen in the particulars of claim and, although I will return to their detail, was as follows. Firstly, that BGB, Mr Gallucci and Mr Pinto had conspired to deceive PTL acting by Dr Panico into entering into an investment management agreement and putting the trust assets under their control. Secondly, in furtherance of such conspiracy, they had each made false representations that they intended that the trust’s assets would be invested in low-risk investments in accordance with an agreed investment strategy. Thirdly, in reliance to this, PTL had entered into the written IMA, that being said to have been created on 30 November 2014, and procured that the bank transfer the trust’s assets to funds identified by the defendants as being in accordance with the investment strategy. Fourthly, in fact, the funds were not invested in low-risk investments as provided for by the investment strategy; but, rather, were invested in high-risk investments, and the majority were lost; but the defendants did not reveal this to PTL, but instead used false information and documents, purportedly from Interactive Brokers, to conceal this until PTL eventually learnt the truth. Fifthly, as a result of the written IMA and its ability to control what happened to the trust assets and their respective roles, each of the defendants owed fiduciary duties of

loyalty and good faith to PTL; which they had breached by: firstly, having the funds invested in high-risk investments, or being misappropriated; secondly, misleading PTL as to what had happened; thirdly, refusing even in 2020 to explain to PTL what had happened. Sixthly, further, Mr Gallucci and Mr Pinto had dishonestly assisted in BGB's breaches of fiduciary duty. Seventhly, further, each of the defendants were liable for breach of trust regarding their holding and dealing with the trust assets. Eighthly, further, the representations made by each of the defendants were all false and dishonest and the defendants were liable in deceit. Ninthly, also, the written IMA should be rescinded. Tenthly, and as a result of the aforesaid, PTL had suffered loss both directly of the trust's assets and indirectly in losing the ability to recover them earlier than in 2020. Personal and proprietary remedies were claimed. Those particulars of claim bore the name of PTL's then counsel, Mr Nigel Hood, and were supported by a statement of truth from and signed by Dr Panico.

10. BGB and Mr Gallucci served a defence bearing the name of Mr Hugh Miall of counsel, who has appeared for them before me. Mr Pinto served a defence bearing the name of Mr Christopher Langley of counsel, who has appeared for him before me. PTL, while it was the claimant, and now In Media Trust, IMT, have now appeared before me by Mr Phillips KC, leading Mr Fisher of counsel.
11. Part of BGB and Mr Gallucci's defence, which their solicitors had also forcefully advanced in correspondence, was that the written IMA was not signed or created on 30 November 2014 but in fact in January 2018. They then made clear that they would resist the continuance of the WFO, where a further hearing regarding it was due to take place on a date to be fixed following 11 January 2021. The upshot was that the parties agreed a consent order, which was made by Mr Justice Stewart on 6 January 2021, whereby the WFO was set aside. It was provided that there would be no inquiry on the costs undertaking as to damages provided by PTL; but it was also provided that PTL would pay BGB and Mr Gallucci's costs of £190,639 and Mr Pinto's costs of £40,139, those said to be those parties' costs of and relating to the WFO application.
12. Then, following various correspondence, BGB and Mr Gallucci issued their application of 29 April 2021 to strike out or for reverse summary judgment. It was expressed in the application notice and in witness evidence in support that the grounds

were essentially as follows. The first set of grounds was that the claim was based on the written IMA and alleged duties of BGB and Mr Gallucci arising from it. However, no written IMA or indeed any other contract existed in 2014 or following between BGB and PTL; and the true relationship was that BGB had simply marketed some funds to PTL and the trust with the result that the bank decided to invest in them, and which funds had unfortunately turned out to be unsuccessful. It was said that, in the absence of the written IMA, PTL could not sue BGB or Mr Gallucci for what had occurred. It was also said that any deception was by Mr Pinto alone and had not caused any loss.

13. The second set of grounds was that, in any event, all that had happened was that some trust assets had been invested in funds which had been redeemed at a loss.
14. Thirdly, and separately, it was asserted that the then claim and the obtaining of the WFO had been based on assertions as to the written IMA having been created on 30 November 2014 which Dr Panico knew were untrue, and so that the claim was and is an abuse of process and should simply be struck out.
15. That application relied on past affidavits of Mr Gallucci of 10 and 14 September and 23 October 2020, and a witness statement of Mr Gallucci of 20 November 2020.
16. That application was eventually resisted by the claimant, the then claimant being PTL, who, firstly, applied by an application notice of 14 November 2020 to amend the particulars of claim and to join IMT as a claimant. During the hearing before me, the claimant's proposed amendments have changed substantially. Secondly, the claimant supported the resistance to the defendant's application and the claimant's own applications with various witness statements of Dr Panico, of their solicitor, Guy Grewar, and of Matteo Pettinari, whom I will call "Mr Pettinari", a director of IMT of 14 January 2022. Mr Pettinari explained that IMT had become a co-trustee of Jacaranda Trust on 4 March 2016 specifically to deal with Italian tax matters, and had then become a full trustee on 27 September 2021.
17. BGB and Mr Gallucci then applied under Civil Procedure Rule 32.7 for Dr Panico to attend the hearing of the various applications for cross-examination on the basis that

they alleged that Dr Panico had been dishonest, both generally and in his previous affidavits regarding when and how the written IMA was created. I made an order at a hearing on 15 February 2022 which provided in its paragraphs 1 to 3:

1. 'Pursuant to CPR r32.7, Dr Paolo Panico shall attend the hearing listed pursuant to paragraph 6, below, for the purposes of being cross-examined on his 1st Witness Statement dated 14 January 2022 and any further evidence he files as permitted by this order. That cross-examination shall be in respect of the issue of whether or not Dr Panico knowingly or recklessly caused the Claimant to commence and/or maintain its claim in these proceedings on a false basis. If Dr Panico does not attend the hearing for cross-examination then the sanction in r32.7(2) shall apply.
  2. The Claimant's application dated 3 February 2022 for an order under CPR r32.7, for permission to cross-examine the Second Defendant, is dismissed.
  3. The First and Second Defendants shall by 4.00 pm on 4 March 2022 file a statement of the facts and matters relied upon to justify the Court inferring or concluding that Dr Panico's state of mind was deceitful for the purposes of its case that the Claimant knowingly or recklessly commenced and/or maintained a false claim.'
18. In paragraph 4 I gave Mr Pinto an opportunity to apply to strike out the claim on the basis of abuse of process on the same lines as BGB and Mr Gallucci's application, which opportunity Mr Pinto did not take up or pursue.
19. BGB and Mr Gallucci then filed a statement of facts and matters relied upon in accordance with my order of 15 February 2022. The claimant's side then filed a second witness statement of Dr Panico's dealing with his relevant mindset regarding the written IMA and its creation and the references he had made to it previously in this litigation.
20. Then on 20 May 2022 IMT issued an application to be substituted as sole claimant supported by witness statements of Mr Pettinari and also a Mario Carella, whom I will

call “Mr Carella”, who had been appointed as protector of the Jacaranda Trust in place of Mr Gentile on 2 December 2021. Those witness statements stated that PTL had ceased to be a trustee in the light of the history.

21. Then on 6 June 2022, IMT issued a further application to be substituted supported by further witness statements of Mr Pettinari and Mr Grewar stating that Mr Pettinari felt that he could sign a statement of truth for the then proposed amended particulars of claim.
22. On 13 June 2022, PTL assigned by deed all relevant causes of action to IMT. No point has been taken by any defendant regarding the validity or effect of that assignment.
23. The various applications then came before me to be heard from 14 June 2022 to 17 June 2022. There, Mr Phillips and Mr Fisher appeared for IMT and Mr Miall for BGB and Mr Gallucci, no one at that point for Mr Pinto. However, Mr Schaw-Miller of counsel appeared for PTL. At that hearing I substituted IMT for PTL as claimant on the basis that that substitution would not in any way affect the abuse of process argument or the strike-out application based upon it.
24. However, Dr Panico did not then attend. The result was that I made an order applying Civil Procedure Rule 32.7 to the effect that Dr Panico’s witness statements were not to be read in relation to the abuse of process argument, and thus not in relation to the question of whether Dr Panico, and PTL through him, had deceived or sought to deceive the court regarding the history of the written IMA; although I did provide that Dr Panico’s evidence was not to be excluded with regards to other matters. I delivered a separate judgment giving my reasons for taking that course.
25. I then heard Mr Phillips (then) QC with regard to the then proposed amendments. However, the time available was insufficient and I adjourned the hearing.
26. I subsequently heard Mr Phillips, now KC, and then Mr Miall, and also at that hearing Mr Langley for Mr Pinto, on 31 October, 1, and 2 November 2022. While there was sufficient time to hear counsel as regards to the proposed amendments, there was not sufficient to deal with the question of abuse of process. One matter which arose was



as to whether Mr Pinto should have an opportunity to adduce evidence with regards to certain limitation points being advanced. I made an order enabling Mr Pinto to file a witness statement but on the basis that I would not draw any inferences against Mr Pinto simply from a failure by Mr Pinto to do so, albeit that would leave me in a situation of simply having (only) the existing evidence before me. I gave my reasons for making that order at the time.

27. Mr Pinto decided not to take up the opportunity to adduce further witness evidence. That left the abuse of process argument on which I heard from Mr Phillips and Mr Maill on 27 and 29 March 2023, Mr Langley not attending. I add that Mr Pinto's solicitors sent a letter not just explaining that they did not intend to adduce any witness evidence but also contending that I should not make certain findings which Mr Phillips was inviting me to make with regards to Mr Pinto. I had hoped to deliver this judgment slightly sooner but it has been delayed owing both to its length and to various medical complications of mine.
28. The main reasons that so many days have been devoted to hearing these applications are twofold. Firstly, during them, the proposed amended particulars of claim have undergone numerous changes and iterations. The original version of particulars of claim occupies some 25 pages. The first version of the amended particulars of claim occupies some 56 and the second version some 67. Secondly, as BGB and Mr Gallucci have resisted the amendments, counsel have felt it appropriate to take me through a very large number of documents contained in bundles, which run to over 2000 pages, albeit that has to be seen in the context of a case where the trust has lost over €8 million as a capital sum, even before any consideration of interest.
29. I have borne in mind all the documents in evidence before me as well as all of the parties' extensive written and oral submissions. If I omit any point or deal with a point shortly, that is for considerations of space and time. I can always be asked to deal with such expressly or in greater detail if and when I am asked to approve a transcript or if an appeal is brought.
30. In relation to the application to amend, the claimant, IMT, now seeks to advance the case, as summarised in paragraph 46 of the amended particulars of claim, being as

follows. Firstly, BGB, in or following September 2014 assumed a contractual obligation to invest or propose investments of the trust monies in low-risk investments but that BGB breached that obligation by investing or procuring the investment of trust assets in high-risk investments resulting in a loss due to the fall in value of those investments. That is called “the contract claim”. Secondly, BGB, Mr Gallucci and Mr Pinto conspired at some point or points between September 2014 and March 2015 to use unlawful means, namely deceit by false representations, to injure the trust by having the trust invest its assets in relevant funds which invested in high-risk investments, the loss again being the consequent fall in value of those investments - that is called, “the first conspiracy”. Thirdly, BGB, Mr Gallucci and Mr Pinto conspired following about September 2015 to injure the trust by unlawful means, namely deceit by false representations by persuading it not to know of and hence not to investigate the fact that the values of the relevant funds were falling, the loss there being that values continued to fall from then €4,124,978.07 to a mere €259,642.33 net of a payment of €73,647.21. That I will call “the second conspiracy”.

31. On 16 June 2022 I clarified with Mr Phillips that, as appears on various deletions within the amendments or proposed amendments to the particulars of claim: firstly, that although the claimant says the alleged contract gave rise to both contractual and fiduciary duties, no fiduciary duty is asserted to have arisen in the absence of any contract; and, secondly, all claims in breach of duty of care, that is to say negligence, and in dishonest assistance and in deceit as such, are either not being made or are not being pursued.
32. I found this to an extent somewhat surprising including because, although it is sought to be alleged that both Mr Gallucci and Mr Pinto, and by each of them BGB, had made fraudulent misrepresentations, there is no claim sought to be brought in deceit against them individually, either as a company or as individuals, but only as alleged co-conspirators. Thus, even if it is ultimately held that one or another made fraudulent representations, no claim was sought to be brought on that sole basis, including against that individual or BGB through them, unless at least one other conspired with the first person to make the relevant fraudulent misrepresentation or misrepresentations. However, that is the claimant’s position. My role is only to consider what is sought to be advanced by way of amendment.

33. The court’s power to permit amendments is contained in the Civil Procedure Rule 17.1(2)(b), which reads as follows:
- “If his statement of case has been served, a party may amend it only ... with the permission of the court.”
34. Such power is to be exercised in accordance with the overriding objectives of Civil Procedure rule 1.1, which reads as follows:
- “(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
- (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly;
  - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
  - (f) enforcing compliance with rules, practice directions and orders.”
35. I note that the overriding objective includes enabling a party to put forward their whole case. Generally, the court will permit amendments at an early stage if: firstly, the amendment is properly framed and appropriately particularised, and I bear in mind the notes at White Book, 17.3.5 and will refer to various case law in due course. Secondly, that the amended case has some real prospect of success. I bear in mind the notes in

White Book, 17.3.6 and will refer to the case law in due course. Thirdly, that there is no impermissible limitation advantage to be gained by the amendment.

36. As to the third aspect, I refer to Civil Procedure Rule 17.4:

“(1) This rule applies where –

(a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980<sup>1</sup>;

(ii) the Foreign Limitation Periods Act 1984<sup>2</sup>; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings...”

And to section 35 of the Limitation Act 1980).

“New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a) the addition or substitution of a new cause of action; or

- (b) the addition or substitution of a new party;
  - (c) and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.
- (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county] court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.
- (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
- (5) The conditions referred to in subsection (4) above are the following—
- (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
  - (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action...”

to each of which I will return.

37. Mr Miall initially opposed the proposed amendments on the basis of each and all of those aspects not being satisfied. However, following numerous revisions to the form of the draft amended particulars claim, in relation to the first aspect, Mr Miall has confined his objections to the form of pleading to a relatively few items.

38. In relation to the second and third aspects, in summary, Mr Miall submitted:
1. firstly, that both the pleaded case did not disclose reasonable grounds for any of the three types of claim and, also, that the evidence did not show real prospects of success for any of those three types of claim; and
  2. secondly, in relation to limitation:
    - i. it was common ground the claims which were now proposed to be advanced in the amended particulars of claim were all “new claims” for the purposes of section 35 and did not arise from the same or substantially similar facts to those already in issue in the claim for the purposes of section 35 of the Limitation Act 1980 or CPR 17.4. Mr Phillips accepted that both those assertions were correct
    - ii. there was a real potential or argument that any cause of action sought to be advanced in the amended particulars of claim would not have been limitation barred when the claim form was issued on 7 September 2020 but would now be limitation barred if a new claim form were to be issued today. He submitted that section 35 and CPR 17.4(2) both prohibit the court granting permission to amend to include, and thus to bring, such a “new” cause of action. That is because the effect of section 35(1)(b) is that a claim brought by way of amendment is deemed for limitation purposes to have been brought when the claim form was issued (i.e. the amendment has a “relation back” for limitation purposes to the date of issue of the claim form notwithstanding that the amendment takes place years later) ; and, if the limitation period would have expired before the amendment is made, that is to say at least before today, amending would gain a limitation advantage over issuing a new claim; and, accordingly, amendment is only permitted if the new claim arises from the same or substantially similar facts to those already in issue and which it is common ground is not the case here.

39. Mr Phillips responded to say that it is clear that the limitation periods for each and every claim had not expired at this point. He says that there were acts of deliberate concealment by each of the defendants or their agents until 2020 (but certainly in 2018) by way, at least, of provision of fraudulent statements of investment and investment values, and, secondly, in relation to the conspiracy claims that they are based on the fraud of the defendants or their agents.
40. Mr Phillips accepted that the basic limitation periods would be six years in relation to the breach of contract claim expiring no later than 2021 under section 5 of the Limitation Act 1980, and six years in relation to the conspiracy claims arising from when the torts were complete under section 2 of the Limitation Act 1980. He accepted that tort would be complete for the first conspiracy by 2015. He submitted initially that for some of the second conspiracy the tort might only be complete as late as 2018, but he eventually accepted that even for the second conspiracy the relevant tort would be complete by the end of 2015.
41. However, Mr Phillips submitted that section 32 of the Limitation Act 1980 applied; it reads as follows:
- “32. Postponement of limitation period in case of fraud, concealment or mistake.
- (1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;
- the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
- (2) References in this subsection to the defendant include references to the defendant’s agent and to any person through whom the defendant claims and his agent.
- (3) 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...”

42. In consequence, Mr Phillips submits that, in relation to any claim based on fraud, the limitation period would now still simply be running; and that in relation to any of the three claims, new limitation periods started, as a result of each occurrence of a deliberate concealment, including in at least 2018, and are still running now. He submits that it should be clear to the court that limitation has not yet expired as at today, and so there is no impermissible litigation advantage to be gained by permitting amendment to introduce those claims, and CPR17.4(2) and section 35 of the Limitation Act 1980 present no bar to amendment.
43. Mr Miall disputed that section 32 enabled the claimant to succeed and submitted as follows. Firstly, that for the court to be able to permit an amendment, it needs to be clear that a limitation period has not yet expired, that is to say it must not be reasonably arguable that it has expired at this point in time, see the *White Book*, notes 17.4.2 citing *Cameron Taylor v BDW [2022] EWCA 31* at paragraph 19, and further case law which I will mention in due course. Mr Phillips accepted that in principle but contested certain issues regarding on what basis the court carries out this assessment.
44. Mr Miall, secondly, submitted that section 32 only postpones the running of limitation periods or gives rise to new limitation periods where the claimant had never known of the relevant fraud or of a relevant concealed fact. He submitted that, in this case, notwithstanding that the claimant (being for these purposes PTL as IMT, as assignee, is bound by whatever affected PTL) may have been subsequently deceived into ignoring relevant material, once the claimant (being for these purposes PTL) has or is deemed to have had relevant knowledge, they are deemed to have it at all points in time thereafter.
45. Thirdly, Mr Miall submitted that section 32 only affects a postponement or the arising of a new limitation period where the claimant could not with the exercise of reasonable diligence have discovered the relevant fraud or relevant concealed fact. Mr Miall submitted that it was reasonably arguable that the claimant could in the circumstances



of the case have made such discoveries had the claimant exercised reasonable diligence.

46. Fourthly, Mr Miall submitted that it was therefore simply at least not clear that limitation has not yet expired; that is to say, it is reasonably arguable that it has expired; and therefore the court must refuse permission to amend and leave the claimant to issue fresh proceedings in which issues of limitation can then be tried out without the effect of a section 35(1)(b) automatic relation back to the date of issue of the claim form in these proceedings.
47. I did raise with counsel the decision in *Masterbank v Deutsche Bahn* [2017] EWCA 272, and other cases where it had been indicated that the court might grant permission to amend on a deemed basis, being that the amended claim was deemed for limitation purposes to have been brought on the date of the grant of the permission to amend. However, I also drew their attention to the decision of His Honour Judge Russen (now) KC, sitting as a Judge of the High Court, in *DR Jones v Drayton* [2021] EWHC 1971, which reviewed the Mastercard line of cases and held that, as a matter of discretion, that approach was only possible where the defendant only has a serious argument that some of the claims proposed to be introduced by amendment are statute barred whilst it is clear that other elements of the proposed amendments are not yet statute barred – see paragraphs 61-65 of that judgment, which read as follows:

“61. It is true that neither in *Morrison v Mastercard* nor *Mastercard v Deutsche Bahn* did the court expressly confine the Mastercard basis of amendment to cases involving an ongoing accrual of the cause of action into the 6 year period prior to amendment. Nevertheless, it is obvious that its endorsement of the defendant's acceptance of that position reflected the nature of the claim. The reasoning behind the defendant's position in the *Libyan Investment Authority* case is more difficult to discern, as Floyd LJ appears to have found, but it is clear that the court assumed its limitation defence might not be a complete one.

“62. However, in my judgment there is a class of case where the court should not exercise its discretion in a way which side-steps the conventional approach to deciding the limitation point at the amendment stage. This is where the defendant

contends it has a reasonably arguable limitation defence to the entirety of the new cause of action sought to be introduced, having regard to the date of its accrual, which cannot be overcome by recourse to CPR 17.4(2).

“63. Both the conventional approach and the Mastercard basis of amendment are aimed at preserving a defendant's limitation defence. The conventional approach is in my judgment the appropriate one to adopt where the defendant has a serious argument that the whole of the new claim is statute barred. As the relevant works were undertaken in 2010 and 2011, that is DBS's position on the present application.

“64. In these circumstances, I am not persuaded that the Mastercard basis of amendment should be regarded as having any significance on the present application. This is particularly so when the parties' primary submissions have comprehensively engaged not only with the question of the applicable limitation period but also the impact of CPR 17.4(2) (cf. the Advanced Control Systems cases and the situation envisaged in the Libyan Investment Authority case). The material necessary for determining the amendment application on the conventional basis has not in fact been side-stepped in the present case. Instead, it formed a significant part of the evidence and argument relied upon at the hearing.

“65. For completeness, I should say that had I considered it appropriate to proceed on the Mastercard basis then I would have been persuaded by Mr Land's submission that the new claims should be treated for limitation purposes as having been made as at the date of this judgment, not least because the qualification to the relation-back principle was not suggested until after the hearing of the application.”

48. In fact, on 3 November 2022, Mr Phillips expressly stated that he did not seek to advance a contention that I should approach matters on a Mastercard basis. Also, he accepted that the timing of any matter relied on in relation to the second conspiracy claim rendered that claim complete by the end of 2015. I have therefore proceeded on the basis that I am not being invited to take the Mastercard route.

49. I have also borne in mind paragraphs 66 to 74 of the judgment in *DR Jones v Drayton*, which read as follows:

“66. In cases where there is no scope for proceeding on the Mastercard basis and the proposed amendment appears to face a limitation problem on the application of the primary limitation period, the court does not have any discretion to permit it unless the claimant can knock out the limitation defence (on a summary determination by reference to the "reasonably arguable" threshold test) or he can bring it within CPR 17.4(2): see *Bellinger v Mercer*, at [15], and *Diamandis v Wills* [2015] EWHC 312 (Ch), at [46]-[47].

“67. When the court's discretion does arise the factors operating upon its exercise are those summarised in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at [38], *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd (No. 3)*, at [19], and *Vilca v Xstrata Ltd* [2017] EWHC 2096 (QB) at [28]-[29]. The points made in the first two of those decisions were summarised again by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB), at [10], which Mr Frampton quoted in his skeleton argument, but without the qualification in *Vilca* (mentioned below) that a good explanation for delay is not actually a prerequisite to success with a late amendment.

“68. The command in CPR 1.2 to give effect to the overriding objective (which Carr J in *Quah* described as being of the greatest importance) embraces the various considerations identified in those cases. So far as the aims of achieving fairness, saving expense and ensuring compliance with rules and orders are concerned, three observations in those decisions bear upon the present application and the arguments of counsel.

“69. The first goes to the timing of the application for permission to amend. The authorities confirm that lateness is a relative concept. A "very late amendment" is one which prejudices an existing trial date. In *Quah* the application to amend was issued some 3 weeks before the trial date and its consequences meant it was categorised as "very late"; whereas the less prejudicial consequences of the application heard in *Vilca* some 2 months respectively before the trial meant it was "late" but not "very late".

“70. The second observation relates to the history behind the amendment. Whatever the degree of lateness, the decisions in *Quah* and *Vilca* show that the applicant

should provide a good explanation for the delay. However, the absence of one is not necessarily fatal to success on the application but instead just one of the factors to be considered in deciding it fairly. This was also recognised by the decision in *Essex County Council v UBB Waste (Essex) Ltd* addressed below.

“71. The third observation goes to the force of the new case sought to be introduced by the proposed amendment. The court is likely to look less kindly upon an amendment which is not tightly drawn or focused. Mr Land referred to the Court of Appeal's decision in *Swain-Mason v Mills & Reeve LLP (Practice Note)* [2011] EWCA Civ 114; [2011] 1 WLR 2735, at [73], for the proposition that an amendment should be clearly expressed so that the opposing party knows from the moment it is made what is the amended case he has to meet. So far as the merits behind any new claim are concerned, the authorities which address the court's amendment power under CPR 17.3 show that the burden upon the applicant involves the same benchmark as that applied (negatively) on an application for summary judgment. The amending party needs to show that the new claim has a real prospect of success. In *Quah* the claimant failed to establish that the merits of the new claim were sufficiently compelling to justify the amendment whereas in *Vilca* (which concerned an amendment to plead a Peruvian law limitation defence) the claimant took no point over the clarity of the defendant's proposed amendment and conceded that the defence had a real prospect of success.

“72. Mr Land also referred to the passage in the White Book (para. 17.3.6) for a summary of the test to be applied when scrutinising the merits of the proposed amendment. One of the decisions cited in that passage is that of Mr Andrew Hochhauser QC in *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch), at [5]-[7], where the deputy judge applied the real prospect of success test to the various amendments proposed. For good forensic reasons Mr Frampton made the submission that the application of this test meant that DRJ only needs to show that it has a better than merely arguable case. That certainly holds true, on the application of the negative test, for a respondent seeking to escape the clutches of an application for summary judgment by shouldering the evidential burden of showing he has a "realistic" case worthy of trial.

“73. Mr Frampton also relied upon the decision in *Essex County Council v UBB Waste (Essex) Ltd* [2019] EWHC 819 (TCC), at [10]-[11], where Pepperall J addressed the merits behind the amendment, alongside the other factors mentioned

in Quah and Vilca, by talking of claims or defences which are "intelligible and apparently credible". If the weighing of the competing outcomes of permission or refusal of the amendment application meant that the balance of injustice favours the amending party, the judge's view was that amendments carrying that degree of conviction should be allowed.

“74. There is probably either no difference or a barely perceptible one between that test and the one recognised in SPI North but, for the purposes of the present application on which the persuasive burden is wholly upon DRJ, I would approach any exercise of discretion by simply applying the real prospect of success test to the proposed amendment. The application of that test in the analysis and evaluation of DRJ's new claims will require DRJ to show that they are sufficiently strong to justify the conclusion that they are more than merely arguable even though DRJ does not have to establish they are likely to succeed. In a different interlocutory context that would equate to a "good arguable case" (recognising that the same phrase can in yet another such context mean something more in requiring the applicant to demonstrate he has the better, possibly much the better, of the evidence and argument to support his case).”

50. I have borne in mind His Honour Judge Russen KC’s conclusion that a party seeking to amend needs to show but only has to show, “that it has a better than merely arguable case”, see paragraph 72 on the merits, but also that the defendant should be able to see a case of sufficient clarity (so that the opposing party knows in the moment it is made what is the amended case he has to meet." (See paragraph 71 of that judgment).

51. Counsel also took me to my own decision in *Toner v Telford* [2021] EWHC 516 (QB) mainly on the interpretation of section 32 of the 1980 Act to which I will return. However, the decision contains the usual summary of the court's approach to both the question of what are "real prospects of success" and as to the pleading of fraud or rather subjective wrongdoing at an early stage in litigation before defendants had provided disclosure and while the claimant may contend that they are "in the dark", in its paragraphs 25 to 30 which are as follows:

“25. In *Media Entertainment v Karagyydev* 2020 EWHC 1138 (which was cited to me) at paragraphs 50-56 I said:

“The CPR

50. CPR3.4(2) provides that: “The court may strike out a statement of case if it appears to the court- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court’s process or otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or order.”

51. In principle, on the wording of the rule, the question of whether there is jurisdiction to strike-out under sub-paragraph (a) in circumstances of the nature of those before me involves simply a determination as to whether the wording of the statement of case, assuming the facts stated to be proved, discloses a cause of action in law, being a genuine and serious dispute, which could justify the relief sought – see White Book 3.4.2. Mr Burton has also drawn my attention to a passage in *Altimo Holdings v Kyrgyz Mobil* 2012 1 WLR 1804 where at paragraph 84 Lord Collins stated that “it is not normally appropriate to strike out (or grant summary judgment) so as to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts...”

52. CPR3.4(2) is, however, itself discretionary, being introduced by the word “may”, and which brings into play the overriding objective in CPR1.1. Thus, for example, if a statement of case does not disclose reasonable grounds, the court may often allow an opportunity for amendment, and the court will consider what is the proportionate response in relation to all aspects once one of the jurisdictional conditionals in the three sub-paragraphs of CPR3.4(2) is established.

53. CPR16.4(a) provides that Particulars of Claim must include “a concise statement of the facts on which the claimant relies”.

54. The Practice Direction to CPR Part 16 (“PD16”) in paragraph 8.2 provides that “a claimant must specifically set out the following matters in his particulars of claim where he wishes to rely upon them in support of his claim: (1) any allegation of fraud... (5) notice or knowledge of a fact.”

55. CPR24.2 provides that “The court may give summary judgment against a claimant... on the whole of a claim or on a particular issue if- (a) it considers that- (i) the claimant has no real prospect of succeeding on the claim or issue... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

56. It is common ground that in approaching the CPR24.2(i) test of “no real prospect” the court applies the principles summarised in *NCC Skills Ltd v Ascentis* [2016] EWHC 206 at paragraphs 5-8 being

“The Test

5. Applications for summary judgment are governed by CPR 24 . CPR 24.2 provides that:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

6. There is no dispute between the parties as to the principles to be applied on an application for summary judgment. As was pointed out by Mr. Andrew Latimer, those principles were conveniently summarised by Simon J (as he then was) in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 at paragraph 15.

“The principles which apply have been set out in many cases, are summarised in the editorial comment in the White Book Part 1 at 24.2.3 and have been stated by Lewison J in *Easyair Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], approved subsequently (among others) by Etherton LJ in *A C Ward & Son v. Caitlin (Five) limited* [2009] EWCA Civ 1098 at [24]. For the purposes of the present application it is sufficient to enumerate 10 points.

(1) The Court must consider whether the defendant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success, see *Swain v Hillman* [2001] 2 All ER 91 , 92. A claim is ‘fanciful’ if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].

(2) A ‘realistic’ prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 .

(3) The court must avoid conducting a ‘mini-trial’ without disclosure and oral evidence: *Swain v Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers* case, the object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661 , Mummery LJ at [17].

(6) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* ( No. 5) [2001] EWCA Civ 550 , [19].

(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example *JD Wetherspoon v Harris* [2013] EWHC 1088 , Sir Terence Etherton Ch at [14].

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(9) The overall burden of proof remains on the claimant, ...to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial, see Henderson J in *Apovodedo v Collins* [2008] EWHC 775 (Ch) , at [32].

(10) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where ‘there are circumstances that ought to be investigated’, see *Miles v Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v Landmark Solicitors LLP* [2011] EWHC 2685 (Ch) , Henderson J at [55]-[56].”

26. I also at Paragraph 136 of that judgment made clear that the relevant facts, being those which are said to give rise to the causes of action upon which the Claimant seeks his claimed remedies, have to be “pleaded” i.e. appear in the statement of case, and not simply in a witness statement. The function of statements of case (or pleadings as they were previously called) is to set out the facts relied upon as giving rise to a claim in law (or from which such facts are to be inferred); while witness statements adduce the evidence from which those facts are to be proved, and which evidence should not appear in the statement of case itself. It is important that the facts are “pleaded” in the statement of case both in order to test whether the relevant party is advancing a claim which can exist in law so as to give rise to the remedies sought and so that the other party (and the court) can assess it and respond to it by their own statement of case and generally. However, the court does have to bear in mind that the line between what is “fact” and what is “evidence” may be a narrow one and one which it is difficult for litigants, especially if acting in person, to appreciate.

27. Even more recently, in *Rollingson v Hollingsworth* 2020 EWHC 3568 (which was not cited to me but which is to similar effect) I cited *Portland Stone Firms Limited v Barclays Bank Plc* [2018] EWHC 2341 where at paragraphs 23 to 30 (and which deal with the court’s approach both to CPR3.4 and CPR24 applications and to pleading fraud and other serious matters) it was held that:

“23. The applicable principles set out in and flowing from CPR 3.4 and 24 are also extremely well known. The summary by Lewison J in *Easyair Ltd v Opal telecom Ltd* [2009] EWHC 339 (Ch) at [15] was relied upon by all parties as a convenient summary:

“The correct approach on applications by defendants is, in my judgment, as follows:



- i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
- iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 ;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;
- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 7252”.

24. I adopt and will apply those principles in the present case. I would only add that, where a claim is defective and therefore susceptible to be struck out or subject to summary judgment, the Court should consider whether the defect in question might be cured by amendment and, if it might, should consider whether it is right to give the party in default an opportunity to make the defect good: see *Hockin and Ors v RBS* [2016] EWHC 92 (Ch) per Asplin J. This is another facet

of the Royal Brompton Hospital principle that the Court should not merely look at the materials before it but should take account of what can reasonably be expected to be available at trial. I have borne this approach in mind in reaching my conclusions in the present case.

Proof of fraud and the approach to striking out allegations of fraud

25. Where, as here, a Claimant wishes to amend to plead fraud and the application is opposed, it is material to bear in mind the approach that the Court routinely takes to proving fraud in civil litigation. A sufficient summary for present purposes is provided by *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:

“It is well established that “cogent evidence is required to justify a finding of fraud or other discreditable conduct”: per Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd.*, [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: “where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger”, per Rix LJ in *Markel v Higgins*, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungood-Thomas J put it in *In re Dellow's Will Trusts*, [1964] 1 WLR 415,455 (cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H), “The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it”... ..Thus in the *Jafari-Fini* case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, “Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct.”

26. This summary is consistent with many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty: see, for example, *Mukhtar v Saleem* [2018] EWHC 1729 (QB); *Elite Property Holdings Ltd v Barclays Bank* [2017] EWHC 2030 (QB); *Three Rivers DC v The Governor and Company of Barclays of England (No 3)* [2003] 2 AC 1 at [186] per Lord Millett – see below.

27. One of the features of claims involving fraud or deceit is the prospect that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy. This has routinely been addressed in cases involving allegations that a defendant has engaged in anti-competitive arrangements. In such cases, the Court adopts what is called a generous approach to pleadings. The approach was summarised by Flaux J in *Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc* [2012] EWHC 3346 (Comm) at [29] ff. Flaux J set out the principles in play as described by Sales J in *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch) at [62]-[67], which included the existence of a tension between (a) the impulse to ensure that claims are fully and clearly pleaded, and (b) the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial but may be shut out by the law of limitation if the claimant is to be forced to

wait until he has full particulars before launching a claim. Sales J indicated that this tension was to be resolved by “allowing a measure of generosity in favour of a claimant.” Flaax J continued at [31]:

“[31] This generous approach to the pleadings in cartel claims has been endorsed by the Court of Appeal, not only in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland* [2010] EWCA Civ 864 but most recently by Etherton LJ in *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190 at [32]: “As was stated by the Court of Appeal in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864 at paragraph [43], however, it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies. That same generous approach was for the same reason taken by Sales J in *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 in dismissing an application to strike out or to grant summary judgment against the claimant in proceedings for damages for infringement of Article 101. That approach is appropriate in the present case prior to disclosure of documents.”

[32] In the case of applications for summary judgment, it is well established that the court should not engage in a mini-trial where there is any conflict of evidence. The dangers of too wide a use of the summary judgment procedure were emphasised by Mummery LJ at [4-18] of his judgment in *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical* [2006] EWCA Civ 661. [5] and [18] of that judgment seem to me particularly apposite to the present case:

"5. Although the test [whether the claim has a real prospect of success] can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials....

18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

[33] The same point was made by Lewison J (as he then was) in *Federal Republic of Nigeria v Santolina Investment Corporation* [2007] EWHC 437 (Ch), at [4(vi)] citing the *Doncaster Pharmaceuticals* case: "Although

a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.'"

28. These are salutary warnings and necessary protections for the Claimants, which I bear in mind. It is, however, to be remembered that the Court's concern in these passages was in large measure based upon a lack of knowledge on the part of the Claimant before disclosure had been given. In the present case, the Defendants have given disclosure based upon wide-ranging search terms relating to multiple custodians. Although the Claimants submit that the Defendants' disclosure is not complete, they have not identified any specific omissions or areas of default that would justify the Court in treating the Claimants as if they were still materially excluded from access to relevant disclosure for present purposes.

29. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see *Three Rivers District Council v The Governor and Company of Barclays of England (No 3)* [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] that:

"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 ... 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"

The proper function of pleadings

30. It should not need repeating that Particulars of Claim must include a concise statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim. Practice Direction 16PD8.2 mandates that the Claimant must specifically set out any allegation of fraud, details of any misrepresentation, and notice or knowledge of a fact where he wishes to rely upon them in support of his claim. The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise

as possible and confined to setting out the bald facts and not the evidence of them”: see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.

31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see *Tchenquiz v Grant Thornton* [2015] EWHC 405(Comm) and *Brown v AB* [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious.”

28. It is also made clear in those citations that:

(a) The Court will consider, where disclosure has not yet taken place, whether a pleading is sufficient at this point in the light of whether there is a real prospect that it may be “improved” following disclosure, and especially where the defendants are alleged to have engaged in conduct which they have sought to conceal from the claimant. However, (i) the existing pleading still has to meet a measure of sufficiency including by way of particularised facts which of themselves would justify on the balance of probabilities an inference of fraud and (ii) the prospect of disclosure “improving” matters has to be a real one with a basis, and not a simple hope that something might turn up (i.e. “Micawberism”), whether on disclosure or exchange of witness statements;

(b) The Court will also usually give a respondent party whose pleading is defective or deficient an opportunity to apply to correct its defects and deficiencies. On the other hand, the Court first has to form a view with regard to the pleading which is actually before it.

29. I also bear in mind that in *Partco v Wragg* 2020 EWCA Civ 594 at paragraph 27 there is a warning from the Court of Appeal against seeking to summarily dispose of single issues in a Claim (at least where they are not distinct, and certain are not distinct here), where the result may be to lead to overall delay due to appeals etc. in a Claim which is going to go to trial in any event on many matters, and where justice may, in any event, be best served by a fully investigated and informed decision. However, it was also stressed that if a Claim is bound to fail then it is best that that is determined at an early stage. The paragraph reads:

“27. It seems to me that the following principles are well established, at least as articulated in relation to summary disposal under Pt 24 of the CPR. (1) The purpose of resolving issues on a summary basis and at an early stage is to save time and costs and courts are encouraged to consider an issue or issues at an early stage which will either resolve or help to resolve the litigation as an important aspect of active case management: see *Kent v Griffiths* (No. 3) [2001] QB 36 at p. 51B–C. This is particularly so where a decision will put an end to an action. (2) In deciding whether to exercise powers of summary disposal, the

court must have regard to the overriding objective. (3) The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action. (4) The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated, and a properly informed decision reached. The authority for principles (2)–(4) is to be found in: *Three Rivers District Council v Bank of England* (No. 3) [2003] 2 AC 1 per Lord Hope at paras 92–93, considering *Swain v Hillman* [2001] 1 All ER 91 at pp.94–95; *Green v Hancocks (a Firm)* [2001] LI Rep PN 212, per Chadwick LJ at para.53, p.219, col. 1; and *Killick v PricewaterhouseCoopers* (No. 1) [2001] LI Rep PN 17 per Neuberger J at p.23, col. 2, 2–27.2”

30. I add that various of these principles have been very recently restated in *Qatar Airways Group v Middle East News* [2020] EWHC 2975 at paragraphs 147-160 and 214, albeit in the context of a jurisdiction challenge. Although this decision was published after I had heard various submissions from the parties, I do not regard it as taking matters further than what was already common-ground, and so I have not sought further submissions on it.”

52. Following the completion of oral submissions before me, judgment was delivered in *CNM Estates Tolworth Tower) Ltd v Carvill-Biggs & Anr* [2023] EWCA Civ 480. I invited submissions on this decision, although none were provided, but it seems to me that paragraphs 48, 66, 69 to 77 and 84 of that judgment confirm what I have already stated to be the approaches to be taken:

"48. One necessary condition for any amendment is that the claim as amended should have a real prospect of success, which is the same test as applies on a summary judgment application. There is no point in giving permission for an amendment which is fanciful and which has no real prospect of success. In this regard the principal focus must be on the pleading in question and no attempt should be made to resolve disputed matters of evidence (conducting a mini-trial): *Okpabi* at [103] to [107]. It is, however, appropriate to consider whether a proposed pleading is coherent and contains properly particularised elements of the cause of action relied upon (*Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [42])...

66. Males LJ has already referred to three cases: *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294 ("*Okpabi*"), *Quah Su-Ling v.*

*Goldman Sachs International* [2015] EWHC 759 (Comm) ("*Quah Su-Ling*"), and *Elite Property Holdings Ltd v. Barclays Bank Plc* [2019] EWCA Civ 204 ("*Elite*")....

69. The question which then arises is how far it is appropriate to consider the strength of a proposed claim in such circumstances. There is no doubt that permission to amend should be refused if it is apparent that a proposed claim would have no real prospect of success. To what extent, if any, is it otherwise relevant to gauge the prospects of success of the amendments?

70. In *Elite*, the claimants appealed against a refusal of permission to amend. Having explained at [40] that there was no dispute about the test to be applied, Asplin LJ (with whom Hamblen LJ and Nugee J agreed) said this:

'41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.

42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon. With that test in mind, I turn to the grounds of appeal.'

71. In the authorities which Asplin LJ cited in this passage, the courts were not commenting on applications to amend as such, but rather on the principles applicable to summary judgment and setting aside default judgments.

In *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472, [2003] CP Rep 51, Potter LJ (with whom Peter Gibson LJ agreed) said this when comparing the test for summary judgment with that which applies to an application to set aside a default judgment:

'8. I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in [*Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221] that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable...

10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in *Civil Procedure (Autumn 2002) Vol 1 p.467* and *Three Rivers DC v Bank of England (No.3)* [2001] UKHL16, [2001] 2 All ER 513 per Lord Hope of Craighead at ... [95].'

72. In *Three Rivers District Council v. Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1, Lord Hope had reiterated that it is not appropriate to conduct a mini-trial on an application for summary judgment. He said at [95]:

'The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial



judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.'

73. In a similar vein, the Supreme Court has recently stressed the importance of avoiding a mini-trial in the case of a challenge to the jurisdiction of the court. Lord Hamblen said this at [103]-[107] in *Okpabi*:

'103. ... Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.

104. If the issues are addressed by reference to the pleaded case, then the focus of the inquiry is clearly circumscribed and problems of lack of proportionality should generally be avoided.

105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. ...

107. The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable.'

74. Asplin LJ's comments in *Elite* thus lend no support to any idea that, so far as the strength of a claim is concerned, the courts take a different approach in the context of a "late" amendment to that adopted in relation to summary judgment. To the contrary, Asplin LJ relied on cases in which the principles governing summary judgment applications were addressed, and her remarks reflect those principles. Nor were we taken to any other authority in which it had been held that, when considering a "late" (as opposed to a "very late") amendment, it was permissible to attach weight to the apparent weakness of a case which would survive an application for reverse summary judgment.
75. As we have indicated, an application for permission to amend particulars of claim will be refused if the amendments put forward a new case which would have "no real prospect of succeeding" within the meaning of CPR Part 24. Beyond that, the Court has to strike a balance between the interests of the applicant and those of other parties and litigants more generally: "[i]n essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted" (*Nesbit Law Group LLP v. Acasta European Insurance Company Ltd* [2018] EWCA Civ 268, at [41] per Vos LJ).
76. Aside from very late amendments, we do not think the perceived strength of the case is normally a factor to be taken into account when undertaking that balancing exercise. As Carr J recognised, however, in *Quah Su-Ling* at [38(d)]: "lateness is not an absolute, but a relative concept". There will therefore perhaps be cases where the quality of the delay is unclear. In such

cases, it may be necessary to consider, as Carr J suggested: "a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done". But even if it is necessary to adopt that approach when the amendment is on the cusp of being "late" and "very late", it will never be appropriate to attempt to conduct a mini-trial...

77. The general rule is that, except in the case of "very late" amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes. The CPR do not bar litigants from pursuing claims that might at an interlocutory stage be considered weak. In our view, HH Judge Eyre QC (as he then was) correctly summarised the principles applicable to the determination of an application to amend in *Scott v. Singh* [2020] EWHC 1714 (Comm) at [19]:

'The new case set out in the proposed pleading must have a real prospect of success .... The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment.'

84. *Elite* makes clear at [42] that:

'The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents

and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

53. Therefore, in considering whether to permit the amendments, I need to consider as key points the following. Firstly, whether the proposed amended particulars of claim are a proper pleading, including whether they contain sufficient particulars of facts so that, if they were established, the court would infer any relevant wrongful subjective status of mind, here on the part of Mr Gallucci and Mr Pinto. Secondly, whether the claim is more than merely arguable considering the evidence before the court, but also what realistically might come from disclosure by the defendants where such has not yet occurred. The burden in showing this on an amendment application is on the claimant seeking to amend, whether or not in reverse summary judgment the question of showing no real prospects of success lays the burden on the applying defendant. Thirdly, whether it is clear, that is beyond reasonable argument, that limitation has not yet expired in relation to each cause of action which it is sought to be introduced. The burden is on the claimant to show that there is no such reasonable argument.
54. I turn to the facts, but before doing so one initial question relates to the extent that BGB is bound by Mr Pinto's oral and written statements and actions. The claimant asserts that GP had actual authority to communicate and act as he did, which is disputed by BGB and Mr Gallucci, who say in Mr Gallucci's first witness statement that Mr Pinto was merely a consultant and not authorised to enter into any contracts on behalf of BGB. The claimant there asserts that Mr Pinto had ostensible authority to communicate on behalf of and to bind BGB.
55. In relation to this the claimant relies on facts which do not seem to me to be disputed. Firstly, at a meeting between Dr Panico and Mr Pinto and Mr Gallucci on 3 October 2014, Mr Pinto handed Dr Panico a business card describing Mr Pinto as "investment manager" of BGB, which business card Mr Pinto continued to use and distribute. Secondly, Mr Pinto had and throughout used the email address Gennaro.pinto@bgbwestern.com, provided to Mr Pinto by BGB and an email template which gave BGB's address, contact details and regulatory information. Thirdly, Mr Pinto had very many communications with Dr Panico, Mr Amari and others related to

the claimant over the entire history. Fourthly, Mr Gallucci, the guiding mind of BGB, was copied into many of these emails and communications.

56. BGB and Mr Gallucci say that Mr Pinto provided his services to BGB through a service company originally First Diamond Limited and then from 24 June 2015 Blue Anchor Advisory Limited ("Blue Anchor"). They accept that Mr Pinto was registered with the Financial Conduct Authority as having an advisory function under BGB's authority, BGB also being registered with the FCA. They say that only the directors of BGB have or had any authority to sign any document on behalf of BGB. However, they do not say that Mr Pinto or anyone associated with the Trust was ever told that Mr Pinto had no authority either to enter into contracts on behalf of BGB or to communicate anything on behalf of BGB. BGB and Mr Gallucci also refer in evidence to the fact that Mr Pinto sent various relevant emails, including certain relating to interactive broker documents, from a private email address.
57. I will return to the questions as to whether the claimants have real prospects of asserting that Mr Pinto was BGB's agent, either to make contracts or to make communications on behalf of BGB and also as to whether BGB and Mr Gallucci have real prospects of succeeding on issues of that not being the case in due course in this judgment.
58. Further points arise regarding the relationships of BGB and Mr Pinto and Blue Anchor with the various funds in which the Trust's monies were actually to be invested, those being various open-ended investment companies known as the JG Fund and the Griffin Funds ("the Funds"). BGB and Mr Gallucci refer to the Trust monies having been used to purchase shares in those companies, which shares would fluctuate in value depending on the financial performance of the Funds and thus the companies, this being a situation where those open ended investment companies would invest their monies in various ways according to their own investment strategies.
59. BGB and Mr Gallucci say that BGB were the appointed investment managers of the Funds and received investment manager and advisory fees from them but had no interest in them. Mr Gallucci accepted that he is discretionary beneficiary of a trust which owns half of JG Capital, an entity which controls, and presumably derives

benefits from, the open-ended investment companies and which trust also has an indirect partial ownership of BGB. Mr Pinto says his service company was paid by BGB and Mr Pinto had no direct interest in the Funds, although Mr Pinto was managing their investments. I see no reason not to accept BGB and Mr Gallucci's and even Mr Pinto's evidence with regards to those matters where the claimants have not sought to advance any different case.

60. The relevant history of dealings between the parties starts in September 2014. I find the proposed amended particulars of claim confusing, as rather than just having an orthodox series of paragraphs setting out the factual history relied on, they deal with it (after identifying the parties) first in terms of the authority of Mr Pinto, then the "The Ownership of BGB", then "Caveat regarding documents relied on by the Claimants" (referring to alleged lack of reliability due to the Defendants being alleged to be dishonest. Then in a section headed, first "Background " and then "Summary of the Claims", they give what really seems to be a part summary of the claims. Only then, in a section headed "The defendants advising on and managing the mutual funds investments", do they have a section which seems to be seeking to set out the factual history relied upon.
61. However, Mr Phillips has taken me through many of the documents which the claimants have, and, while I have considered all that to which I have been taken by parties, the most important alleged history and documents seem to me to be as follows.
62. Paragraph 47 of the amended particulars of claim relate to Dr Panico having been introduced to Mr Gallucci and Mr Pinto in September 2014 by Mr Gentile by an email of 16 September 2014.
63. Paragraphs 48 to 50A of the proposed amended particulars of claim refer to the 3 October 2014 meeting between Dr Panico, Mr Gallucci and Mr Pinto. Dr Panico in his first affidavit said that it was represented that any funds placed under BGB's management would be kept safe and put in a low risk profile set of investments, although I note that Dr Panico also said, wrongly, that those representations induced the entry into the written IMA.

64. Mr Gallucci's evidence is that the meeting was only a "meet and greet", and that Dr Panico and Mr Pinto had already decided by then that the Trust would invest in the Funds. IMT's proposed amended particulars of claim state that the words used at the meeting cannot be recalled, but that Mr Pinto and Mr Gallucci represented that the defendants would create a low risk investment portfolio for the Trust monies which would ensure a full return of the invested capital and would use the Funds to achieve this.
65. I have before me no notes or minutes of 3 October 2014 meeting and it is unclear whether or not any exist, including in BGB's own files which have not yet been the subject matter of any disclosure.
66. On 28 October 2014, Mr Pinto emailed Dr Panico regarding "the signing of the contract". It is at least unclear what was meant by that and whether it is a reference to any contract or other document to be signed by the bank or by PTL. On the same day Mr Pinto emailed Dr Panico regarding documents "relating to information from the advisor" to go to the bank. At 4.31 pm that day Mr Gallucci emailed Mr Amari at the bank regarding certain forms and Mr Gallucci's understanding that they would enable Mr Gallucci, that is to say BGB, to see "the account", that is to say information relating to the account of the Trust with the bank.
67. On 3 November 2014 at 9.33 am, Mr Pinto sent Dr Panico an email as follows:
- “Good morning Paolo
- I hope all is well
- I'm bothering you for a moment for some "technical" information related to me.
- I am (we are) close to receiving all the various "authorisations" for the product exclusively designed, built and dedicated (thanks also to the indications received from Massimo) to the trust so as to be as much as possible in order to meet the expectations of results.
- I should indicate a minimum/maximum "capacity" of said product and here I need your help.
- Could you kindly indicate an amount (even an average amount) that will be transferred

within the portfolio as well as a possible timing?

Thank you very much and good day.

Gennari.”

68. Dr Panico in his first affidavit says that this confirmed his version of BGB's proposal made at 3 October 2014 meeting. Paragraphs 51 to 52 of the proposed amended particulars of claim say that this was a representation that BGB were in the course of structuring an investment product for the Trust, such investment product being designed to meet the investment aims, that is to say the previously communicated investment aims, of the Trust being a set of low risk investments. They term this “the bespoke investment representation”.
69. On 4 November 2014 at 19.07 pm, Mr Gallucci sent Mr Amari at the bank an email saying that Mr Pinto had told Mr Gallucci:  
"Genaro [Mr Pinto] told me to get in touch with you for the management mandate and the risk profiling. Obviously the management should be conservative, but we need to agree on the parameters and especially the definition. That would be for a medium risk profile and not a low one. Even if the objective is to have a conservative, low volatility return, I would not want to narrow the field of action too much. When you have a chance, we can get in touch to define a few things for the start of operations."
70. On 5 November 2014 Mr Amari replied to Mr Gallucci in an email stating:  
"As far as profiling is concerned, I have already kept my hands fairly wide in the MiFiD forms so as not to have my hands tied when it comes to investing in alternatives, even though the management of the trust must in any case be that of a good family man and therefore an aggressive profile would have caused some problem for the trustees. I will have a copy of a balance mandate sent to you tomorrow and we can start working on it."
71. Also on 5 November 2014 the bank sent Mr Gallucci, copied to Mr Amari, "The discretionary portfolio management agreement", that being the bank's agreement with PTL regarding the bank holding and managing the Trust's money.”
72. Mr Gallucci replied to Mr Amari at 11.43 am on 5 November 2014 saying:



"Thank you for sending me this mandate. Do we do it even without having the account number or do we wait? We should understand with the bond fund policy that we would like to insert (even more than 50%) can be inserted or falls under the classification of diversified funds (so 50% max)."

Mr Amari responded at 18.27 pm to say:

"If you let me have the details of the Fund, I will have it surveyed internally. What percentage of the portfolio will be invested in it?"

Mr Gallucci answered at 18.48 pm to say:

"The class in question where we would like to channelise as much as possible in this class E ("income") to the JG global growth fund. You can see the investment policy on page 65, appendix 4. Keep in mind that we are in the launching house of the new class so we can still make a change in policy or <general terms if it would help to increase the potential allocation (management will be very conservative anyway). It's basically a bond. Could you let me know how much you think we can subscribe to the new, open-ended song? Do we get to 50%?"

73. I have a document dated 14 November 2014 signed by Dr Panico and a Mrs Catherine Dogat as directors of PTL, which is said to be a trustee resolution of the Trust, and which reads as being such a resolution. In its recitals, it refers (i) to the trustee having powers to engage the services of an investment counsel, advisor or manager, and to delegate matters to them and (ii) to Mr Gentile having introduced BGB Western to the trustee and the trustee being desirous of delegating to BGB Western.
74. The operative part of the resolution provides in clause 1:  
"The Trustee resolves to delegate to BGB Western Limited the discretionary management of the portfolios of the Jacaranda Trust. The investment policy shall be prudent with a view to ensuring the preservation of capital."
75. Clause 2 provides for a delegation of authority to execute all contractual documents to enter into an investment management agreement with BGB to Dr Panico.

76. Mr Miall submits that the dating of this document as being 14 November 2014 is altogether suspicious in the light of what happened with regards to the written investment management agreement; and suggests that this document may in fact have been created only at some point between 2018 and 2020 to try to rectify a general absence of documentation on Dr Panico's part.
77. On 27 November 2014 Mr Gallucci emailed Mr Amari to say:
- "I would also like to understand what other funds we can include in accordance with a mandate you give us. In addition, I would also like to evaluate 'your' funds if this can help with subscriptions and especially to complete the asset allocation. In this regard do you think they could pay a rebate on management fees? If you have something to send me I can start to review it."
78. This was followed on 28 November 2014 by an email from Mr Amari to Mr Gallucci saying:
- "The funders are Global Macro with liquidity of 35 to 45 days and we need to classify it as 'opportunistic'. I have prepared a mandate which would allow us 'free hands' (the Fund would be in the class of 'diversify'). I wait your okay to send the mandate to the Trust company."
79. Mr Gallucci replied on the same day to say:
- "We can change the liquidity if we need to, but if you can adjust the mandate, we avoid other changes. The official monthly NAV [that is to say net asset value] allows us to keep costs down which would obviously be higher if we had a weekly NAV. I understand that you can't go above 30 per cent for funds anyway, right? Does this relate to maximum exposure (30 per cent max for one or more funds together) or to single fund exposure (30 per cent each up to a theoretical 90 per cent, three times 30 per cent)?"
80. On 6 November 2014, Mr Gallucci emailed Mr Amari to refer to various funds and saying that he was sending Mr Amari two of "our funds for your information, both are managed by external managers on our managed accounts", one of those funds being the Gryffon Fund.

81. On 6 December, Dr Panico email Mr Amari to say:  
"I am told by BGB Western that they cannot start trading because some documents are missing from me? I must have missed it. Can you tell me what is missing? Thank you and see you soon!"
82. Mr Amari replied later on 6 December to say, "We are missing the management." Dr Panico responded with a scanned document of the "Jacaranda Trust management agreement". At 12.35 pm that day Mr Amari emailed Mr Gallucci, copied to Mr Pinto to say, "Confirmed diversified funds up to 70 per cent. I have just received the mandate signed by the trustee."
83. Mr Gallucci replied to all saying to Mr Amari:  
"I thank you for the confirmation. Could you please give me the weights of the portfolio?" If I am not mistaken, there will not be an official mandate between you and I. How can I be sure that our suggestions will be taken into consideration? In what form will they be given? Further, if I am not mistaken, we are talking about some access to the account to monitor it. Has Paolo [Dr Panico] signed that form?"
84. The claimant says that in all this, not only was Mr Gallucci himself taking a full role, but he was acting as someone who was giving advice which would be taken into account.
85. On 12 December 2014, Dr Panico and another signed a discretionary portfolio management agreement with the bank (being "the DPMA"). This in clause 1 granted the bank a discretionary management power without needing the prior consent of PTL. In subclause 1(a), it provided that:  
  
"The bank and the client [PTL] have agreed upon the investment strategy described in the appendix which forms an integral part of the present agreement. The client confirms that this strategy suits his financial situation as experienced in investment matters and its investment objectives more generally his client profile and that he understands the risks inherent to the chosen investments will ensure in the short-term,

mid-term and long-term. The client is aware that notwithstanding the chosen investment strategy, losses may occur, for example, in the case of negative market fluctuations.

b) The Client may, during the course of the management of his Assets and with the Bank's consent, opt for another investment strategy, subject to sending a written request to that effect to the Bank. The Client acknowledges that he/she is familiar with the terms and conditions for changing strategy as described in the Appendix, especially those relating to any delays and extra costs caused by an early exit. The new investment strategy shall replace the strategy referred to in the Appendix to the present agreement and shall be effective after express acceptance by the Bank.

c) Considering the aforementioned, the Client is aware that any amendment to the investment strategy during the course of this agreement might have a negative impact on the objectives pursued by the Bank, since these objectives may only be achieved, in principle, at the end of the investment horizon applicable to the investment strategy pursued by the Bank.

d) Any minimal or maximal thresholds defined in the investment strategy shall only be indicative.

The Client further acknowledges that due to market fluctuations the thresholds agreed upon in the investment strategy set out in the Appendix for management of the Assets may temporarily be exceeded

3a) The Bank is authorised to execute in the interest and on behalf of the Client all the investment transactions usually executed by banks, notably in alternative products and in particular in hedge funds, subject to the objectives specified in the investment strategy referred to in the Appendix. In the scope of this management, the Bank is notably authorised to:

purchase and sell, in cash or on a forward basis, lend, convert, exchange or arbitrage financial instruments against other financial instruments;

exercise subscription and distribution rights;

place fiduciary deposits with banks in any country and in any currency;

purchase or sell, in cash or on a forward basis, shares or units of undertakings for collective investment;

invest in precious metals and in commodities;

execute any hedging transaction (inclusive of the purchase of puts or sale of calls) in the markets for options, futures and other derivatives;

Transactions in derivatives may be executed either on an over-the-counter market or on a regulated market, at the Bank's choice. In the latter case, the Client accepts to be bound by the terms and conditions, rules and practices of said market;

- lend financial instruments to the Client or conclude agreements with third parties with a view to lending the Client's financial instruments to said third parties;
- carry out all and any other transactions necessary for execution of the present agreement;
- pay any expenses, taxes, fees and other costs relative to the above-mentioned transactions and to debit them to the Account.

Subject to any limits defined in the investment strategy set forth in the Appendix, more specifically, the Bank shall be authorised to:

- invest in financial instruments that cannot be traded on a regulated market, in derivatives or instruments with low liquidity or those that have high volatility;
- effect short sales, purchases using borrowed funds, temporary transfers of securities or any other transaction that involves margin payments, a deposit or exchange rate risk.

The transactions described above may be conducted both on regulated markets and outside them.

b) While carrying out the present discretionary portfolio management agreement, in some circumstances, the Bank runs the risk of finding itself in a situation where there is a potential conflict of interests. Provided that the transaction takes place under market conditions, the Client expressly authorises the Bank to:

- enter into relationships with other companies or banks belonging to the same group as the Bank or not;
- purchase the Client's Assets or sell to the Client assets belonging to the Bank; in principle, any order to purchase, sell or enter into options on securities and derivatives traded on a regulated market is executed by the Bank as an agent, whereas orders for the purchase or sale of currencies or for derivatives traded on an over-the-counter market are in principle executed by the Bank as a principal counterparty;
- sell to the Client any kind of financial instrument newly issued or subscribed by

the Bank, or companies of its group, provided that the transaction is executed on market conditions.

4a) Regarding the risks inherent to the different financial instruments in which the Bank may invest, the Client confirms that he has received, read, understood and accepted the provision entitled

“Overview of the main risks and characteristics of financial instruments” contained in the General Information Document, or the mandate to take effect, the Client must have established a minimum risk level drawn up, inter alia, on the basis of his declarations and the information contained in the “Assets Analysis”.

b) The Client confirms that he is familiar with and understands the functioning of the types of investment instruments and asset classes mentioned under Articles 3 a) and b) and in particular those authorised under the investment strategy chosen by the Client.

The Client further confirms that he understands and accepts the risks inherent to such investments, notably those inherent to direct and indirect alternative investments.

As to transactions in options, futures and other derivatives, the Client is informed and accepts that he may be liable to margin calls and to the closure of his open positions, resulting in possible losses, if he does not provide the necessary margin cover.

The Client confirms that if he transmits investment instructions to the Bank, he understands and accepts the risks and characteristics of the investment products concerned. Therefore the Client agrees that the Bank shall not be obliged to provide him with any additional information or documentation regarding these products.

c) The Client is equally aware that strong past performances of an investment product or an asset class are not a guarantee of future strong performances.

d) The Client acknowledges and understands that, depending on the investment strategy chosen, the Assets may be concentrated to a greater or lesser degree on certain products or financial instruments, in which case the risk of loss is increased.

7a) In exchange for services rendered under this agreement, the Client agrees to pay the Bank a fee as specified in the appendix.

b) The Client has been informed, hereby acknowledges and expressly agrees by signing this discretionary portfolio management agreement, that the Bank may receive retrocessions of fees or other financial advantages from certain counterparties in the

scope of its relations with third parties and that such retrocessions or other financial advantages shall accrue to the Bank by way of additional remuneration.”

86. The DMA set out its investment strategy in its appendix 2 which was entitled "Investment Strategy 'Growth'." Clause 1 and clauses 2.1 to the end of 2.1(c) stated:  
 “1. INVESTMENT OBJECTIVE AND INVESTMENT HORIZON:  
 The investment objective is to optimise the return of a portfolio whose volatility, variability of returns, is comparable to that of an internationally-diversified portfolio of stocks denominated in EUR. Due to the presence of stock market risk, the portfolio's recommended investment horizon is at least 10 years. The investor should have an investment profile that the bank defines as “high risk”.

2. BREAKDOWN OF INSTRUMENTS BY STRATEGY AND INVESTMENT LIMITS:

**2.1. Target asset allocation**

The proportions shown below are determined on the basis of the total value of the portfolio assets under management.

CONVERTIBLE BONDS

& EQUITIES AND SIMILAR	0- 100%
BONDS AND SIMILAR PRODUCTS	0- 70%
DIVERSIFIED FUNDS	
COMMODITIES/REAL ESTATE	0- 70%
FUNDS	0- 30%
CASH & MONEY MARKET FUNDS	

The Bank is allowed to invest the different asset classes through structured products with or without capital protection.

The proportions indicated above are provided for information purposes only. The Client acknowledges that, due to market fluctuations, these limits may be temporarily exceeded, and in cases of abnormal market conditions, liquidity conditions might deteriorate.

a) Convertible Bonds & Equities and similar products

This asset class includes international stock market securities denominated in EUR or in any other currency. It may also comprise equity funds (third party or CBP funds),

structured equity products or any financial product whose volatility is comparable to that of the equity markets.

Furthermore, this asset class can be made of convertible bond investments, mainly through funds or structured products, without any explicit capital guarantee feature. This asset class also targets "long/short" funds, i.e. funds that are able to take short positions on the stock markets.

b) Bonds and similar products

This asset class includes bond-type products denominated in EUR or in any other currency, including emerging country currencies. Non-investment grade or non-rated securities are explicitly permitted.

c) Diversified funds

This asset class targets global funds characterised by diversified investments in different asset classes and / or different regions.”

87. Although I have borne in mind the entirety of that appendix, I also note in that in appendix 3 it was provided that the bank would be remunerated for its services with a fixed fee of 0.30 per cent per year of the asset value, exclusive of VAT.
88. On 14 December 2014, Mr Gallucci emailed Mr Amari who asked whether certain "LIS equity funds" would fall within a relevant classification of assets.
89. BGB and Mr Gallucci rely on all this as showing that the Trust by PTL was prepared to engage in "high risk" investments. I note that what would amount to "high risk" investments in this context would be a matter of assessment by the bank and would depend on the bank's interpretation of those words. Further that, whatever was that interpretation, would not prevent the bank actually investing in low risk investments should the bank decide to do so.
90. On 15 December 2014 at 9.18 am, Mr Pinto sent to Mr Gallucci and Mr Amari an email stating:  
"Can we get the go ahead today to start one allocation? This week I'll have the opportunity to meet the client and the firm that assists him and it would be useful to have at least something to present."



Mr Amari replied to all to say:

"Today I received the original mandate. What do you want to start with? Let me have a list of the securities to be subscribed and as soon as the mandate is associated with the report, I will send it ahead."

At 11.08 am, Mr Pinto replied to all stating:

"According to the interpretation I/we have given to the pdf of the specifications and weights (appendix 2) investment strategy growth, the idea would be ..."

Then there is a reference to investments in different funds.

Mr Pinto then said:

"Such an allocation is part of the mandate and the sector specifications which have also been communicated to the client. We look forward to hearing from you."

91. The defendants before me referred specifically to the fact that this email seemed to be sent referring to elements of appendix 2 of the DPMA. The claimants have relied on the references to "specifications communicated to the client". The defendants say that the emails suggested that there would be high risk investments, and the claimant submits that it would refer to the previous desire for low risk investments.
92. It seems that Mr Amari and the bank wished to consider this internally as at 11.51 am on 15 December 2014, Mr Amari emailed Mr Gallucci to say, "I have launched the internal audit. I think I'll have an answer tomorrow", and suggested that a relevant bank officer was not present on that particular day.
93. On 17 December 2014, Mr Amari emailed Mr Gallucci and Mr Pinto with the result of the internal consideration:

"I have just come out of a two-hour meeting with my RM.

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

currently taking a stricter attitude.

We have two solutions to overcome this problem;

1) the simplest, since these are medium- to long-term positions, is to deposit the funds in question in an administered account, thus removing the Bank's responsibility for the open positions. There would then be two open accounts, one under management and one under administration (or even a single administered account, if so required). The opening of a second account would be immediate, there is no need to retrieve documentation and/or forms.

From a practical point of view, compared to the current situation we would need the trustee's acceptance of the subscription of the funds in question. On the part of the portfolio placed under administration the trust would not pay management fees but only a custody fee; consequently this solution is in economic terms favourable to the trust and unfavourable to the Bank in the medium/long term.

As a basis for discussion, I have prepared a table of what could be the conditions applied to the administered relationship, in order to keep the Bank's position neutral in the medium/long term, neutral for the first year (also for the other reason we know)

2) The second possibility would involve the signing of an advisory agreement or sub-delegation of management between CBPQ and BGBW, countersigned by the client for acceptance. This possibility would also be unfavourable to the bank in terms of commission and would in any case be more risky, because it would inevitably lengthen the timeframe.

We had originally discussed investing in traditional funds and therefore long-only funds, which would not have been a problem

Product selection is a problem for us, as we will be responsible to the client for alternative fund positions that we do not have time to evaluate. The spirit is to quickly find a solution that will put everyone at ease. If you give me the go-ahead on the first proposal,

I will get in touch with Paolo on the same day to discuss MIFID profiling.

I look forward to hearing from you

Regards.

**Michele**"

94. The claimants submit this was all part of a course which led to the bank not approving of the degree of risk which would be present if the monies were to be and remain

invested in the Funds; and also that it suggests that the bank was to become the mere custodian rather than manager for the Trust, and that BGB was to become either the real manager or alternatively some form of submanager, but still owing duties to the Trust.

95. On 18 December 2014, Mr Amari responded further to Mr Gallucci and Mr Pinto:  
“ Solution found, 2 accounts, one operational managed and one administered on which the medium-term positions 'slip' (with the attendant problems that we know). I have already explained everything to Paolo, who is in full agreement. I am modifying the commission structure accordingly; for the first year the impact is neutral for the client, from the second year onwards the client saves on medium/long-term positions. I start the subscriptions tomorrow for the amounts requested (well over 70% of the portfolio). We will need to credit the TAs of the funds.  
Regards.  
Michele”
96. I note that it is unclear as to what was the "everything" which Mr Amari says had been explained to Dr Panico.
97. Mr Gallucci responded at 15.14 pm stating that there was only a short timescale available before Christmas and referring to "Nerine Fiduciaire in Geneva (the administrator)". The reference to Nerine ("Nerine") is that it was an entity which was responsible for reporting to the financial institution UBS which appears to have been the entity which actually held the monies within the Funds. One responsibility of Nerine was to calculate the net asset values of the Funds from time to time, and which would then enable the calculation of the net asset values of the shares within the Funds.
98. On 18 December 2014 PTL instructed the bank to transfer 8.7 million euros for investment in the Funds. The bank used a standard form template for this instruction which contained various blanks regarding the question as to whether or not the client, here PTL, had received advice from the bank but which were not filled in. The investment was treated by everyone as being effective from 1 January 2015.

99. On 19 January 2015 Mr Pinto sent an email to Mr Amari and Mr Gallucci which asked Mr Amari to proceed with a subscription of a further 350,000 euros to the JG "E" Fund. Mr Amari emailed Dr Panico stating:  
"My friends at BGB Western are requesting to subscribe again to the Fund we have already purchased. I would need confirmation of the following instruction."
100. There was then set out effectively an instruction to invest a further 350,000 euros. Dr Panica responded on 26 January 2015 to say, "Are these the same Funds we have already invested in, right? If so, I would say it is consistent with the agreed investment lines", and which had the result that another 350,000 euros were transferred and invested.
101. There were some communications between the individuals regarding the possibility of investing Trust monies in another fund called Millennium International. Mr Gallucci on 9 February sent to Mr Amari an email stating:  
"What liquidity does the Fund have? Notice and redemption? Gennaro suggests selling this Fund so sorry for the hassle, but it should be put up for sale now."
102. On 11 February 2015 Mr Gallucci emailed further with regards to the Millennium Fund. On 17 February 2015 at 11.19 a.m. Mr Pinto emailed Mr Amari copied to Mr Gallucci asking for a transfer in relation to €500,000 in the trust for purchase of units in the JG "E" fund. Mr Amari replied that he would take care of it. This seems to have resulted in Dr Panico giving an instruction on 23 February 2015 to Mr Amari to carry out that further investment of €500,000 into the funds. The claimants say that this is a further episode of the defendants advising the trust to sell one of its investments and to switch into the funds. In April 2015 Mr Gallucci seems to have dealt with a possible redemption of the trust's investments in the funds but which did not then occur.
103. On 29 April 2015 Mr Gallucci emailed Mr Amari to place a provisional sale order for the trust's assets in the JG "E" fund. At 1949 hrs Mr Gallucci sent a further email to Mr Amari saying, "In case you can cancel it, the administrator by 30 May can accept the cancellation of the redemption order. This is in case you decide to keep it. If you

want, we can talk about it verbally. This amounts to change of strategy to implement”. Mr Amari responded on 1 June to say that he had not heard anything further and assumed that “the redemptions were successful”. However, on 24 June 2015, Mr Pinto emailed Mr Amari and Mr Gallucci to say that he would appreciate it if they did not proceed with the redemption request because further payments were expected. At this point in time various net asset value statements for the trust’s investments in the funds were produced, which seem to show some depreciation of capital value but no more than 10 per cent at the most.

104. On 8 July 2015, Mr Pinto wrote on BGB notepaper a report to JG Capital about what the report states were first single percentage figure and then double digit percentage figure losses being suffered by the JG Class “E” fund in the summer of 2015.
105. On 3 September 2015, Mr Pinto emailed Dr Panico copied to Mr Gentile stating, “I’m sending an appendix for one of the funds used in the management. In fact, it is a better presentation of the management techniques used and does not substantially change any of the contractual aspects. Please bring this signed document to my attention by email and then send it to me by post.”
106. The document is entitled, “JG Global Growth Fund Limited”, and “Proposed Change in the Investment Policy”. It refers to there being a new investment policy effective from 1 March 2015. It states,

“The main operating objective of the Investment Adviser is represented by capturing the directionality and volatility of underlying Markets, also increase of the invested capital in the medium-to-long term to a rate substantially higher than the one offered by investments like government bonds or participation in traditional mutual funds. The Fund aims to produce profits through the trading and the arbitrage in the market of futures, options, interest rates, bonds, commodities and currencies. The Fund is structured to be long or short and positions can be significantly geared on derivatives. Investors should expect great volatility on the Portfolio The Investment Advisor generally base its decisions of investment on statistical, mathematical or discretionary models, technical analysis, the principles of the arbitrage, let alone on the identification of trend of short and long period Every trading methodology implemented by the Investment Advisor has a degree of specific correlation regarding the market and

normally it is adapted in various ways to particular operating conditions: the market rates, the presence of consolidated trends, are some of the conditions that can influence the operating result of the manager”.

107. It was then signed by Dr Panico and Ms Dogat. The claimants say that this signature of a document which recorded a strategy which stated investors should expect great volatility on the fund portfolio was signed in reliance on the statement from Mr Pinto that the document would not change anything material, that being stated in Mr Pinto’s email of 3 September 2015. It is unclear as to precisely when it was signed but there is also before me another email of 8 September 2015 from Mr Pinto to Dr Panico stating not only that the signature was not urgent but also “it is only for administrative purposes”. The claimants say again that Mr Pinto was saying that the document would not make any substantive difference to anything.
108. On 4 September 2015, Nerine produced a net asset value statement for the trust’s major investment in the JG class “E” fund. That statement referred to an opening position as at 31 July 2015 of a value of €7,486,257.05 and a closing position as at 31 August 2015 of €3,208,288.57 with no subscriptions, no redemptions, and a movement in value during the period of €4,277,968.49, that being a negative movement value and thus a drop in value of some 40 per cent.
109. Dr Panico queried this by email to Mr Pinto copied to Mr Gallucci of 16 September 2015 stating, “On this occasion I understood from the bank that some funds had a very significant loss last month (50 per cent??). Will you let me know how the performance is going, please?” Mr Pinto replied by an email sent simply to Dr Panico stating, “As for the rest of your email, what was ‘communicated’ by the bank is an ‘exclusively technical factor of valuation of certain assets’. No worries ... but we’ll have a chance to talk about it in a very short time.”
110. On the same day, 16 September 2015, Mr Pinto sent a report on BGB notepaper to JG Capital reporting for August 2015 in relation to the Gryffon Fund class “E”. That report stated in the final two paragraphs that, in the beginning of the month the portfolio has been performing well, gaining around 3% up, until the beginning of the crash in world equities starting on the 19th of August. It went on to say that before the

crash the portfolio has accumulated a large long position in futures indices and short Bond Futures consequently fell -11.85% on the 19th, - 23.28% on the 20th, -15.39% on the 21st and -21.69% on the 24th of August. Furthermore, that the August 24th Monday flash crash triggered automatic stop loss due to margin requirement insufficiency, decreasing significantly the accumulated long position in futures indices. It went on to say that “The view for the Long side of the Portfolio remained intact and Long positions in Equities and Short on Bund had been kept in the expectation that the Market had just corrected (even if violently) in a Bull market which can rise more with the macroeconomic improvements showed in Europe and US. Unemployment should show further improvements as well as reporting from the companies balance sheets, therefore the performance of the Portfolios should be improved while the situation on Markets normalises.”

111. Thus the report seems to suggest that fund values had fallen by some 40 to 50 per cent during that month. In fact on 8 September 2015, the UBS had sent an email to Nerine stating themselves that they had understood that there had been a decrease in net asset values of minus 58 per cent from July to August and this had resulted on 18 September 2015 in JG Capital replying to UBS to say that they had noted, “there has been an alarming fall during the month and we have requested and received the report from Gennaro Pinto, the investment manager of BGB Weston Limited”. They went on to attach a copy of the report and there is then a paragraph, “As is clearly demonstrable, the performances of these classes are highly volatile. We received confirmation from Private Trustees SA as trustee of the Jacaranda Trust that they were in agreement with the investment policy, which was effective from 1 March 2015”.
112. That appears to be a recording of what I have already identified on this judgment, that is to say that: Nerine and UBS had noted the actual levels of falls in value of the JG Funds, and had passed that information to the bank who had notified Dr Panico and PTL accordingly; and that the existence of such falls was well known to Mr Pinto as the fund manager of the JG Funds and had been recorded in his own reports written as such fund manager on BGB Weston notepaper to JG Capital.
113. As I have stated, Mr Pinto had informed Dr Panico that what had happened was merely a matter of technical valuation and had stated that he was going to speak to Dr

Panico; and Dr Panico was then sent by the bank a valuation of the trust's investments and which valuation, effectively, took the figures which had been provided by Nerine and UBS. Dr Panico, on 5 October 2015 at 7.15 p.m, emailed Mr Pinto and Mr Gallucci to say, "The bank shows me a valuation of a portfolio with a loss of 5.5 million! (see attachment). You mention that it relates to an asset valuation problem? How does the portfolio look like to you? When we saw the situation together at the beginning of August it didn't look so bad (there was a loss as is natural given the way the markets are going but this is catastrophic). I see the clients on Wednesday and with this evaluation I believe the meeting will become intense ... Can you help me understand?", the reference there to the clients seemingly being to the beneficiaries of the trust.

114. There must then have been conversations taking place between Dr Panico and Mr Pinto because Dr Panico at 8.06 p.m. on 5 October 2015 emailed Mr Gallucci, copied to Mr Pinto to say, "After the telephone exchanges with Gennaro, I would say that we have clarified. All that remains is to 'realign' the bank too. Thank you very much for your immediate reaction and have a good evening."
115. On 13 October 2015 at 5.31 p.m. Mr Pinto sent an email to Dr Panico reading as follows: "I will forward to you the summary of the equity to which you must add the three values, the funds in Quilvest", that is to say the bank, "as well as the liquidity and the current account (I do not have access to this). I reserve the right to send to you the grand total as soon as I receive the official NAV of the funds. Attached is the operational PDF of private equity included in the management for €7,150. My estimate is that we are in the area of 9500/9600. The report is very easy to read and if you need any clarification, I'll be happy to assist you".
116. Attached to that email is a set of documents headed, "Interactive Brokers". They are written in Italian but what they record is an initial value of certain funds of €7,147,011.42 and a final value of €7,148,753.79. They record over a number of pages a detailed set of transactions with numerous purchases and sales recorded within them. What at first sight they appear to be is Mr Pinto explaining to Dr Panico that in addition to what is within the JG Funds were other investments held by Interactive Brokers with a value in excess of €7 million and which when combined with what was



left in the JG Funds resulted, as stated in Mr Pinto's email of 13 October 2015, in there being trust assets whose value was in the region of €9.5 million or €9.6 million.

117. The claimant's case is that this document and surrounding telephone conversations and emails convinced Dr Panico and thus PTL as trustee that the bank's documents did not state the full or true position, and that there were in fact no significant losses, and further that the trust assets were invested in relatively safe low-risk investments.
118. Dr Panico queried the difference between the bank's documents and the IB statements and what he was being told by at least Mr Pinto in further emails of 15 December 2015. At 18.59 hrs he wrote to Mr Pinto stating, "I'll forward you the bank situation today. Some of the securities are still missing. Can I ask you to make sure that at least the situation on 31 December is complete and adequately sensible? There's a real possibility of having to show it to the Italian financial administration. I'm afraid it's embarrassing to have to explain that some securities of considerable value are not registered on the account!"
119. At 19.09 hrs Dr Panico wrote again to say, "Thank you", and "this is fine in general and on a quarterly basis (if possible on the Quest valuations). Is there no way to get the bank to have a consistent valuation of all securities and accounts? There is no problem on my part but it is to avoid inconsistencies."
120. Mr Pinto replied at 8.03 p.m. to say, "I am aware of this and I did not do so before because I was waiting until 31.12 to let you know (for financial statement purposes) the general situation. To this end I'd like to know if you would like (for convenience) a general or detailed extract (the difference is as to number of pages) for the future ... do you prefer quarterly or monthly reporting?"
121. He followed up that by an email at 8.20 p.m.:

(From: "GPinto" <gennaro.pinto@bgbweston.com>

Sent: Tuesday, December 15, 2015 8:03pm

To: paolo.panico@privatetrustees.net

Cc: massimo.gentile@studiogentile.com

Subject: Re: Jacaranda Trust

Dearest

I am aware of this and I did not do so before because I was waiting until 31.12 to let you know (for financial statement purposes) the general situation.

To this end I would like to know if you would like (for convenience) a general or detailed extract (the difference is in the number of pages)

For the future...do you prefer quarterly or monthly reporting?

A hug

Gennaro Pin)

122. And then with a further email on 17 December 2015 at 3.01 p.m., where he said he was committing himself to providing a full report by 31 December and thereafter on a quarterly basis.

123. In fact, on 12 January 2016, Mr Pinto provided a further report for JG Capital in relation to the Gryffon Fund class E, the final three paragraphs read:

“ The big question in 2016 in my view is whether the dollar bull cycle is over or whether the summer consolidation vis-a-vis the other major currencies was merely a pause. I believe that the outlook is still favourable for the U.S. dollar and an increase in the QE programs in Japan and the Eurozone is the most likely catalyst for a renewed period of U.S. dollar strength.

In this context the portfolios returns won't match expected returns and I have to stay invested through the high and low to earn the long term returns.

Over-exposure to derivatives market (index equities) and debt and the surprising resilience of the Russian Ruble are the key reasons why the funds have underperformed their respective sectors this year. Despite numerous exhortations from BGB Weston's Directors to reduce positions' size and hedge the risk I kept positions open in accordance with my strong convictions. I got it wrong, I sold down various positions and I have significantly reduced the fund exposure. Sometimes the most brutal aspect of running a fund is the punishment meted out by volatile financial markets.

So what is my conclusion from all of this? I have made some mistakes in the last

quarter 2015. It was an error I will not repeat unless the circumstances are really extreme. Managing weights down rather than the complete sale of quality businesses is also an area for improvement going forward. Sudden changes in correlations on specific markets are hard to forecast and any risk model will struggle to overcome this issue. Certainly, my sensitivity analysis around my view could have been more robust and I will certainly look to learn and improve from these lessons.”

124. That report would seem to indicate that the fund was suffering still more very substantial losses. UBS produced a further net asset value statement suggesting that the closing position at 31 December 2015 was that value of the fund’s shares had fallen by a further 50 per cent.
125. Mr Pinto, on 14 January 2016 at 12.08 hrs sent an email to Dr Panico copied to Mr Gentile stating, “I enclose an extract from Jacaranda’s master account (already sent to Massimo) in which the situation was briefly reported under, ‘Private Equity and Funds’, there are positions valued in Quilvest (of which you have documentation) and ‘Private Equity’. The latter is not present in the ‘Quilvest’ dossier as it is not, ‘regulated’ and I am actively committed to ensuring that there is an optimal solution. I would also like to forward you the movement if necessary and to this end I’d like to ask whether you would like a specific report and for each position or a global summary and whether it should be limited to December or more months. As I mentioned, the document could turn out to be substantial.”
126. This email, thus again appeared to confirm that the trust had two sets of assets: those within the funds for which there were various valuations from Nerine; and those which were elsewhere, that is to say in the Interactive Brokers’ account and which were held in some private equity form.
127. On 18 January 2016 Mr Pinto sent Dr Panico and Mr Gentile a further email, “I’m sending you the accompanying letter as well as a short summary note about the year 2015 signed by me concerning the Jacaranda account. I also enclose the documentation regarding the deposit and custody of securities.

128. The summary note was on BGB Weston notepaper and it stated that the Jacaranda Trust portfolio then had assets of €9,530,150.92 as at 31 December 2015 and divided into asset classes of regulated funds of €2,280,681.26 and private equities of €7,249,469.66. It went on to state that in the first half of 2015 the investments had been mainly in short and very short- term bonds. It went on to say that in the second half of 2015, financial turmoil had “contributed to a drastic revision of the overall portfolio allocation” and that in consequence “in order to actively seek a positive return on assets under management, it was decided to invest part of the resources in private equities.”
129. There were then attached a set of Interactive Brokers’ statements showing a total net asset value of €9,530,150.92. Dr Panico sent this material by email to Mr Amari at the bank copied to Mr Pinto on 20 January 2016. Mr Amari responded on 21 January 2016 to say that the bank’s reporting was derived from what was provided to it by UBS and Nerine and “I would also like to point out that I do not have any role or visibility on the stocks of private equity investments nor on how they have been fuelled.” The claimants say that this was simply Mr Amari saying that he was only dealing with certain types of the trust’s investments and casting no doubt in any way on what Mr Pinto was saying about a separate class of the trust’s investments, that is to say such assets as had become within the asserted private equity portfolio.
130. On 15 February 2016, Christina Chieppi, whom I will describe as “Ms Chieppi”, of the company, Fiducia Lombardia, effectively the trust’s tax adviser, which company I will call “CFL” was also operated by Mr Pettinari who was or was to become the operating person at IMT, and Ms Chieppi emailed Dr Panico to seek a statement of the trust’s assets with the bank. Dr Panico responded on 15 February to supply what the bank had said was the position and to say, “As you may be aware, there are reconciliation difficulties between the bank and the manager of BGB Weston in relation to certain private equity funds that do not appear on commonly used valuation systems.”
131. Mr Pinto also emailed CFL, copied to Dr Panico and Mr Gentile saying that he was following up the previous email and saying he was, “Offering the necessary support to your professional purposes. The current composition of the portfolio sees an addition to the value of the funds as documented by Quilvest in its possession and also an

investment in a private placement equity. The nature of this does not envisage ISIN code and therefore I would be pleased to transmit shortly its valuation as at 31.12.2015 by means of a statement of account.” Mr Pinto followed up this email with a reply to all supplying the previous IB statements.

132. In 2016 Mr Pinto continued to send emails using the BGB email template to Dr Panico, Mr Gentile, CFL and Mr Pettinari attaching IB’s statements showing a healthy situation.

133. By email of 16 March 2016, Mr Pettinari responded to Mr Pinto copying Mr Gentile stating that Mr Pettinari wished for periodic account statements of individual bank accounts for each operation, and counter asset statements in the frequency the bank normally provided, and asked for this to be done as a matter of urgency. Mr Pinto responded by email of 17 March 2016 with an email which read:

“Good morning Dr Pettinari

Thank you for your email last night and I reiterate my commitment to take the greatest possible care.

With regard to the request for statements by position held and NAV value (consolidated or by individual fund managed by us), it is not difficult to obtain them within the usual technical timeframe (one or two days).

As far as the request for execution per transaction is concerned (if I have understood your question correctly), I would like to specify that as an asset manager I use various counterparties both for securities trading and for various depository banks and/or securities custody, which makes it technically laborious and complex to reconcile in a short time.

This use of different counterparties is justified by the segregation of accounts and the diversification of "counterparty" risks in accordance with the guidelines of the main financial intermediary supervisory authorities.

In addition, fund management activities, such as ours, are not "passive style" (i.e. simply subscribing to a security and waiting for its natural maturity) but rather "active style" (i.e. also possible buy and sell transactions opened and closed within the same day).

It is no coincidence that a managed product was chosen at the time, rather than the

administration of a common securities account (in this case with Quilvest), precisely to simplify administration by providing a simple to read NAV and easy to compare on a monthly or quarterly basis, delegating the administrative tasks to the Fund administrator.

I would be happy to continue the discussion and would therefore be grateful if you could indicate a convenient time and a contact number for me.

Awaiting your reply, I cordially greet you.

Gennaro Pinto”.

134. Mr Pinto then on 18 May 2016 sent to CFL and also Mr Gentile what he said was an NAV specification for the Jacaranda position and a specification regarding “a sale of some fund shares due to the switch to the private equity fund on 30 July 2015”. He there attached a set of statements headed with the BGB headings which set out that the initial values of investments in the funds had been reduced markedly and which referred to a further fund, Gryff FD Eur Priv and suggested an investment of €7,740,247.64 in such fund on 30 July 2015. Mr Miall has conducted a careful analysis of these documents together with what had been previously said to be the case by Nerine and UBS, and has identified that, if a distinctly careful analysis was carried out, these documents made little financial sense in terms of movement of monies; but, nonetheless, Mr Pinto was producing at that stage statements which purported to justify what he was then saying with regards to the value of the trust’s assets.

135. CFL queried matters further by an email of 13 June 2016 to Mr Pinto copied to Mr Gentile and Mr Pettinari, which read:

“Good morning,

I understand from reviewing the enclosed prospectuses that the sales of fund shares were made on the individual position of the Jacaranda Trust.

These disposals may have generated income by considering the disposal consideration in relation to the relative book value of the fund units being disposed of.

From the phone call we had, it seemed that the transactions took place within the fund directly by the manager and this was then reflected in a different naval valuation based on the amounts held at 31.12.2015. While we are not interested in these transactions for our purposes, we certainly need to retrieve the details of the initial purchases of

fund shares and the subsequent sales/purchases in order to arrive at the quantities held at 31.12.2015.

I am available for further clarification and look forward to receiving your kind reply. Antony Caputo”.

136. As stated in that email, CFL’s queries arose from the potential need to report to tax authorities and as they made clear, they were concerned with the income position rather than the details of specific transactions.
137. This seems to have led to a further email of 22 September 2016 from Dr Panico to Mr Pettinari, but also to Mr Gallucci and Mr Pinto, and copied to CFL. It seems to refer to some communications between them and to a meeting which had taken place on Tuesday of that week, the email being sent on a Thursday. Dr Panico said, “However, on that occasion”, being a meeting, “I also met Lorenzo Gallucci of BGB and a Nicolo Parigi of BIL who I would like to involve in the discussion. I am also copying in Mr Pinto of BGB who is following the case. My understanding of the issue is this. Jacaranda Trust has two positions: (a) a securities portfolio in Quilvest; (b) shares in a fund managed by BGB that Quilvest system fails to load. The trust’s account in BIL is open and active.” Dr Panico then refers to a desire to upload a fund to BIL as a custodian bank and asked then that Mr Pinto and Mr Parigi would coordinate with regards to that and states that he understands that BIL would have no problem, “seeing” the fund in question. This all appears to have related to a desire to replace Quilvest, whom I continue to call “the bank”, with BIL.
138. Mr Pettinari on the same day at 12.45 copied, again to all, including Dr Panico, Mr Pinto and Mr Gallucci, sent an email which stated the following:
- “Hi Paolo I have just finished a meeting with Pinto and I would like to add the following:
- 1) We asked Pinto for a number of documents about his structure and in particular, commercial brochure, corporate documents, authorisation documents at the local supervisory body, prospectus of the funds in his portfolio.
  - 2) We asked for a valuation at the current date in case of a request for an overall liquidation of the positions,-

3) We had understood that the purpose of the opening at BIL was linked to the transition to a "normal" management of a single portfolio with delegation to manage BGB Weston: this approach is not acceptable to BGB which wants as a counterparty only the custodian bank that buys the funds (in fact hedge) that it manages on behalf of its clients (Pinto tells us that the assets are about 3b for about 10 funds).

4) BGB already works with BIL for other positions (so from our point of view we do not understand then what the administrative problem of BIL is).

In essence, to avoid dialectical short circuits:

1) We are only concerned about the administrative manageability of this type of instrument: the trust is tax resident in Italy, the approach to non-harmonised funds is penalising on paper, even if in this specific case, being a trust, there should be no penalisation (we are checking); apart from the tax issue, there is still a need for 'civil law' reporting, which is currently absolutely inadequate because we do not have a complete bank statement;

2) If the trustee and protector wish to continue with BGB, they must clarify the risks and investment strategy of the structured products in the portfolio because BGB does not agree to manage the account as a normal single portfolio management mandate, which is very transparent from a control point of view;

3) If they intend to continue with BGB it is essential that there is a bank that correctly receives the valuations from the fund manager which in this case is UBS (we await confirmation on this point). If BIL is unable to do so (which is not understandable to us given that it already appears to be working with BGB funds) and the trustee and protector intend to maintain these products, the only alternative is to open an account in the UK with a bank known to BGB in order to have a statement of account correctly valuing the securities. We will then clarify the Italian taxation of the trust on non-harmonised (or harmonised depending on whether the funds are actually regulated) products.

Matthew

**Aw.Matteo Pettinari**

*Direction*

Compagnia Fiduciaria Lombar?



139. BGB and Gallucci say that all this is inconsistent with a contract existing between PTL and BGB, but the claimants dispute that. What it does, it seems to me, clearly show is that Mr Pinto, including in emails copied to Mr Gallucci, is making clear that there are in fact two sets of funds in which the trust's assets were held and that although others are asking for information about this, Mr Pinto is continually saying that everything is entirely satisfactory.
140. Thereafter, Mr Pinto, using a BGB email address and heading, continued to provide IB statements seemingly showing no or no real loss to the trust monies.
141. It is now common ground that there was no written investment management agreement in place between PTL as trustee and BGB. On 15 January 2018 at 10.24 a.m., Dr Panico emailed Mr Amari to ask whether or not Mr Amari had, "the copy of the management agreement to BGB" and asking for it to be sent to him. Mr Amari responded on the same day to say, "There's no management mandate to BGB. There are financial products which have been underwritten and whereby BGB operate as manager or adviser (take this with a pinch of salt. Gennaro can inform you better on the matter)."
142. Dr Panico, on 20 January, following receipt of various documents from Mr Pinto, wrote to say, "It would be good to have a 'management agreement'. You don't have a standard like BGB. We can sign it on Monday." Following production of a document by Mr Pinto, Dr Panico on 21 January at 9.35 a.m. wrote to say, "The agreement is certainly important because customers have already asked to see it this Monday".
143. The next day, on 22 January 2018, Dr Panico wrote to Mr Pinto to say, "Sorry for the 'stress', because you know tomorrow I have the meeting and I too want it to be the last opportunity in which we clarify the investments and then 'look forward'. I hope you can get to me today in the morning." Then there are three bullet points including: asset management agreement; and NAV of the funds at Quilvest situated as at 31.12.2017 that you sent to the trust company."

144. Thus it seems that Dr Panico was going to be meeting the trust beneficiaries and wished to have a written management agreement between PTL and BGB to show them.
145. At 11.22 a.m. on 22 January 2018 Mr Pinto replied to Dr Panico attaching a draft investment management agreement and stating, “To make it faster, I am sending you the PDF concerning the assignment.”
146. Dr Panico replied at 11.43 a.m. on 22 January 2018 to say, “Great, thanks! I send it back to you completed and signed: if I remember correctly from the correspondence, BGB’s commissions on page 2 are one per cent on an annual basis. On this there are also “performance fee”?” He then said that he would be telephoning Mr Pinto.
147. Mr Pinto responded by email at 1.26 p.m. stating, “You remember well! Please report that provided in the ‘investment profile’ referring to the ‘protection’ profile, the percentage as a performance fee is irrelevant given that the portfolio is conservative and therefore with minimal brokerage activity aimed at obtaining over performance.”
148. Dr Panico responded at 1823 hrs to say, “Here is the assignment (omitting the parts that do not seem useful for tomorrow’s meeting). Excuse the stress. Can you get me back a countersigned copy back by tomorrow morning”.
149. The written IMA template had by then been filled in by Dr Panico and signed twice with the place of signature being given as Luxembourg and the date being given of 30 December 2014. In that form it was attached to Dr Panico’s 18.23 hrs email to Mr Pinto. Included was a commission provision in favour of BGM of one per cent of net asset value per annum and numerous contractual terms. There was also filled in an appendix 2 that set out an investment strategy that was to be adopted, which was to conserve capital value and not to risk more than a 5 per cent in depreciation in capital value, and which also provided that the risk profile was to be medium low.
150. Mr Pinto, having received the document as part completed by Dr Panico, then signed it twice using a BGB Weston stamp, a printed stamp of his own name and his handwritten signature. That is virtually next to Dr Panico’s signature of his

handwritten inclusion, the place of signature being Luxembourg and the date as being 30 November 2014.

151. In his defence in these proceedings, Mr Pinto referred to this particular document in paragraph 15.6 stating, “It is admitted and averred that the IMA”, that is the written document, “reflected the nature of the existing relationship between the trustee and BGB as it was understood by Mr Pinto at the time.” In paragraph 19.2 he stated that, “It’s admitted that appendix 2 of the IMA accurately recorded Mr Pinto’s understanding of the trustees’ investment strategy as it had been expressed by Dr Panico in 2014.”
152. Paragraph 19.2 then goes on to refer to paragraph 6.3 of Mr Pinto’s defence and in which, amongst other things, he referred to the meeting of 3 October 2014 where he said, “Dr Panico expressed a desire for a relatively low-risk investment which prioritised the return of capital on liquidation or redemption rather than the possibility of high returns.” I do note also that Mr Pinto in paragraph 19.2 of his defence stated that he had not been involved in the selection of any funds or the nomination of any investments for the trustee and that that had all been a matter for Mr Gallucci and BGB. I do say at this point that I find it somewhat difficult to understand how that statement can be related to the content of Mr Pinto’s reports to JG Capital and where it was Mr Pinto who had seemingly created the asserted private equity position.
153. Also at this time, on 25 January 2018 Dr Panico emailed Mr Pinto to direct Mr Pinto to sell various trust interests in the funds. The result was that a substantial payment of something more than €1 million was then made to the trust as a consequence of this purported liquidation by Blue Anchor, being Mr Pinto’s service company and not by BGB. It is altogether unclear as to what, if anything, was actually liquidated at this point as the only evidence before me is that the payment was made by Blue Anchor.
154. On 19 November 2018, Mr Pinto sent to Dr Panico, copied to Mr Gentile, an email, which stated for what Mr Pinto was now asserting the trust portfolio to be composed, and with a supporting PDF to the same effect. Mr Pinto stated that it was composed of Italian Government bonds with a nominal value of €6.3 million and derivative contracts maturing on 30 December 2019 for a nominal amount of €1.7 million. The

email went on to say that the portfolio would be closed on 31 December 2019 and that, in summary, the value of the trust's assets which had been transferred, presumably from the bank, was €9.6 million and that there would have turned out to be a one per cent return per annum resulting in an eventual total, which is said to be accrued income, but which was said to give rise to an overall total of €10,54,560. The email went on to say that, as at 31 December 2019, the file would show that valuation minus the amount which had already been reimbursed to the bank. Mr Pinto stated that he was certain that there would be no problems and that, if favourable market conditions for early liquidation without cost or penalty arose, then that course might be considered.

155. Dr Panico responded on 21 November 2018 with an email to Mr Pinto also copied to Marina D'Ottavi ("Ms D'Ottavi"), who appears to be one of the trust's beneficiaries, referring to a meeting which had been held between Dr Panico and the settlor and the beneficiaries the previous day. He attached minutes of the meeting and referred to various matters, which were referred to in the minutes, including that no interest had ever been credited to the trust account in the bank, and that the €1 million reimbursement had actually been paid from Blue Anchor, which he described as a fund. He then asked that BGB Weston would sign a confirmatory statement and stated that this could be discussed including at a meeting in London.
156. The minutes of the meeting of 20 November 2018 referred to the purpose of the meeting as having been to reconcile the values of assets, "initially under management by the trust to the manager of BGB Weston in London"; referred to the fact that there was to be an eventual liquidation and repayment, "on 31/12/2019 by the manager of BGB Weston"; stated that it was intended to identify actions for the trust to carry out to ensure repayment on 31 December 2019, referred to the valuations which had been communicated by Mr Pinto, and then made specific reference in bullet points to: "the trustee on behalf of the Jacaranda Trust gave a management mandate signed on 30.11.2014 to BGB Weston of London" and which was seemingly a reference to the written IMA, albeit that it had actually been signed in January 2018; and to a letter of 7 February 2018 from BGB referring to various valuations. It also set out what was in effect an action plan designed to ensure that there would actually be made the forecast

repayments out of the monies being purportedly managed by BGB on 31 December 2019.

157. Mr Pinto responded to Dr Panico copied to Ms D'Ottavi on 26 November 2016 saying that he would have no problem in sending the letter requested and that there was nothing to hide. He said that the calculations would be scrupulously checked and he said that Blue Anchor was actually, "the group's special purpose company" and was used as a bridge in order to avoid certain costs and penalties arising. He assured the recipients of the emails that his availability and that of BGB was always guaranteed.
158. On 10 December 2018, Mr Pinto then on BGB notepaper sent Dr Panico a confirmation that the capital remaining under management amounted to €8,148,170.91. On 4 February 2019, Mr Pinto sent to CFL, Mr Pettinari and Ms Chieppi a statement confirming Interactive Brokers' statement of 31 December 2018 and stating that the only change had been the credited account amount of €1,144,000 being in effect the Blue Anchor monies.
159. There then seems to have been a meeting between Mr Pettinari and Mr Pinto and Mr Gallucci on 30 October 2019. This resulted in Mr Pettinari emailing Mr Pinto copied to Mr Panico and Ms Chieppi on 31 October 2019 stating that they were awaiting various bank statements and also, "mandate/management or investment contract with BGB signed by the trustee". Mr Pettinari repeated his request on 1 November 2019.
160. On 19 November 2019 Mr Pinto emailed to say that he was sending to Mr Pettinari various transaction reports and also "mandate received from the trustee". Mr Pettinari responded to Mr Pinto on 19 November at 1449 hrs to say, "The original mandate seems signed only by Paolo[?] Is there a copy with those signatures? Who signed for BGB Weston?" and raised various queries about fees as recorded in the document which had been sent to Mr Pettinari. It thus seems that what Mr Pinto sent was a copy of the written IMA document but in its form as Dr Panico had signed it, without Mr Pinto's signatures being included.

161. Mr Pinto, at 6.17 p.m. responded to Mr Pettinari and copied to Dr Panico to say, “The mandate was signed by me as manager in charge reporting characteristics and conditions agreed and shared with Paolo. Beside his signature is mine.”
162. Something seems to have been sent then in the form of the written investment management agreement but with certain differences. Instead of Mr Pinto’s signature appearing with a BGB stamp and a printed stamp of his own name and his signature, there is simply Mr Pinto’s signature. There has further been a section completed described as special instructions which sets out a number of matters including there being a target one per cent yield per annum and certain other provisions including with regards to commission. What seems to have happened is that the original form as held by Mr Pinto, which seems to have been only the original form as signed only by Dr Panico, has been completed by someone, presumably Mr Pinto, albeit then attached to an email which was also copied to Dr Panico.
163. On 6 February 2020 Mr Pinto emailed Dr Panico and IMT with more IB statements showing a trust value of €8.4 million; and Mr Pinto emailed Dr Panico, copying in Mr Gallucci, Mr Pettinari and Mr Gentile, saying that the IB statement proved that value.
164. On 26 February 2020, Mr Pinto emailed Dr Panico and Mr Gentile saying, “I am enclosing two screenshots hoping they will cool the mood” and stating that he was trying to cooperate and doing his best.
165. On 27 February 2020, PTL (by Dr Panico) responded by a letter addressed to BGB for the attention of both Mr Gallucci and Mr Pinto. It started by stating, “On 30 November 2014 we gave you a management mandate for the assets for the Jacaranda Trust.” Dr Panico then referred to the “hedging derivatives for the portfolio you created” expiring on 31 December 2019, and that the trust should then receive some €8.6 million. It then went on to say that to date the trust’s account had received no cash and no evidence, and that the day before “the manager, Gennaro Pinto,” had sent a screenshot referring only to a low value proposed partial transfer. The next paragraph stated “We would like to have evidence by tomorrow evening of the Jacaranda Trust liquidation with the two custodians UBS and Citibank that you mentioned. We remind you that in practice BGB Weston is not ‘only’ a manager

because one, a large part of the trust liquidity was initially transferred to offshore funds of your indication and two, BGB Weston subsequently transferred the sums from most of these funds to the portfolio created through Interactive Brokers. These transactions were certainly carried out as part of the autonomy of the person delegated to the management as per the mandate signed on 30 November 2014. However, it is the responsibility of BGB Weston to transfer the liquid funds to the account of the Jacaranda Trust with CBP Quilvest as per our request of 10 December 2019". There was then a threat to protect the interests of the trust, including by in some way contacting the Financial Conduct Authority.

166. This letter, of course, referred to the written IMA as having been signed on 30 November 2014 when it was actually signed in 2018. It was, however, sent nearly two months after the date which Mr Pinto had given for the expiry and liquidation of the assets supposedly held within both the funds and the Interactive Brokers umbrellas, and where the trust at that point had not received any monies apart from €1 million sent a significant time before then.
167. On 2 March 2020 BGB, in a letter signed by Mr Gallucci, responded to PTL's letter stating that it was noted that the writer, "does not share the representations contained in your letter" but stated that the way forward was for the trust to contact Interactive Brokers directly and that otherwise, whilst reserving rights, BGB proposed to cooperate with the trust.
168. On 7 March 2020 in a further letter signed by Mr Gallucci, BGB wrote to PTL to say, "In this respect as managing director of BGB I confirm the following". There were then a number of bullet points. The first was that the position with Interactive Brokers was that there was a held the sum of €8,421,728.28 in accordance with what had been previously said to be the case as at 31 December 2019. Secondly, although it is accepted by BGB now that this was not quite correct, that BGB had notified Interactive Brokers that the amounts were to be liquidated and the account closed. The email went on to say, "As we are constantly monitoring Interactive Brokers, we understand that this procedure has begun despite a longer period of time than initially expected". It then said that it was expected that the trust would have its own account credited with the relevant monies by 30 May 2020. There was no actual reference to

the alleged written IMA or the nature of the relationship between BGB and PTL, if any, in either of those letters.

169. The claimant contends that Mr Gallucci was, in the letter of 7 March 2020, providing his own personal confirmation that he had personally investigated matters, including with Interactive Brokers. Mr Gallucci and BGB's position is that Mr Gallucci had delegated the investigation with Interactive Brokers to the person who was actually purportedly handling the matter, namely Mr Pinto.
170. On 20 March 2020 Filippo Tenderini, a lawyer assisting PTL, emailed Mr Pinto and Mr Gallucci to say that he understood that BGB had received a mandate from the trustee "to intermediate the Jacaranda Trust into subscribing a low-risk investment in Italian Government bonds with Interactive Brokers for an amount of €8 million", and that liquidation of this amount had been requested, and stated that he wished to hear as to what was happening.
171. On 4 May 2020 following a direct communication by Mr Tenderini to Interactive Brokers, Interactive Brokers as a genuine entity informed Mr Tenderini that they had no knowledge of the matter, had not created any of the purported statements or documents purporting to emanate from Interactive Brokers which Mr Pinto had provided, and in effect that they had no knowledge whatsoever of the matter which had absolutely nothing to do with them. They confirmed this position in subsequent letters. No one has suggested that any of the material purporting to be from Interactive Brokers which Mr Pinto produced and circulated was in any way genuine.
172. It seems absolutely clear from all of this, and is effectively not only common ground between the parties but also confirmed by Interactive Brokers, that: firstly, the true situation is that the trust monies had gone into and stayed in the JG funds and had there suffered massive losses; secondly, that the various Interactive Broker statements were simply forged creations.
173. That gives rise to questions, which I will come to, as to the extent to which it is clear as to who forged them and who had knowledge of the forgeries, although I record that: the claimant says that they were forged by Mr Pinto with the knowledge of Mr



Galluci; and Mr Galluci effectively says through Mr Miall that they were simply the forged creations of Mr Pinto, with no knowledge of Mr Galluci's.

174. Mr Pinto in his defence at paragraph 26 states, "Mr Pinto believed the Interactive Brokers' statements to be genuine documents" but he has not said in his defence or in any evidence as to how he came to be in possession of those statements or what he knew about them. I gave Mr Pinto the opportunity to put in evidence as to these matters, although as I have said and due to the procedural history of these applications, I made clear that, if he did not do so, I would not draw any inference from the fact he had not done so but would simply be left with the evidence before me. However, where Mr Pinto declined to put in any evidence, I am simply left in a position of no evidence from Mr Pinto as to such matters except for the bald statement which I have read from his defence.
175. Mr Phillips KC, took me through the above-mentioned documents and much of what is set out in them and above is similarly detailed in the section of the proposed amended particulars of claim headed, "The defendants advising on and managing the mutual funds investment".
176. The proposed amended particulars claim then go on as follows: Firstly, in a section headed the contractual obligation, in paragraph 147 it is said that there was an express oral agreement between PTL and BGB for BGB to act as advisor to the trust on the basis of a contractual consideration, being BGB's ability to earn commissions and fees from third parties, including the JG funds and companies. No reference is made to the one per cent commission figure which appears in the IMA document signed in January 2018, but dated November 2014. That asserted agreement is referred to by way of a defined term, "the investment management agreement", which definition appears in paragraph 53 of the proposed amended particulars of claim as being an agreement which was said to have been induced by representations made at 3 October 2014 meeting and the bespoke investment representation. No date is actually given for the oral agreement although it seems likely that it is said to have been made either at the October 2014 meeting or shortly thereafter.

177. The contract claim is also though put on the basis of not just an oral contract but also an implied contract. In paragraph 148 of the amended particulars of claim it is said that the conduct of the parties, up to events referred to in paragraph 86 of the proposed amended particulars of claim, which were in June 2015, gives rise to the implication of a contract, being an undertaking by BGB to act as the investment advisor and manager in respect of the proposed and actual investment of the trust funds in return for the opportunity to earn fees and commissions on investments made with the trust funds.
178. Thus, the nature of the contract is put in two ways: firstly, as an express oral agreement; secondly as an implied contract. It is then said that from either of those two sources there arose duties on BGB to advise, including as to the level of risk of potential investments. It is then said that those duties were breached in a number of ways but primarily as follows. Firstly, that it is said that BGB failed to advise PTL that the investments were and would be high risk; and secondly, that BGB actually effected investments in high-risk investments and not low risk investments. It is then said that if there had been no breach then the trust would have invested its funds on the basis of a low-risk strategy and funds would not have been lost.
179. The next section is headed “The First Conspiracy”. In paragraph 152 of the proposed amended particulars of claim it is said that there were two misrepresentations: firstly, that at 3 October 2014 it was said – this being called the October investment representation – that BGB had suitable investments available to ensure that the capital value of assets invested within them would be maintained, and it is said that that representation was untrue and known to be untrue because Mr Gallucci and Mr Pinto knew that the JG funds were volatile and illiquid. Secondly, it is said that “the bespoke investment representation” was false, that term being defined in paragraph 52 of the proposed amended particulars of claim as being a representation contained in Mr Pinto’s email of 3 November 2014, “that the defendants were in the process of structuring a bespoke investment product that was specifically designed to meet the investment aims of private trustees, as trustee of Jacaranda”. That representation is said to have been false and known to be false as it is said that Mr Gallucci and Mr Pinto’s intention throughout was to have the trust assets invested in the JG funds which were not bespoke, and which did not have a strategy which would meet the aims of the trust; it being added that PTL and Dr Panico believed that the JG funds

were simply holding feeder products in which money would be simply held and then transferred into safe investments.

180. It is said in paragraphs 154 and onwards of the proposed amended particulars of claim that these misrepresentations were made in pursuance of the first conspiracy, but, apart from an allegation that the defendants conspired together, no further particulars are given as such conspiracy. The loss in terms of the lowering of value of the trust's assets is said to have arisen in the same way as with regards to the contract claims.
181. There is then a section headed, "The Second Conspiracy". In paragraph 159 of the proposed amended particulars of claim there are references to "the assurances". That term was defined earlier in the proposed amended particulars of claim in paragraph 92 to refer to the history of the matter and to say that the defendants, again and again, stated that the capital value of the trust assets had been maintained. Paragraph 93A asserts that Mr Gallucci had delegated the task of dealing with queries from 2015 onwards to Mr Pinto, but later paragraphs say that Mr Gallucci knew what Mr Pinto was doing. Paragraph 159 alleges that both the second defendant and the third defendant, that is to say Mr Gallucci and Mr Pinto, knew that the statements that Mr Pinto was making with regards to values were untrue, and that they made and allowed such statements to be made with the intention that PTL would not investigate the true financial situation of the various funds. Paragraph 160 says that the result was that PTL did not investigate, and so did not take action to stop the decline in value of the funds from October 2015, when the value was €4.1 million, to some €320,000 in Spring of 2018.
182. Ultimately in the hearing before me, and following there having been numerous revisions made to the draft by Mr Phillips and Mr Fisher; with regard to the question of the form and particulars of the proposed amended particulars of claim, the defendants did not take issue with them, save for some very limited points. I do find the proposed amended particulars of claim to be distinctly confusing, including in the terms of the definitions which to my mind appear in a number of particular and somewhat surprising places. On the assumption, which I will come to in due course, that I allow amended particulars of claim, I will need a list of defined terms to be included at the start of the document.

183. The remaining two points which Mr Miall raised as to the form and particulars of the proposed amended particulars of claim were as follows: Firstly the fact that paragraphs (now) 135 to 141 set out a history as to how the written IMA came into being in early 2018, which read:

“135. By email dated 15/01/2018 (10:24) addressed to Mr Amari and copied to the Third Defendant Dr Panico requested a copy of the management mandate to BGB. The Third Defendant responded on the same day by email addressed to Mr Amari and Dr Panico at 10:32:

*“I don’t want to confuse things... but perhaps reference is made to the ‘Gryffon memoranda’ etc. If I have understood correctly, these are fairly voluminous dossiers in which the services subscribed are described (whereof course we **the** managers.”*

136. By email of 20/01/2018 (06:39) addressed to the Third Defendant, Dr Panico wrote:

*“but is it simply the “Memorandum” of the funds  
It would be good to have a “management Agreement” you don’t have a standard like BGB  
We can sign it on Monday”*

137. By email dated 21/01/2018 (09:35) to Dr Panico, the Third Defendant wrote:

*“In addition to the one reporting the funds there should be another page with our details and the management objective.  
If you only have the memo then I turn you this agreement on Monday”*

138. By email dated 22 January 2018 (11:22) the Third Defendant sent to Dr Panico a form of Investment Management Agreement (the “Written IMA”) for completion and signature. Dr Panico completed the Written IMA and signed the same, dating it 30 November 2014. The Third Defendant subsequently signed the Written IMA on behalf of BGB.

139. The Written IMA was produced and signed by the Third Defendant as a further assurance to Private Trustees that the Defendants were acting honestly and in the best interests of Private Trustees.

140. The Claimant does not seek to rely on the Written IMA as a contractual document

but will rely on the statement made by the Third Defendant in his Defence to the effect that the Written IMA reflected what had been agreed in the Autumn of 2014.”

184. Mr Miall says that this is a classic pleading of evidence and not the facts relied on and inappropriate in view of the wording of CPR 16.4(1) which requires facts to be stated and not evidence. However, while I find the claimants’ pleading and method of pleading not entirely clear, I see no real reason to delete these paragraphs on this ground, for three reasons: firstly, these paragraphs refer to Mr Pinto’s defence as admitting that the written IMA document reflected the relationship as it stood from 2014 onwards. It seems to me that the claimants were entitled to seek to advance this as some sort of admission that they can rely on in some way or other under Civil Procedural Rule 14.1, and I shall not prevent them for doing so as a matter of pleading. Secondly, if such an admission is to be relied on, then it does seem to me that the amended particulars of claim properly should set out how a document which is dated 30 November 2014 actually came into being in January 2018, which these paragraphs do. Thirdly, it seems to me that the defendants will not have any great difficulty in responding, to the extent which they wish to do so, to these particular paragraphs and in particular paragraph 141.
185. Mr Miall’s second point is that paragraph 148 of the amended particulars of claim dealing with the implied contract assertion does not say when the implied contract came into being or what caused it to come into existence. As a result, in argument Mr Phillips clarified that the implied contract would have come into existence, if at all, by 14 November 2014. It seems to me that that needs to be stated if matters are to proceed and all the more so since the present version of paragraph 148, as I have said, refers to a number of events as having given rise to the implied contract, including the events of June 2015, described in paragraph 86 of the amended particulars of claim. It seems to me that there is an inconsistency there which would need to be dealt with. That, however, is a matter which can be considered by counsel following this judgment and pending the consequential hearing.
186. Mr Miall for BGB, the alleged contracting party, submits that the claimant has not shown any real prospects of success as far as the contract claim is concerned, in two respects: firstly, that the claimant has not shown any real prospects of success in

establishing any contract, oral or implied between BGB and PTL; secondly, that no real prospects of success have been shown in establishing any breach of any such contract.

187. Mr Miall submits firstly, that there is simply no contract between BGB and PTL at all for two sets of reasons. BGB were simply a manager of the JG funds who offered the trust an opportunity to invest in them. BGB was just an agent or facilitator of a seller, that is the JG entities, not an advisor contracted to the buyer being the trust. Secondly, that if there was any contract it would be in a contract with the bank and not with PTL, with the result that only the bank could bring proceedings on the contract and not the trust.
188. Mr Miall, further submits that, that ,in any event, PTL had agreed to the high-risk strategy of the funds, see firstly the DPMA between PTL and the bank and secondly, the events in September 2015 when Dr Panico signed the JG fund's strategy document which was to take backdated effect from the beginning of March 2015; and so that such investments did not amount to any breach of any contract which did exist.
189. As far as the formation of the contract is concerned, it seems to me to be both trite law and common ground between the parties, firstly, that an oral contract can arise by verbal offer and acceptance, where one person here, BGB, is giving a promise, here said to be of services to another. It requires an objective mutual intention to create legal relations; sufficient certainty of terms; and consideration, being something of perceived value, either to be gained by the person giving the relevant promise, here BGB, or to be expended by the person who is receiving the benefit of the relevant promise, here the trust. Secondly, that an implied contract can arise from a course of mutual conduct from which it can be implied that the parties have determined to enter into a contractual relationship in the same way as if there had been an offer and acceptance containing particular terms and with consideration. However, that is not lightly to be implied, but only where there is a necessity to do so. For that proposition I refer to the authorities cited to me in this area, being *West Bromwich Albion v El-Safty* [2006] EWCA Civ 1299 at paragraph 42 which reads:
- “42. The question therefore arises as to whether a contract between Mr El-Safty and WBA itself can be implied. The test for such an implication, as it became common

ground during the hearing of the appeal, is necessity: see *Baird Textile Holdings Ltd v. Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, especially at para 62.”

190. The *West Bromich* decision refers to the decision in *Baird Textile Holdings Ltd v Marks & Spencer* [2001] EWCA Civ 274 where it seems to me that the relevant propositions are set out:

In paragraphs 15 to 21 of the Vice Chancellor’s judgment, which read:

“15.. For Baird counsel submits that where, as alleged in paragraph 9, one party intentionally induces a particular belief in another, on which the other relies, such conduct attracts legal responsibility. The responsibility relied on is (1) to give reasonable notice to terminate the relationship and (2) during the subsistence of the relationship, to acquire garments from Baird in such quantities and at such prices as were in all the circumstances reasonable. More specifically he contends that the judge was wrong in three respects, namely (a) necessity is not the test for the implication of a contract from conduct, (b) there is a sufficient prospect of success in establishing an intention to create the legal relations relied on, and (c) the obligations are sufficiently certain to be enforceable as part of the alleged contract.

16.. In connection with the wide proposition counsel referred to academic discussion with regard to “relational contracts” and the legal implications to which they may give rise. But the articles which he produced did not suggest that the normal rules as to the implication and formation of contracts or the usual requirements of certainty did not apply to “relational contracts”. Accordingly it is to those rules that I turn.

17.. Counsel suggested that the requirement of necessity to which the judge referred was derived from the judgment of Bingham LJ in *The Aramis* [1989] 1 Ll.L.R 213 . He submitted that it was either confined to the cases exemplified in that case or, at least, inapplicable to cases in which there had been a long continuing relationship or an intentional inducement such as Baird relies on in this case.

18.. *The Aramis* [1989] 1 Ll.L.R 213 concerned the question whether a contract could be implied between the transferee of a bill of lading to whom the goods had been

delivered and the carrier. Prior to the Carriage of Goods By Sea Act 1924 the implication of such a contract was necessary if the transferee and the carrier were to have rights enforceable between themselves in respect of, for example, damage to the goods or the payment of freight. Bingham LJ considered the authorities at some length to see how the implication of contracts in this field had grown and developed. He cited with approval from the judgment of May LJ in *The Elli* [1985] 1 LL.R. 107, 115 that “... no such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.”

18.. Bingham LJ accepted that the authorities showed that “a contract will only be implied if it is necessary to do so”. In expressing his own view Bingham LJ said (page 224):

“... it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.”

19.. Counsel for Baird relied on the fact that in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195, a case concerning the implication of a contract from a request for tenders and a submission in response, Bingham LJ put the matter somewhat differently. In that case he referred (pp. 1201 and 1202) to the “confident assumptions of commercial men” and the need to “be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for”.

20.. For M&S it was submitted that it would be odd if the principle for the implication of a contract at all should be different or less onerous than the principle for the implication of a term in a contract. Reliance was placed on *Wilson v Partenreederei*



*Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 LL.R.311 . The former concerned the question whether a contract to abandon an arbitration might be implied from conduct, or more precisely lack of conduct. Lord Brandon of Oakbrook considered (p.914) that an actual abandonment, as opposed to an estoppel precluding an assertion of continuance, required proof of conduct of each party, as evinced to the other party and acted on by him, as “leads necessarily to the inference of an implied agreement” between them to abandon the contract. Lord Roskill referred (p.923) to “the only possible inference [being] that the agreement to arbitrate has been rescinded by mutual consent”. Though Lord Diplock made no similar observation both Lords Keith of Kinkel and Brightman agreed with Lords Brandon and Roskill. In *The Gudermes* the cargo owner sought to establish a further contract with the ship-owners arising out of arrangements made to cope with the situation arising from an unauthorised diversion to Malta rather than Ravenna. The judge, Hirst J, held that the appropriate test was that described by May LJ in *The Elli* [1985] 1 LL.R. 107 , 115. The Court of Appeal upheld that direction. Staughton LJ giving the judgment of the court considered (p.320) that “... it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.”

21.. In my view the judge did not adopt the wrong test for the implication of a contract from conduct. It is apparent that the statements in *The Aramis* are not confined to the limited circumstances with which that case was concerned and are reflected in one form or another in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* , *Wilson v Partenreederei Hannah Blumenthal* and *The Gudermes* .”

And in paragraph 48 of the judgment of Judge, LJ which reads:

“48.. I agree with the judgment of the Vice Chancellor on the contractual issue generally, and in particular his analysis of the problems of ascertaining with any sufficient precision the parties' mutual obligations, and also, by reason of the uncertainty, of establishing a mutual intention to create a legally enforceable relationship.”

And in Mance LJ's judgment in paragraphs 59 to 64 and 69 and 70 which read:

“59.. The Vice-Chancellor has set out paragraph 12(1) and (2) of the judgment below, in which Morison J summarised the relevant legal principles as he saw them. For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.

60.. Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some family situations) no intention to create legal relations.

61.. An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement: see Chitty on Contracts (28<sup>th</sup> Ed.) Vol. 1 para.2–146. It is otherwise, when the case is that an implied contract falls to be inferred from parties' conduct: Chitty, para.2–147. It is then for the party asserting such a contract to show the necessity for implying it. As Morison J said in his paragraph 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred.

62.. That the test of any such implication is necessity is, in my view, clear, both on the authority of *The Aramis* [1989] 1 Ll.R. 213, *Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C.* [1990] 1 WLR 1195, *The Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Ll.R. 311 cited by the Vice-Chancellor, and also a matter of consistency. It could not be right to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract — which must itself have terms.

63.. Here it is sought by the claimant to argue in reverse. First, the issue of intention to create legal relations is addressed and it is suggested that the judge gave only one reason (based on paragraph 9.28 of the claim) for negating any such intention. Then, having sought to show that reason as ill-founded, it is argued that the only barrier to an enforceable contract is “essentially one of interpretation” and of giving effect to an intention on the part of the parties to contract.

64.. It is, in my judgment, more appropriate to take the requirements in the order in which I have set them out, and to recognise their potential inter-relationship. If there is no sufficient agreement on essentials, that is on any view fundamental, and it may well also reflect an absence of intention to create legal relations.

69. Objectively, the only sensible analysis of the present situation is in my judgment that the parties had an extremely good long-term commercial relationship, but not one which they ever sought to express, or which the court would ever seek to express, in terms of long-term contractual obligations. The upshot is that I agree with the judge's conclusion that there was never here any agreement on essentials.

70. In addition, I consider that the fact that there was never any agreement to reach or even to set out the essential principles which might govern any legally binding long-term relationship indicates that neither party can objectively be taken to have intended to make any legally binding commitment of a long-term nature. Their conduct in this regard contrasts with their conduct in entering into short-term commitments relating to each season, as well as their conduct in entering into other particular contracts, such as that made by both M & S and Baird with the clothing designer, Matthew Williamson, dated 27<sup>th</sup> March 1998.”

191. I note that the claim as originally presented in Dr Panico’s first and third event affidavits and in the particulars of claim was on the basis that the representations made on 3 October 2014 induced the written IMA, which was said to be dated and signed on 30 November 2014, a matter to which I will come back in due course.

192. The first and second defendants’ defence at paragraph 19(4) said that what happened on 3 October 2014 was only a general discussion, and in paragraph 24 said that there was no agreement that the first defendant would provide investment management services at all. Mr Gallucci’s first witness statement said that 3 October 2014 meeting was a “meet and greet” on the basis that Dr Panico and Mr Pinto had already discussed investment and Mr Gallucci did not produce any notes of the meeting. And Mr Gallucci said that Mr Pinto had no authority to commit BGB to contracts.

193. Mr Miall submitted in relation to the question of an oral agreement having been made at some point in late 2014: firstly, that no witness statement evidence suggested one had been made at all; secondly, no document referred to such; thirdly, if there had been an agreement one would have expected these parties to have put it in writing; fourthly, that the trustee resolution purportedly dated 15 November 2014, even if genuine, envisaged an entry into a written agreement in the future, not an existing oral agreement; fifthly, Dr Panico asked Mr Pinto to produce a written agreement without referring to any oral agreement and signed one with many terms in 2018, which terms could not have been agreed in 2014; sixthly, that it was simply unclear what conversations were relied upon; seventhly, that Dr Panico would be the logical source and witness for IMT to base a claim of an oral contract upon but, there is in fact no relevant evidence from Dr Panico before me or at least nothing about any oral agreement in any of it.
194. Mr Miall submitted, eighthly, that there is no reason to believe that the claimants' case would get any better. Firstly, because Dr Panico is not apparently cooperating with the claimant or at least is not prepared to give evidence in court as has become apparent during these hearings, and secondly, any suggestion that BWB might hold some meeting notes of the relevant meetings or other useful documents, was, according to Mr Miall: pure Micawberism without any real basis for any such hope.
195. Mr Miall submitted, ninthly, that PTL, when it intended to have a contract with a party, would make sure that it made one in writing; see, for example, the DPMA entered into with the bank and copied to Mr Gallucci in December 2014.
196. With regard to the question of an implied contract by conduct, Mr Miall submits, firstly, that the relevant conduct is not identified with any specificity but simply a history of events is given. Secondly, that it is not said or clear (a) why a contract should be necessary or why this could not be a situation of a non-contractual relationship, or (b) why objectively it would be concluded that there would be an intention to create legal relations between BGB and PTL. Thirdly, that when Mr Gallucci in his email of 11 December 2014 asked as to how Mr Gallucci could be sure that his suggestions would be taken into consideration where there was going to be no official mandate between the bank and BGB, Mr Gallucci was not in any way

accepting that he was advising PTL, but was simply concerned as to whether or not it was worth BGB's time and effort putting their resources into what was happening with regards to the trust.

197. Mr Phillips submitted that there were real prospects of establishing a contract on one or other ground. He referred to numerous of the emails from Mr Gallucci to the bank and in particular those of 28 October, 4 November, 5 November, 27 November, 28 November and 11, 15 and 18 December 2014. He submitted, firstly, that Mr Gallucci would not be asking the bank for the mandate between PTL and the bank unless BGB was advising PTL, which advice would presumably be on a contractual basis. Secondly, that Mr Gallucci would not be seeking to influence what was contained in the mandate unless BGB was managing investments for PTL, presumably again on a contractual basis. Thirdly, that Mr Gallucci would not want to be assured that BGB's suggestions would be taken into account unless BGB was having some contractual remunerated role in return for its efforts. Fourthly, that Mr Gallucci referred on various occasions to PTL and the trust as "the client", and Mr Phillips submitted that Mr Gallucci did so because he saw PTL as being a client of BGB and not simply a customer, even if PTL was also a client of the bank. Fifthly, but for the same reasons, Mr Gallucci was seeking to set up a situation where the bank was actually to act on the instructions of BGB.

198. Mr Phillips accepted that for an oral agreement then the particular conversation should be set out and that as far as a contract by conduct is concerned, then the particular conduct should be set out and identified. He accepted that that is required by Civil Procedure Rule 16.4(1)(e) which incorporates in effect paragraph 7.4 and 7.5 of the Practice Direction:

"Particulars of claim must include --

... (e) such other matters as may be set out in a practice direction."

However, Mr Phillips submits that that is not mandatory and depends on all the circumstances of the claim and that the claimant really needs disclosure before it can plead out the matter properly.

199. Mr Phillips relied on paragraph 15.6 of Mr Pinto's defence, which I have already quoted above, and which states that the written investment management agreement

reflected the nature of the relationship as in 2014. Mr Phillips would therefore say that Mr Pinto is both accepting and evidencing that the relationship at that point in time was a contractual one with an intention to create legal relations.

200. Mr Phillips further referred to various of Dr Panico's communications with Mr Pinto and Mr Gallucci, in particular those of 5 and 10 October 2015, and submits that Dr Panico would only have made the relevant inquiries contained in them if Dr Panico had thought that there was then a contractual relationship.
201. Mr Phillips also referred to the 2020 correspondence, including the letter of 7 March 2020 from Mr Gallucci to Dr Panico and also the email of 20 March 2020 from Mr Tenderini to Mr Pinto and Mr Gallucci, and submitted that neither side would have written in such terms unless they believed that there was a contractual relationship between them, and which belief would be based on their recollection of the past events.
202. Mr Miall countered those submissions saying, firstly, that the various communications with the bank all related to the mandate position between the bank and the trust; and had been made to ensure that BGB was not wasting time but rather to enable BGB to be sure that the bank could properly transmit its customer PTL's monies as part of the proposed investments. Secondly, he submitted that Mr Pinto in his defence was only referring to the transactional mechanisms and matters in the written IMA and not to a legal relationship. Thirdly, he submitted that if Dr Panico had thought that there was an oral contract or a contract by conduct, he, being a lawyer himself, would have said so rather than simply sought to rely on what he knew was a backdated document which he had persuaded Mr Pinto to execute.
203. I have considered all the documents and submissions, even if I have not mentioned them specifically.
204. I see the claimant's case on the existence of a contract as being distinctly thin. It seems to me also that it may well become clear, following disclosure at least, that it is not sustainable. But I have come to the conclusion that it just passes the real prospects of

success test to permit amendment in principle, as is stated in the CNM decision. My essential reasons are as follows.

205. Firstly, even if Mr Gallucci is right that the 3 October 2014 meeting was of a "meet and greet" nature, he accepts that there had already been meetings between Mr Pinto and Dr Panico and that there would continue to be dealings directly between them.
206. Secondly, in my judgment, on the evidence before me, it seems to me clear that Mr Pinto was held out by BGB as being its investment manager and without any limitations on his authority being identified. It is also clear that Mr Gallucci knew that Mr Pinto was holding himself out as such and impliedly assented to it. The position of "investment manager" seems to me in context to be a senior one. It seems to me that that would (and in any event there are real prospects of success in relation to a contention that it would) confer ostensible authority on Mr Pinto. I do not see as to why such ostensible authority should not include authority both to make representations and to contract on behalf of BGB, or at least that there is a real prospect of that being established.
207. Thirdly, Mr Pinto was prepared to assent to the written IMA document being backdated to 30 December 2014. In his defence document he says that it reflected the then (that is the 2014) relationship. The natural meaning of his words is that it reflected the then legal relationship. I do accept, firstly, that the written document included various terms which could not have been agreed in 2014, including with regards to commission and standard terms and conditions. I also accept that on the evidence before me, as I will come to further, Mr Pinto was the fraudulent creator of the IB documents and guilty of gross deceptions and misleadings of Mr Panico, PTL and the trust with regards to the value of the funds. I also accept that Mr Pinto had a strong motive to assent to Dr Panico's regularisation of the documentary position in 2018; firstly, because he wished to keep Dr Panico on side, so to speak, and, secondly, because he wished to protect himself with regards to the legal position between the parties where a contract between PTL and BGB would potentially assist him. But, nonetheless, it does seem to me that all of that, even the adverse points, do together point towards Mr Pinto seeing what had happened in 2014 as having created a client

and adviser/manager relationship, that being supported by Mr Pinto's own emails of 15 December 2014 which appear to refer to a trust as being the "client".

208. Fourthly, Mr Gallucci's dealing with the bank at first sight seems to me to go beyond the usual situation of a seller's agent and a buyer. At first sight it looks much more like a buyer's adviser dealing with the buyer's bank to ensure that the investments into the JG funds could actually occur. It seems to me that that adds some weight to the claimant's case.
209. Fifthly, while I am very much concerned as to whether or not the claimant can actually show consideration in law, it is correct that BGB was likely to derive some commercial benefit from managing a larger amount in the JG funds, such larger amount being derived from the trust, and where the fund manager would be likely to be remunerated in some way by reference to the level of assets and transactions taking place within the funds.
210. Sixthly, I cannot decide if the 14 November trustee resolution document is actually genuine as being a 2014 document. The evidence is simply not clear. However, whether or not it is genuine, for PTL (and by extension Dr Panico) not to have had a legal relationship with BGB would at first sight appear to be a dereliction of duty on the parts of Dr Panico and PTL where a trustee would ordinarily be expected to have established a contractual relationship with someone on whose advice/recommendations the trust was to commit very substantial sums. That gives rise to two points. Firstly, it makes it somewhat likely that Dr Panico regarded the relevant factual situation as giving rise to a legal relationship where BGB was a manager. Secondly, though, it suggests that Dr Panico was not a person acting with a particularly high level of competence; and therefore it seems to me to be unsafe to adopt Mr Miall's submission that if Dr Panico had thought that there had been a contract, it would necessarily have been in writing.
211. Seventhly, it does seem to me that BGB will be holding material documents relevant to these issues, including notes of meetings (including of the 3 October 2014 meeting) and of telephone calls which will be subject to disclosure obligations. It does not seem



to me that Mr Phillips's submission that relevant material will appear on disclosure is purely speculative and what would be described as Micawberism.

212. Eighthly, while I can see that the outcome at a trial may well be that any relationship was non-contractual, and that it can be argued that such would be a perfectly possible ordinary situation where the existence of a contract might not be required to give rise to the existence of a fiduciary relationship or a duty of care - relationships which the claimant does not seek to assert in this litigation - the mere fact that the law of fiduciary relationships and/or of duty of care can fill the gap of the absence of a contract does not seem to me to be any particular full answer to the claimant's claim; because the question as to which sort of relationship it is appropriate to assign to the factual situation is a question which is peculiarly fact specific and will depend on all the evidence, including such documents as it seems to me may well be held by BGB.
213. Ninthly, while it is correct that no one over the history ever said that there was an oral agreement or one by conduct, at no point did anybody say that there was not; and, further, Mr Gallucci did not say that there was no contract in March 2020, notwithstanding that Dr Panico's letter of 27 February 2020 referred to a written IMA. Mr Gallucci may have wished simply to "keep his powder dry" and say nothing, but an alternative explanation is that Mr Gallucci believed that there was a contractual relationship, and that is something which I simply cannot determine on the evidence before me.
214. Tenthly, I come back to the situation that the evidence can well be read to show that BGB was doing exactly what a manager/adviser normally does for their client, and that that would suggest potentially a contractual relationship. Even where PTL was not directly remunerating BGB, it seems to me that there is a real prospect of the claimant establishing a contract in one of the two ways on which they rely.
215. Eleventhly, I note that the particulars of oral conversations and of conduct are very thin. However, this is an early stage of the litigation, and it does not seem to me that it is appropriate to apply the real prospects of success test so as to simply cut PTL, and now IMT, out of the claim, only because Dr Panico was not presently co-operating

and PTL and IMT have limited information, in circumstances where there is real reason to suppose that there may be relevant information in the BWB file.

216. Twelfthly, I have considered Mr Miall's argument that any contract would be with the bank and not PTL. However, I cannot see any clear reason as to why there should not be a contract with PTL. BGB was potentially advising PTL and potentially managing PTL's funds. Even if the bank technically was also managing PTL's funds, that would not necessarily exclude the potential for there being a contractual relationship where BGB was advising PTL, and the bank's role was being relegated to one which was more technical (i.e. holding assets and complying with instructions from PTL made on BGB's recommendations) in nature.
217. The particulars which are given are thin in relation to the oral contract and I do accept that necessity is a high test for an implied contract. However, for all the reasons which I have given and where it seems to me that the most important ones are that: firstly, there are factors which point towards a contract or at least the potential for one; secondly, that BWB are likely to have material documents; and, thirdly, that the last thing which I am supposed to be doing is carrying out any sort of mini-trial - it seems to me that the claimant does have real prospects of success. On the other hand, as I have said, it does seem to me that this is a thin claim, at the bottom end of the real prospects of success spectrum, and that if it proceeds then it should be made clear that BGB will have the opportunity to, in effect, seek reverse summary judgment again after either disclosure, or rather, PTL giving further information regarding how it puts the claim in contract following disclosure and/or witness statements.
218. Mr Miall also submits that the contract claim will fail because Dr Panico signed, firstly, the DPMA with the bank giving a high-risk profile for the trust, and, secondly, the modified JG fund strategy in 2015 which again provided for a high-risk strategy; and which he says demonstrate that there could not have been a contractual agreement that the trust would only be recommended to invest and would only invest in low-risk investments.
219. However, I still see the claimant as having a real prospect of success in relation to breach of contract as well as the establishing of a contract. Firstly, in relation to the

bank's DPMA document, Dr Panico was only signing a bank document which contained the bank's definition of high risk. As to that, firstly, what is meant by the bank's definition of high risk is, it seems to me, to be unclear. A reference by the bank to "high risk" could be with regards to practical matters which would be no risk in lay language. Secondly, and in any event, it may well have been envisaged between the bank and PTL that they would discuss any actual investments, and that the purpose of categorising a strategy as "high risk" was simply in order to provide flexibility, something which Mr Amari himself said in his emails of 5 and 28 November 2014. Thirdly, it seems to me the question as to what was the arrangement between PTL and the bank has potentially limited weight in relation to the real question which is before me, which is as to what was the arrangement between PTL and BGB.

220. Secondly, with regards to the signing of the 2015 strategy document; firstly, it is not at all clear whether Dr Panico read it in detail, though I accept that as a lawyer he really ought to have done so. Secondly, there is no evidence at all that Mr Pinto explained the document or the investment strategies or the relevance of the investment strategies contained in it to Dr Panico. On the claimant's case it would have been Mr Pinto's responsibility have done so.
221. Thirdly, Mr Pinto, it seems to me at least distinctly arguably, made at least two misrepresentations then and at that time which would have influenced Dr Panico, being: firstly, which Mr Pinto stated expressly, that the document did not represent any real change from what had gone on before; and, secondly, that the funds had not by then experienced high volatility and suffered major losses. Those two points, it seems to me, undermine any suggestion that Dr Panico was assenting to the contents of that document on some sort of informed basis or even really understanding what the document said. It seems to me that the statement that the document did not effect any real change might even be such a statement as would generate an estoppel (so as to prevent BGB contending that the document provided for anything other than low-risk investments) in various possible circumstances dependent upon the degree of reliance upon that statement.

222. Fourthly, Dr Panico's evidence throughout is that he wished for the funds to be invested on low-risk investments, and that is what he said in numerous communications.
223. Fifthly, the investment management agreement filled in by Dr Panico in 2018 and signed by Mr Pinto expressly had an appendix which provided for the investments to be low risk, Mr Pinto says in his defence that that represented the intended investment strategy back in 2014 and 2015.
224. It seems to me in the light of all those matters, that, although again I have some doubts about the claimant's case, I do continue to see it as having real prospects of success.
225. I then come on to the first conspiracy claim. Mr Miall submits that there are no real prospects of success here. He submits that case as to the alleged unlawful conduct, namely, the making of fraudulent misrepresentations as to the intention of Mr Gallucci and Mr Pinto being that the funds would be invested in low-risk investments of a bespoke nature, will necessarily fail. Firstly, because Dr Panico signed the bank's DPMA providing for high-risk strategy, and, secondly, because Dr Panico signed the September 2015 fund strategy document providing for a high-risk strategy, each demonstrating that Dr Panico knew and accepted that the investments would, or might, be high-risk. Apart from that, Mr Miall seemed to accept that the first conspiracy claim would have real prospects of success, although he very much disputed that Mr Gallucci either did or knew anything wrongful or wrong. Mr Langley, for Mr Pinto, said nothing about this.
226. I do not see Mr Miall's points as preventing the claimant having real prospects of success, and it seems to me that real prospects of success do exist, for the following two main reasons. Firstly, I have already given my reasons as to why Dr Panico's signing of those documents does not necessarily mean that Dr Panico understood that the trust's monies had been invested and would continue to be invested on strategies that were actually high risk. Secondly, in any case the trust monies were invested into the funds managed by Mr Pinto such that they derived very substantial losses before the signing took place of the fund strategy document in September 2015, and thus it post-dated the relevant events.

227. I should say that I see the fraud claim against Mr Gallucci as being somewhat thin. And I note that, as the claim only advanced as being in conspiracy, it would be necessary for the Claimant to prove that Mr Gallucci was himself fraudulent in order to succeed, since for a conspiracy to have occurred would have required that the conspiracy took place both between (i) Mr Pinto and (ii) Mr Gallucci/BGB, where it was Mr Gallucci and not Mr Pinto who was the director and guiding mind of BGB. But it does seem to me that, notwithstanding the thinness of the case, in the light of the decision as summarised in CNM, since I find there to be a real prospect of success, then in those circumstances the ordinary course is to give permission to amend.
228. As far as the second conspiracy is concerned, neither Mr Miall nor Mr Langley sought to submit that there were no real prospects of success. Again, the second conspiracy is dependent on Mr Gallucci knowing that fraudulent misrepresentations were being made, or at least were to be made; a matter where it seems to me at first sight that Mr Miall may in due course be able to mount a distinctly substantial counter argument. However, on the material before me at this early stage in the case, and bearing in mind that it seems to me that disclosure from the BGB side is an essential step for the claimant to be able to properly particularise and advance its case, it seems to me at this stage that there are real prospects of success there as well.
229. That though is only the second stage of the amendment analysis. The third stage is the question of limitation. Mr Miall, and Mr Langley, who joins with Mr Miall's submissions on behalf of Mr Pinto, says that I must refuse permission to amend on limitation grounds, being effectively as set out above and as follows. Where at first sight a "new" claim (as these are) may (i.e. it is reasonably arguable that it would) be limitation barred if a claim form was issued now, the court can only grant permission to amend in relation to a claim which would not have been limitation barred if the claim was deemed (by section 35 of the Limitation Act 1980 relation back) to have been brought on the date of issue of the original claim form, that permission to amend can only be given if the "new" claim arises out of the same or substantially the same facts as those already in issue (and which is accepted not to be the case here).

230. It is common ground, it seems to me rightly, firstly, that all the claims now sought to be advanced would, at first sight be limitation barred if advanced by a claim form issued now, unless the claimant can rely successfully on Section 32 of the Limitation Act 1980. There would have been an exception to this with regards to acts of the second conspiracy which took place less than six years ago, and which thus only caused loss less than six years ago, but Mr Phillips made clear to me in submission that he was only relying on loss which had been suffered up to the end of 2015 and therefore that possibility does not arise. Secondly, that all the claims made in the amended particulars of claims are "new claims" for the purposes of the Limitation Act and Section 35 and that they do not arise from the same or substantially similar facts to those already in issue, for the purposes of either Section 35 or CPR 17.4(2). Thirdly, therefore that the claimant needs to show a relation to each of the various claims, that they clearly have their limitation periods extended (to at least no less than 6 years before now) by Section 32, and that there is no real or reasonable argument that that is not the case.

231. Mr Phillips submitted as follows. Firstly, that in relation to the first and second conspiracy claims that they were based on fraud as the relevant unlawful means relied upon were fraudulent misrepresentations and therefore fall within Section 32(1)(a). Secondly, in relation to all the claims that there had been deliberate concealment of material facts necessary for the claims to be pleaded or otherwise advanced, up to at least 2018 (less than 6 years ago) and indeed to 2020 by way of the defendants not disclosing either the losses made or the fact that the trust funds had been invested in very high-risk investments. He submitted, firstly, that without knowing of the losses PTL as trustee, and also IMT as eventual trustee, had no reason to make inquiries which would have revealed either (i) the losses or (ii) the facts of the investments having been in the high-risk products which investments amounted to both the breaches of contract (i.e. the failures to invest in low-risk products and the investing in high-risk products) and the consequence of the fraudulent misrepresentations (i.e. the represented intentions to invest in low-risk products) which would have revealed that the representations were fraudulent and that there had been unlawful means conspiracies. I note that Mr Phillips very much emphasised that it was only the knowledge of the existence of substantial losses which would have triggered or might

possibly have triggered the making of inquiries as into what level of risk products the trusts's assets had been invested.

232. Secondly, Mr Phillips submitted that there had been continued deliberate concealments by way of the IB documents and other communications from Mr Pinto, although he also relied on emails from Mr Gallucci of 2015 and March 2020.
233. Thirdly, Mr Phillips submitted that, even with the exercise of all reasonable diligence it was clear that the trustees could not have reasonably ascertained the facts of (a) the substantial losses and (b) the breaches or fraud. Fourthly, he submitted that those facts of loss and of breach and fraud were all part of the essence and gist of the various causes of action, such that the claims could not have been brought without them having been ascertained.
234. In support of his submissions Mr Phillips took me to various authorities. Firstly, *Various Claimants v MGM [2002] EWHC 1222* and the summary of the law of Fancourt J in paragraphs 52 to 71:

"52. Section 32 provides, so far as material:

'(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either –

- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

'(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 ...'

"Subsections (3), (4A) and (4B) are irrelevant to the issues in this case.

"The authorities on s.32

"53. In *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47 ('FII'), the Supreme Court was concerned with the application of s.32(1)(c) to the case of a mistake of law as to the tax liability of UK-resident companies for dividends paid by non-resident subsidiaries. The appeal in FII gave rise to complex and important issues that are irrelevant to this case. However, in the course of their joint judgment, Lord Reed PSC and Lord Hodge DPSC reviewed in some detail the historical origins and the purpose of the Limitation Act in general, and section 32 in particular.

"54. They noted, at [155], that it had long been recognised that 'the purpose of the statutes [of limitation] goes further than the prevention of dilatoriness; they aim at putting a certain end to litigation and at preventing the resurrection of old claims, whether there has been a delay or not', and recognised that the effect of section 32 might be to extend the running of the limitation period for an indefinite period of time. Nevertheless, 'it is the duty of the court, in accordance with ordinary principles of statutory construction, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it.'

"55. Having reviewed all relevant authorities on section 32 and its predecessor, and those on sections 11 and 14 of the 1980 Act, Lords Reed and Hodge said at [193]: 'The purpose of the postponement effected by section 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake. That purpose is achieved, where the ingredients of the cause of action include his having made a mistake of law, if time runs from the point in time when he knows, or could with reasonable diligence know, that he made such a mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence"; or, as Lord Brown put it in *Deutsche Morgan Grenfell* [2007] 1 AC 558, he discovers or could with reasonable diligence have discovered his mistake in the sense of recognising that a worthwhile claim arises. We do not believe that there is any difference of substance between these formulations, each of which is helpful and casts light on the other.'

"Although this paragraph has reference to mistake of law, it is clear from the judgment as a whole that (subject only to a possible difference as to the precise time at which the



6-year limitation period starts to run) the general principles explained apply equally to cases of fraud, deliberate concealment and mistake.

"56. This and other passages in FII were considered by the Court of Appeal in *Potter v Canada Square Operations Limited* [2021] EWCA Civ 339; [2022] QB 1, where it was explicitly stated that, in view of s.32 and other sections of the 1980 Act that have a similar effect, the Act does not pursue an unqualified goal of barring stale claims but its objective in that regard is tempered by the acceptance that it would be unfair for time to run against a claimant before they could reasonably be aware of the facts giving rise to a right of action. Males LJ in that case rejected the argument (advanced on the basis of dicta of Simon J) that s.32 itself should be narrowly construed:

'It should be given its natural meaning without a predisposition to interpret it either narrowly or broadly.' [167]

As emphasised in FII, the section must be construed in such a way as to give effect to its purpose rather than defeating it. The purpose of s.32 is to avoid the unfairness of a claim being barred before the claimant could reasonably be aware of the relevant facts giving rise to the claim.

"57. Their Lordships in FII then turned to (and rejected) the argument that time could not start running until it was known that a cause of action was well-founded:

'... At the stage of an enquiry into limitation the existence of the cause of action, and therefore the truth of the facts relied on by the claimant to establish it, is not the relevant issue. Put in general terms, the question is not whether the claimant could have established his cause of action more than 6 years... before he issued his claim, but whether he could have commenced proceedings more than 6 years before he issued his claim. The existence of the constituents of the cause of action - such as fraud or mistake - as verified facts is not the issue' [201].

"The fact that the defendant disputes an element of the cause of action does not mean that commencement of the limitation period is further postponed.

"58. Their Lordships then considered the statutory meaning in s.32(1) of 'could with reasonable diligence have discovered it' and noted that authoritative guidance had previously been given by Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 428 as follows:

'The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without

exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.'

"And by Neuberger LJ in *Law Society v Sephton & Co* [2004] EWCA Civ 1627; [2005] QB 1013 at para 116, who said that it was inherent in s.32(1) that there must be an assumption that the claimant desires to discover whether or not there has been a fraud: 'Not making any such assumption would rob the effect of the word "could", as emphasised by Millett LJ, of much of its significance. Further, the concept of "reasonable diligence" carries with it the notion of a desire to know, and, indeed, to investigate.'

"59. Reviewing the practicability of the suggested approach in relation to a mistake of law, Lord Reed and Lord Hodge observed at [210] that its application would depend on the circumstances of the case, noting that in case of mistaken payment resulting from ignorance of the law the mistake would normally be discoverable immediately, by seeking legal advice - reasonable diligence would usually include the seeking of legal advice in that context. However, if the payment was made in accordance with the current understanding of the law, which was later overturned, the question would be whether it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable.

"60. Although this comparison relates to mistake of law, it is instructive. It establishes that a person cannot rely on legal ignorance of the right to bring a claim if they know the facts that, according to a proper understanding of the law, give rise to that claim. Where mistake of law is not in issue but the question is whether there exists a factual basis for a right to bring a claim, the prior question is likely to be when, by the exercise of reasonable diligence, a person could discover the relevant facts. In this regard, as noted by Millett and Neuberger LJ, it is to be assumed that the claimant is reasonably motivated to find out whether they have a claim.

"61. The Supreme Court in FII did not deal with the question of what was meant by 'any fact relevant to the ... cause of action' or what it was that put a claimant on inquiry in the first place, in a case of deliberate concealment.

"62. The former question is now long established as meaning an essential fact needed to enable a statement of claim to be pleaded (the 'statement of claim test'). This question was addressed comprehensively by Simon J in *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm); [2015] Bus LR 1362 at [24] by reference to several authoritative decisions. It is of value because it addresses the matter in the context of an allegation of deliberate concealment, though the suggestion of narrow interpretation in principle (1) has been disapproved by the Court of Appeal (in the Potter case, see above):

'These cases establish a number of principles which are relevant to the present applications.

- (1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in *Johnson* [*Johnson v Chief Constable of Surrey* (CA, unrep, 23.11.92)]. In this context, Neill LJ referred to "the public interest in finality and the importance of certainty in the law of limitation," in *C v MGN* at p.239A [*C v Mirror Group Newspapers Ltd* [1997] 1 WLR 131]
- (2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in *Johnson*.
- (3) The section is to be interpreted as referring to "any fact which the [claimant] has to prove to establish a prima facie case", see Neill LJ in *Johnson* and in *C v MGN* at p.138H, and Rix LJ in *The Kriti Palm* [[2006] EWCA Civ 1601] at [323].
- (4) The claimant must satisfy "a statement of claim test": in other words, the facts which have been concealed must be those which are essential for

a claimant to prove in order to establish a prima facie case, see Rose and Russell LJ in Johnson and Neill LJ in *C v MGN* at 137B-C. As

Buxton LJ expressed it in "Kriti Palm" at [453]:

... 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.

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, see Russell LJ in Johnson:

Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the "right of action" itself. They do not affect "the right of action", which was already complete, and consequently in my judgement are not relevant to it.

Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the "Kriti Palm" at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in *C v MGN* at 139A.

(6) As expressed by Rix LJ in The "Kriti Palm" at [307], the purpose of s.32(1)(b) is intended to cover the case

where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called "statement of claim" test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis-à-vis a claimant's pleaded case.

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see for example Neuberger J in *Gold v Mincoff* [*Gold v Mincoff*, *Science & Gold* [2001] *Lloyd's Rep PN 423*] at [75] in the different context of s.14A of the 1980 Act, but referring to Johnson and *C v MGN*.'

"63. It follows that to start time running the facts that must be known by the claimant, actually or constructively, are only those that comprise the essential elements needed to constitute a validly pleaded cause of action - importantly, being the cause or causes of action that the claimant has pleaded - not those facts that enhance, support, add detail to or evidence the facts that need to be pleaded at the outset (before disclosure).

"64. The question of what is needed to put a claimant on inquiry, for the purpose of determining what measures (to use the language of Millett LJ) the claimant could reasonably have been expected to take to inquire into the matter, has very recently been considered in a case whose hearings at first instance and in the Court of Appeal fell either side of the decision of the Supreme Court in FII. That case too was one concerned with deliberate concealment of wrongdoing: *Granville Technology Group Ltd (in liquidation) v Infineon Technologies AG* [2020] EWHC 415 (Comm) (Foxton J), sub nom. *OT Computers Ltd (in liquidation) v Infineon Technologies AG* [201] EWCA Civ 501; [2021] QB 1183 (Court of Appeal) ('OTC').

"65. The particular issue in OTC was whether a company in administration or liquidation could reasonably be expected or should be taken to have conducted the same degree of inquiry into circumstances of potential wrongdoing as a trading company would reasonably have done; and more broadly, what if any characteristics or character traits of the claimant are relevant when considering the objective test of what the claimant could with reasonable diligence have discovered of concealed facts.

"66. At first instance, Foxton J rejected the argument that the test of constructive knowledge ('could with reasonable diligence have discovered it') required it to be assumed (possibly contrary to the facts) that there was something to put the claimant on notice of the need to investigate the fraud, concealment or a mistake, as the case may be. He held, following dicta of Aikens LJ in *Allison v Horner* [2014] EWCA Civ 117 at [35] and Henderson LJ in *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 at [46] that the assumption of reasonable diligence would only make sense, in context, if there was something that actually put a claimant on notice of the need to investigate.

However, he emphasised that the question of whether there was something to put the claimant on notice must be determined on an objective basis.

"67. Foxton J then addressed the question of how far the test of reasonable diligence falls to be qualified by particular circumstances of the claimant. Having reviewed further authorities, including a judgment of Lord Hoffmann sitting in the Court of Final Appeal in Hong Kong, he held that the particular circumstances of the claimant companies being in liquidation or administration at the relevant times could well affect the answer to the question whether there was something to put the claimant on inquiry, and that it was not right that such a claimant should be assumed to be a solvent trading company (as a literal application of the test propounded by Millett LJ might suggest). He considered that the insolvency of the relevant claimant might not so far affect a consideration of what

reasonable diligence was to be assumed if the claimant was on inquiry about wrongdoing. The judge found that a reasonably diligent insolvency practitioner could not have discovered the facts relating to the wrongdoing by the cartel more than 6 years before the claim form was issued.

"68. The Court of Appeal agreed with Foxton J that a claimant in administration or liquidation could not for the purpose of the test in s.32(1)(b) be assumed to be a trading company, or to have been on notice to the same extent as a trading company would have been, and this was sufficient to dispose of the only permitted ground of appeal.

However, Males LJ, giving the only reasoned judgment, considered that the test in s.32(1) did require a consideration, first, of whether there was anything to put a claimant on notice of a need to investigate, and then, secondly, what a reasonably diligent claimant would have discovered by its investigation. The criterion of reasonable diligence does not only apply at the second stage: a claimant must be reasonably attentive, so as to become aware of what a reasonably attentive person would learn.

"69. Males LJ expressly stated at [30] that application of the criterion depends on the context in which the issue arises, and that what reasonable diligence requires in any situation must depend on the circumstances. The application of the test is therefore necessarily fact-sensitive. See also per Henderson LJ in the Gresport Finance case, at [50].

"70. The following paragraphs or parts of paragraphs of Males LJ's judgment are relevant:

'In summary, when there has been deliberate concealment of a relevant factor, "reasonable diligence" will not require a claimant to take steps to discover that fact unless there is something (referred to in the cases as a "trigger") to put it on notice of the need to investigate. Whether there is such a trigger must be determined objectively as a question of fact.' (para 35)

'I would agree that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, and curious or ill-informed, are not relevant. But it does not necessarily follow, as Lord Hoffmann NPJ said in *Peconic*, that the claimant must be assumed to be someone or something which he is not.'

'... Although the question what reasonable diligence requires may have to be asked at 2 distinct stages, (1) whether there is anything to put the claimant on notice of a need to

investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section.

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

Fourth, the section applies to all kinds of claim where there is fraud, concealment or mistake. There is no warrant in the language of the section for a different test to be applied in certain kinds of case, such as cases where the claimant is carrying on business. The application of the test will differ according to the circumstances, but there is a single test.' [47]-[49]

'In my judgement a similar approach [to that which applies under s.14 of the 1980 Act] applies to section 32. 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. Rather, claimants in a similar position should be treated consistently.' [59]

"Analysis

"71. I derive from this line of authority, as a matter of principle, that the objective test in s.32(1) requires both a standard of reasonable general awareness and self-interest to be attributed to a claimant, when considering the question of whether a claimant was on notice of the need to investigate, and an objective assessment of the inquiries that a reasonable person in the position of the claimant would carry out, exercising reasonable but not exceptional diligence. Further, the objective standard must be applied to the claimant themselves - in other words, a person circumstanced as the claimant actually was at the relevant time(s), but that individual character traits that may have affected the nature of the claimant's response, or desire to investigate, should be disregarded, to ensure that like cases are treated alike, rather than careless or inattentive claimants being favoured by the law. This in my judgment is consistent with the equitable origins of the statutory provision now found in s.32 of the 1980 Act, where equity relieved against the consequences of mistake and applied the early statutory provisions by analogy, but did not do so in favour of those who failed to act promptly once the claim could with reasonable diligence have been discovered: see paras [103] to [128] of FII."

Those paragraphs relate to Section 32 in the context of deliberate concealment, it seems to me also apply to Section 32 in the context of fraud.

235. Mr Phillips also reminded me that each act or omission of deliberate concealment will lead to a new six-year period running. As I said when reviewing the authorities in *Toner v Telford* [2021] EWHC 516 at paragraph 146:

"I have been taken to *Sheldon v RHM Outhwaite* [1995] 2 All ER 558 and to *RG Securities v Allianz* 191 ConLR 1, and (in Ms Proferes' closing written submissions) to *Hussain v Mukhtar* [2016] EWHC 424 (QB), from which (and also from the cases noted in the White Book at 8-85.1) I draw the following principles (which I do not think were really in contest) being:

- a. The fraud or the deliberately concealed facts must be part of the basis of the relevant claim i.e. unless they were pleaded the relevant cause of action which was the subject-matter of the Claim would not be held to exist



- b. The effect of deliberate concealment is to reset the limitation clock to start again with a new 6 year period (as opposed to a suspension of an existing running period), and even if the limitation period had already expired or the concealment took place after the events constituting the relevant tort or other wrong
- c. The 'deliberate' element of the concealment is a subjective requirement of the concealer actually appreciating that there is something, which may be a breach of duty, which is being concealed, and which involves both an appreciation of the existence of the fact(s) (in the case of a breach of duty, an appreciation of the fact that there is such a breach) and of the concealing of such fact(s)
- d. 'concealment' can take the form of non-disclosure (at least where disclosure had been sought or would have been expected) rather than a positive act
- e. The question of what amounts to reasonable diligence is fact sensitive, with the burden of proof being on the Claimant and with an objective test as to whether the relevant facts 'could' have been discovered 'with the exercise of

reasonable diligent'. This imports some requirement to investigate where things seems to have gone wrong, although it is also necessary to show that such investigation would have revealed the relevant facts. A relevant summary appears in the often cited passage from the judgment of Millett LJ in *Paragon v Thakerar* [1999] 1 All ER 400 at 418:

'The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.'

“ The Court should be careful and caution before concluding on a summary basis on limited evidence and prior to disclosure [as here] that a claimant did not have a real prospect of showing at trial either that deliberate concealment had occurred or that reasonable diligence would have revealed the relevant facts as such matters are particularly fact sensitive and may very well be affected by material appearing on disclosure (see *RG Securities @ paragraphs 43-45*).”

236. Mr Phillips also took me to the decision of *Collins v Brednar* [2000] Lloyds PN 587, where a solicitor asserted that the client claimant's money had been paid to a Mr Mendez where in fact it had been paid to a Mr Obanas. The claimant thought it likely that the money had been paid to Mr Obanas but had accepted the solicitor's

statements to the contrary. Paragraphs 43 to 46 of the Court of Appeal's judgment read as follows:

“43. The thrust of the defendant's argument on the appeal is directed to his case that the claimant discovered the fraud and/or the concealment long before 5 August 1989. On this issue the judge's findings were:

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

44. The first 15 pages of the defendant's written submissions to us are devoted to repeating and elaborating the points which the judge considered and rejected in the passage from the judgment which I have just cited. We were also taken to a number of documents which were before the judge. They included the letters from the defendant in which he asserted that the money had gone to Mr Mendez. Whether or not one describes this correspondence as a protracted tissue of lies, it does no credit to the defendant. His explanations for it are, to my mind, specious.

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

46. The defendant takes a further limitation point that the consequential losses awarded by the judge, including the money spent in support of Mr Mendez and the cost of investigating the true destination of the £524,100, were suffered more than six years before the proceedings were issued. This point is misconceived. The effect of section 32 and the judge's findings is that time had not started to run in respect of these or any of the claimant's claims when the proceedings were issued because it was not until service of the defence that the true destination of the £524,100 was revealed.”

237. It seems to me that there the Court of Appeal approved the judge's holding that if a solicitor tells a client statement X then, at least where there is no independent documentary evidence to gainsay the statement, the client does not "discover" for the purposes of section 32 the true "not X" position until the truth is actually revealed; and also held that, for these purposes, the client can generally assume that their own solicitor is telling the truth to them.
238. Mr Miall, firstly, emphasised that the question is one where the defendants must have no real prospect of success or indeed any serious argument. Secondly, he submitted that, firstly, the court must take the claimant as the claimant then existed, that is a professional trustee who, with the exercise of reasonable diligence, would be able to find out much more than an unfinanced lay person. Mr Miall accepted that this could mean that a fraudster could much better succeed in disapplying Section 32 simply because of the nature of the victim, but submitted to me that this was simply a part of limitation rights of any defendant.
239. Mr Miall submitted, thirdly, that, once the claimant had found out a material fact, it is no answer for the claimant to say that the fraudster had subsequently persuaded the claimant that that fact did not in fact actually exist. Mr Miall submitted that a fact once revealed to a claimant could no longer be concealed or reconcealed.
240. Fourthly, Mr Miall submitted that the same applied with regards to the exercise of reasonable diligence. Once a claimant could have found something out with the exercise of reasonable diligence, and notwithstanding that the claimant had not found it out; the claimant was still deemed for Section 32 purposes to have found it out; and the fact that the fraudster might then have deliberately concealed the fact and put the claimant off from investigating further is irrelevant. Mr Miall submits in those circumstances the claimant would have lost the benefit of Section 32.
241. Mr Miall also relied on the citation from the Toner judgment. In addition to that he relied on various passages in the House of Lords decision in *Sheldon v Outhwaite* [1996] 1AC 102. Firstly, at page 144, B to C:  
“ For myself, I do not find it absurd that the effect of section 32(1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the

concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding the concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him. If the defendant then deliberately takes a step to conceal the relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to me absurd that a plaintiff who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six-year period from the date of the discovery of such concealment to bring his action. Certainly, that consequence is far less bizarre than the result of the construction favoured by the majority of the Court of Appeal [1994] 3 W.L.R. 999 under which a plaintiff's right of action can become time-barred before he even becomes aware of the relevant facts, his ignorance being due to the deliberate concealment of such facts by the defendant.”

242. Mr Miall emphasised that the House of Lords held that once someone knew a relevant fact they could not conceal it. However, I further note the passage at page 145G to H: “I come back therefore to where I started from. Section 32 of the Act of 1980 is not ambiguous. On the plain meaning of the words any deliberate concealment of relevant facts falls within section 32(1)(b) with the consequence that, in applying the statutory time limits, time does not start to run until the concealment is discovered. The onus lies on the defendants to show a compelling reason to limit the generality of the words used. Far from there being any such compelling reason, the H defendants' construction would lead to an unfair result inconsistent with the underlying rationale of the section, viz. that the defendants would be entitled to benefit from their own alleged unconscionable behaviour by deliberately concealing the facts relevant to the plaintiffs' cause of action.”

243. Mr Miall next took me to *Bocardo v Star* [2008] EWHC 1736 and paragraphs 116 to 122:

"116. The relevant provisions of section 32 are as follows:-

'32 postponement of limitation period in case of fraud, concealment or mistake

(1) subject to subsection (3) and subsection (4 A)

below, where in the case of any action which a

period of limitation is prescribed by this Act  
either:-

- (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 have begun to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or with reasonable diligence have discovered it.

Reference in this subsection to the Defendant include references to the Defendant's agent and to any person through whom the Defendant claims and his agent

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

"117. Accordingly there must be deliberate concealment of any fact relevant to the Claimant's claim. Time will not then run against the Claimant until he has discovered the concealment or could with reasonable diligence have discovered it.

"118. Therefore there must be a deliberate concealment of a relevant fact. Second, time does not run against a Claimant until he has discovered the concealment. Third, however the Claimant will be deemed to have been able to have discovered the deliberate concealment when he could have done so with reasonable diligence. Deliberate commission of a breach of duty in circumstances in which the facts are unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

"119. I considered the ambit of section 32 in *AG of Zambia v Meer Care & Desai* [2007] EWHC 952 at paragraphs 376-422. The Court of Appeal has recently heard an appeal by the First Defendants against that decision. I understand that there are some challenges to the limitation determinations made by me. For the present in my view the relevant part is paragraphs 405 et seq. It seems to me plain that Bocardo could have discovered with reasonable diligence which carries with it 'the notion of a desire to know, and, indeed, to investigate' (Neuberger LJ as he then was) in *Law Society v Sephton* [2005] QB 1013 (C.A) long before Bocardo's claim that it did not have the requisite knowledge until 2006.

"120. In my judgment it had the requisite knowledge by 1997 when the details of PW5 were made public. Time ran against Bocardo therefore from 1997. Any claim before 1997 became statute barred in 2003 i.e. 6 years after it could have discovered the claim

with reasonable diligence. It follows therefore that it had requisite knowledge for the purposes of suing Star Onshore from 1997. It follows therefore that its claim is for 6 years to 22nd July 2000 and any earlier claims are statute barred.

"Mr Gaunt QC in his closing submissions submitted that the actions of Star Onshore in 2001 was a fresh deliberate concealment. This he submitted had the effect of 'starting the clock again' so that any claims did not become statute barred until at the earliest 2007. Mr Gaunt QC submitted that this proposition which involves reviving the cause of actions which are already statute barred is to be derived from the House of Lords in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd & Ors* [1996] AC page 102 at page where Lord Brown Wilkinson said this

'For myself, I do not find it absurd that the effect of section 32 (1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding the concealment; if he knew of them, no subsequent act of the defendant can have concealed them from him. If the defendant then deliberately take a step to conceal relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to be absurd that a plaintiff who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six-year period from the date of the discovery of such concealment to bring his action. Certainly, that consequence is far less bizarre than the result of the construction favoured by the majority of the Court of Appeal [1994] 2 WLR 999 under which a plaintiff's right of action can become time barred before he even becomes aware of the relevant facts, his ignorance being due to the deliberate concealment of such facts by the defendant.'

"122. I do not accept that Lord Brown-Wilkinson's judgment had the effect contended for by Mr Gaunt QC. It has no application in my view to a situation where a Claimant has knowledge of the relevant facts already. That much is clear from page 144 A. If a Claimant has the requisite knowledge time runs from him inexorably when he had the full knowledge enabling him to bring the action. As Lord Brown Wilkinson says if he knew of those facts 'no subsequent act of the Defendant can have concealed them from him'. What the decision says is that the Claimant has a full 6 years from the time when he could have discovered the facts even if the concealment is after the accrual of the cause of action. Until the discovery of the concealed matters he does not know he can sue. That is not the case here for the reasons that I have set out above."

I note that that decision was appealed to the Court of Appeal and then to the Supreme Court, but not on this point.

244. Mr Miall next took me to *Ezekiel v Lehrer* [2002] EWCA 16, and to paragraphs 32 to 35 of the judgment in that case:

"32. I simply do not see how a response from the solicitor along the lines of, 'Go and ask Mr Owen why I registered this charge', can amount to a deliberate concealment of the fact that eleven weeks earlier the client had told the solicitor not to allow registration without his authority. Lord Browne-Wilkinson in *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1996] A.C. 102, 144 identifies the fatal flaw in the claimant's argument:-

'For myself, I do not find it absurd that the effect of s. 32(1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. *In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him.* If the defendant then deliberately takes a step to conceal the relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to me to be absurd that a plaintiff who had been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six-year period from the date of the discovery of such concealment to bring his action.'

"The italicised sentence kills the claimant's case stone dead because the claimant cannot have been ignorant of the 'clear' instructions he gave his solicitor during the period leading up to the seeds of doubt being sown by the conversations with Mr Owen.

"33. The letter of 26th November, the fee note and the office copy entries give the claimant knowledge of the second set of relevant facts upon which his claim depends, namely a clear breach of the clear instructions he had given.

"34. Mr Ezekiel is a sufficiently experienced man of business to know that damage would flow and Mr Driscoll readily conceded that if his client knew that his solicitor had been instructed not to allow the charge to be registered without authority and then discovered that it had been done without his authority, he would know he had a cause of action without anybody telling him that his solicitor had been guilty of professional negligence.



"35. It has taken a long time to arrive at the conclusion that the claimant knew what he was doing on 13th September; that if, which I doubt, there was any concealment by the solicitor, that concealment cannot wipe out a fact already known; there was no new starting point as Mr Driscoll submits and the clock continued to tick without interruption. Knowledge of the breach and damage was conveyed in the letter of 26th November. Accordingly s. 32 does not avail the claimant."

245. Mr Miall again relied on this judgment to submit that a party continues to have knowledge which they previously had, notwithstanding that in the interim they may have forgotten it or been induced by the defendant to cease to continue to believe in it.
246. Mr Miall submitted in relation to the Collins decision that that was a case which was decided on its own facts; and moreover was decided following a trial; and where I am simply concerned as to whether or not the claimant has shown that the defendant has no serious argument on this point rather than in some way trying to carry out a trial myself.
247. As far as the law is concerned, it seems to me, first, that I must remember that Section 32 is a limited invasion of and an exception to a defendant's statutory right to rely on limitation. Therefore Section 32 is to be applied with care and I must avoid basing my judgment on sympathy for an apparent victim claimant. Parliament has provided for fraudsters with escape liability, notwithstanding that they have deliberately concealed their frauds, unless less than six years has passed from when the victim, if they had exercised reasonable diligence, could have found out the relevant key facts; and, where the victim has found out a clear fact then, notwithstanding the fraudster then fraudulently pulled the wool back over the victim's eyes so that they were unpersuaded of its the truth or failed to realise its significance, the victim is still deemed to have that knowledge.
248. Secondly, I note that a further fraud in the form of pulling the wool back over a victim's eyes could give rise to its own cause of action if the victim did not take proceedings within a limitation period as a result. That is not claimed by the claimants to be the case here, albeit that the second conspiracy claim in some ways somewhat resembles it. I also note that the claimant (PTL) did manage to issue a claim within

the primary limitation period in any event, although it now turns out to not have been the claim which the claimant now wishes to advance.

249. Thirdly, it does seem to me that I should accept Mr Miall's submission that it is relevant to the question of what is discoverable with the exercise of reasonable diligence both that Dr Panico is and was something of a trust expert and that Dr Panico and PTL would have had substantial resources with which to investigate had they chosen to do so. The case law makes clear that a victim who has substantial resources and expertise is in a worse position than one without.
250. Fourthly, I do accept that, if a victim learns of a fact, the situation of the victim being persuaded by the defendant that that fact does not exist does not stop the victim having their knowledge still attributed to them so that the Section 32 time period continues to run with regards to the cause of action of which that fact is the key element.
251. However, I do not see the case law as saying that the same applies to a fact of which the victim had not learnt but which with the exercise of reasonable diligence the victim could have learnt. The Sheldon, Bocardo and Ezekiel decisions and judgments only deal with facts which the victim had actually discovered; and they made clear that it is the situation of actual discovery and knowledge which renders further concealment legally impossible for Section 32 purposes.
252. That leads on to the question whether, if from facts that the victim does know at a point in time the victim could, if the victim had not first consulted the defendant, with the exercise of reasonable diligence, then have discovered more key facts, but, as a result of the defendant's further actions, the victim is persuaded not to investigate further, and the victim is acting altogether reasonably in both consulting the defendant and accepting what they say so that the victim does not investigate further, and it would be unreasonable in those circumstances for the victim to inquire further; whether, in those circumstances, the victim is deemed to have and to be saddled with the further knowledge which the victim could have acquired at the earlier point of time prior to those further actions on the part of the defendant.

253. In my judgment, the victim is not so deemed to have such further knowledge, for two linked reasons, but which reasons are independent so that either one would stand on its own.
254. Firstly, the question of what knowledge the victim could have acquired with the exercise of reasonable diligence is very much affected by the question of what the victim and the fraudster or deliberate concealer actually do. If the victim's natural reasonable first step is to inquire of the fraudster, and the fraudster's explanation of what the victim had learnt being wrong or inconsequential is sufficiently persuasive to a reasonable person in the position of the victim to assuage their concerns, it seems to me that that can very well lead to a situation that reasonable diligence will not require the victim to inquire further. While Sheldon deems the victim still to know what the victim has already learnt, so no new Section 32 period arises from the fraudster later concealing those already learnt facts, I do not see that that deemed knowledge means that the victim is deemed to have learnt further matters in circumstances where the fraudster has caused it to be unreasonable for the victim to take those steps which could have resulted in the victim learning those further matters.
255. I do not see that where the fraudster has persuaded the victim not to investigate further, and it would in fact as a result be unreasonable for the victim to investigate further, that the Sheldon deeming has to be taken as far as meaning that the victim has learnt what the victim would have learnt had the victim continued to investigate. It seems to me that it would work obvious injustice; and it is a very different situation from that considered by Sheldon of whether where one Section 32 period had started and come to an end as a result of a fact being revealed, a new Section 32 period could arise based on the same fact being reconcealed (and which Sheldon held it could not).
256. Secondly, although the first reason stands on its own, I do not perceive Sheldon, Bocardo or Ezekiel as applying to a situation where a person could with reasonable diligence have discovered something but before they discover it the fraudster persuades them not to take the steps or otherwise deliberately conceals it so they can no longer reasonably discover it. I do not see why the claimant should not have a further new six-year period on the basis of that deliberate concealment. That scenario was not the one contemplated by Sheldon and Bocardo where someone

knowing something such that it can no longer be deliberately concealed from them so that they "unforget". Rather, that scenario is that they never subjectively knew the relevant fact. While Section 32 meant an initial six-year period was running because at an earlier point in time they could with reasonable diligence have discovered, in this scenario they had not discovered and therefore they had nothing to "unforget". Sheldon makes clear that any act of deliberate concealment starts a new six-year period and I do not see why there should be any limitation in contending for and relying on such a "new" six-year period on a person who had not discovered something but could have found it out. That is, as I say, a very different situation from a person who had discovered something but is persuaded to forget it. The Sheldon/Bocardo/Ezekiel reasoning simply does not apply to that scenario.

257. While I have identified that second point, the first one being that the Sheldon approach does not apply to a situation where someone is induced not to further investigate with regards to what that further investigation would have revealed, and this second point being that the Sheldon principle simply does not apply at all to preventing a "new" limitation period starting in relation to matters which could with reasonable diligence have been discovered but had not actually been discovered; I do though bear in mind that Mr Phillips did not seek to rely on this second approach but only on the first one. Since Mr Phillips did not seek to rely on the second approach, I do not base my decision on it either, although it does seem to me that it might well assist the claimant. But I do accept Mr Phillips' submission in relation to the first approach, namely that the Sheldon doctrine and judgment does not prevent the claimant relying on the fact that Mr Pinto, and potentially by extension other defendants, had so acted that, notwithstanding what the claimant had already learnt, it would no longer be the exercise of reasonable diligence to investigate further and learn further facts.
258. Mr Miall went on to submit as follows. Firstly, for deliberate concealment someone would need to appreciate that they were doing something wrong, and he reminded me of the citation from my own judgment in Toner where it was made clear that it is a high bar for the claimant to surmount to persuade the court to conclude that defendants had appreciated that they were doing something wrong, and especially with regards to Mr Gallucci. Secondly, in relation to deliberate concealment, Mr Miall accepted that there could be deliberate concealment by an agent but, firstly, he did not

accept that Mr Pinto was acting as agent for BGB and, secondly, he did not accept that it had been demonstrated to a summary judgment standard that Mr Pinto had been acting as agent for Mr Gallucci or that Mr Gallucci knew or approved of Mr Pinto's acts of deliberate concealment.

259. Mr Miall then submitted in relation to the question of deliberate concealment of the contract claim that, first, the key fact for any breach of contract claim is the breach of contract itself as that would give rise to at least nominal damages. Secondly, he reminded me that Mr Phillips had concentrated on submissions to the effect that the losses had been concealed and that was not actually a submission of concealment of a breach of contract. Thirdly, he submitted that what PTL and Dr Panico did know which was particularly relevant was the following. Firstly, that the trust assets had been used by shares in funds. Secondly, how much trust money had been used to buy each parcel of shares in each fund. Thirdly, that in March 2015 Nerine had provided to UBS statements which showed something like a 500,000 euro fall in value, and those had been passed on to PTL. Fourthly, that in September and October 2015 Nerine had provided to UBS statements which showed drops in value, which Dr Panico saw, and which he himself, in emails on 16 September 2015 and 5 October 2015, had described as catastrophic. Fifthly, in September 2015 Dr Panico had signed, at Mr Pinto's instigation, the fund strategy document which included what on any basis would be high-risk investments, notwithstanding that Mr Pinto had said that it did not represent any change to the previous strategy.
260. Mr Miall went on to submit that that knowledge of Dr Panico, whatever Mr Pinto then or subsequently said, at least arguably was knowledge of both, firstly, the fact of substantial losses and, secondly, the fact that trust money had been invested in high-risk funds. Mr Miall reminded me that Section 32 does not allow a subsequent deliberate concealment to start a new six-year period running if the relevant matters were already known; and he submitted that PTL had and is deemed to have retained knowledge of both breach and loss, and so that (a) the six years ran from 2015 and expired in 2021 and (b) no new six-year period has arisen. He submitted, therefore, that to allow an amendment would give IMT an impermissible limitation advantage and is prohibited by Section 35 and CPR 17.4(2).

261. Mr Miall next submitted that he did not accept that Mr Pinto's supply of the IB statements and other statements as to the trust money being held in secure low risk private equity investments meant that Dr Panico and PTL could not with the exercise of reasonable diligence have learnt the truth regarding loss and any causative breach or misrepresentation. He submitted that they were put on inquiry by a number of matters. Firstly, the absence of any document to show that trust money had left the funds and gone into private equity investments as asserted by Mr Pinto. Secondly, the time taken by Mr Pinto to set up what was said to be a quarterly reporting structure with regards to events which had already taken place. Thirdly, the continued statements by Mr Amari of the bank that the bank had no knowledge of the private equity investment or role regarding it or knowledge of from what and thus how it had been created - see, for example, Mr Amari's email of 21 January 2016.
262. Fourthly, the fact that in early 2016 onwards IMT kept asking Mr Pinto for information and identification of alleged trust assets and reconciliations, to which requests Dr Panico joined in, including in telephone calls in about May 2016 and the meeting on 22 September 2016 with Mr Gallucci and Mr Pinto. Fifthly, the fact that if one looks closely at the Nerine valuations of 5 October 2015 and the transactions set out in them, that Mr Pinto's explanations are, rather than money being lost, the money had simply been sent into private equity investments were simply unreal. Sixthly, that the same applied on any close analysis conducted with regards to documents provided in May 2016. Mr Miall said that all that Mr Pinto and PTL needed to do was just add up the various total numbers of shares and of the various net asset values, and it would be possible to see that trust money could not have been taken out of the funds and used to invest in private equity investments.
263. In all those circumstances Mr Miall submits that it is at least arguable that a trust company in the position and with the resources of PTL and Dr Panico could with reasonable diligence have worked out that Mr Pinto's various explanations and documents were unreal and have found out the truth. While he submits that Mr Phillips has only really submitted that it was the losses that were concealed, Mr Miall submits that for the above reasons they could have been or at least reasonably could have been discovered. Mr Miall further submits that once one knows about the losses, then such would simply give rise to an obvious investigation which

would, with the exercise of reasonable diligence, reveal the existence of the breaches, misrepresentations and conspiracies. Mr Miall repeats his submissions with regards to the first conspiracy claim.

264. With regards to the second conspiracy, Mr Miall submits that following Mr Phillips's clarification that the claim is only for losses based on what would have happened if PTL had liquidated the investments by the end of 2015 and, therefore, only in relation to acts and losses which took place before the end of 2015, that the same analysis applies as with regards to the contract claim and the first conspiracy claim. He submits that with the exercise of reasonable diligence, PTL should have found out the truth in 2016, and that, in those circumstances, limitation would have expired, at the latest, in 2022, and so that I cannot, in 2023, allow an amendment leading to a relation back, for limitation purposes, of the issue of the claim to the claim form in these proceedings.
265. Mr Miall further submitted with regards to the various defendants, that, firstly, he did not accept that Mr Pinto as an agent of BGB, but, secondly, in any event, that Mr Pinto was not an agent or confederate of Mr Gallucci; and thirdly, that there was nothing to prove that Mr Gallucci had deliberately concealed or engaged in any subjective wrongdoing. With regards to the 7 March 2020 letter, Mr Miall submitted that all that Mr Gallucci had done was asked Mr Pinto to investigate, and that Mr Gallucci believed Mr Pinto's assertions, including that the IB documents were genuine.
266. Mr Langley, for Mr Pinto, submitted that limitation would also prevent amendment against Mr Pinto. He submitted, firstly, that the burden on IMT to show that Mr Pinto's response to the claimant's invocation of section 32 was not reasonably arguable, was a high burden, and referred me to the decision of *Ballinger v Mercer Ltd* [2014] 1 WLR 3597, and I read paragraphs 27 and 32 into this judgment.

“27. What that passage does not spell out is upon whom lies the burden of persuasion. Working from first principles however it is plain that, provided the defendant can show a prima facie defence of limitation, the burden must be on the claimant to show that the defence is not in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If

the availability of the defence of limitation depends upon the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a prima facie defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable.

“32. In my view the judge's approach to the limitation question was impeccable, both in relation to the Category 4 amendments and in relation to the Category 5(i) and 5(ii) Amendments. The Respondents did not show, and in my view did not come close to showing, that the Appellants have no reasonably arguable limitation defence to the new claims, and permission to amend should not therefore have been granted pursuant to CPR 17.1(2)(b). The judge answered question one of the threefold enquiry correctly and in the affirmative. It is important to appreciate that his determination was not a final determination that the relevant claims are time-barred. His finding was that the Appellants have a reasonably arguable case that they are time-barred. That does not preclude the Respondents from issuing separate proceedings in which they will seek to prove that the claims are not in fact time-barred, as they have indeed done. Thus, the judge was in my view right to identify as decisive of the application before him the question whether the proposed amendments or any of them arise out of the same facts or substantially the same facts as those already in issue in the claims as then currently pleaded.”

267. Those citations are in line with the authorities have already cited. They make clear, of course, that, for me to refuse amendment, would not prevent the claimant bringing new proceedings where a section 32 could be argued out on a full, rather than merely a summary basis; although, of course, if the claimant had taken, or, indeed, takes that course of action, then that may have adverse cost consequences regarding this claim. Those points are, in fact, reasons as to why the MasterCard route might have been an attractive one, but the claimant disavowed any attempt to invoke it, and so I have not considered it further.

268. Secondly, Mr Langley submitted that there were a real questions as to whether Mr Pinto was, in any way, fraudulent with reference to the IB documents and as to whether or not he forged them, or in any way by their use deliberately concealed relevant facts. Mr Langley said that it is Mr Pinto's case that the documents were



forged by someone and that they recorded non-existent investments, but that it remains Mr Pinto's case that he believed at the time that the documents were genuine. He referred me again to paragraph 6.9 of Mr Pinto's defence, and also to paragraph 6.10 and 6.11, which they said that Mr Pinto only learnt the truth after the proceedings had been commenced. M Langley submits there is a real question as to whether Mr Pinto is correct in his statements that he was honestly and reasonably mistaken as to what had happened with regards to the trust's monies.

269. Thirdly, Mr Langley submitted the section 32 case effectively repackaged the fraud claims being made against Mr Pinto, and that I should not find fraud against Mr Pinto on a summary basis. However, Mr Langley did have to accept that the court has a power to find that fraud has taken place on a summary basis, as occurred in such cases as *Wrexham v Crucialmove* [2016] EWCA Civ 237.

270. Fourthly, Mr Langley said that Mr Pinto's defence had been produced rapidly following the WFO and a claim based on a written 2014 IMA, and that what was taking place now was a very different context where there were a set of very extensive amendments giving rise to new and different claims, and Mr Pinto's simply had not had a chance to formulate or to advance his desired case in those circumstances.

271. In response to this, I asked Mr Langley as to what was Mr Pinto's case as to how the IB documents have come into existence, and as to how Mr Pinto had received them and felt able to send them to Dr Panico and PTL. Mr Langley was unable to answer the question in November 2022. As the hearing was being adjourned anyway to March 2023, I gave Mr Pinto my specific permission to adduce further evidence as to this, but on the express basis that, while his not doing so would leave the evidence in its then state, I would not draw any inference against Mr Pinto merely from Mr Pinto not advancing any evidence by way of taking up the permission. Although Mr Langley objected even to my granting permission to Mr Pinto to adduce such further evidence, it seemed to me to be fair and in accordance with the overriding objective for me to direct this. As I have said, Mr Pinto chose not to adduce any further evidence, and I am simply left with what is stated in Mr Pinto's defence, albeit with its statement of truth.

272. Mr Langley then reminded me that the limitation defence is a matter of right in which any defendant, including a fraudster, could take advantage. He submitted that for Dr Panico to have exercised reasonable diligence, Dr Panico should have pressed Mr Pinto, and also, for that matter, the bank, further. He pointed to the fact that while Mr Pinto was saying to Dr Panico that trust money had been moved out of the funds, thus resulting in the statements from Marine and UBS showing falls in the value within the funds, Mr Pinto had not actually identified any transaction or mechanism of removal, or supplied any document to support such having taken place by way of an actual transactional document or documents.
273. Mr Langley then submitted that the court needed to consider both Dr Panico's actual knowledge, and his objective knowledge, reminding me that the objective knowledge would be: firstly, that knowledge which Dr Panico could reasonably have had, rather than that which he actually had. Secondly, that Mr Langley accepted that Dr Panico would need some sort of trigger to inquire. Thirdly, that PTL was a professional trustee with resources and who owed a duty to beneficiaries to take reasonable care. Fourthly, that I should also consider the role of Mr Gentile who, in 2016, was the protector, and also the role of IMT which became more and more a full co-trustee. Fifthly, that, if IMT and Dr Panico thought there had been a sale of units within the funds, they should actually have required specific details and documents of the relevant transaction simply because there may have been tax consequences which need to be reported. Sixthly, he submitted that this was not the *Collins'* client and solicitor situation where the solicitor held all the information, but one where multiple sources were available to Dr Panico and PTL of which to inquire, and that reasonable diligence could well have resulted in making further inquiries which would have revealed the truth. Mr Langley submitted, in all the circumstances, there was a reasonable serious argument that section 32 would not apply to assist the claimant.
274. Mr Phillips responded to these submissions mainly as follows. Firstly, he accepted with regards to deliberate concealment, that I needed to focus on the relevant defendant or their agent and ask myself if it was clear that they had deliberately concealed a relevant fact or facts. Secondly, that the exercise of reasonable diligence question involved focusing on the claimant's actions and possible actions. Thirdly, Mr Phillips accepted that the Nerine, UBS and bank material did initially instil in Dr

Panico a belief that there had been a loss, but he submitted that Dr Panico had then enquired of Mr Pinto and been provided by Mr Pinto with the IB documents and related assurances, and so that (a) the losses themselves were concealed so that Dr Panico never really knew of them, and (b) the fact that BGB had not invested in low risk portfolios was distinctly concealed.

275. Fourthly, Mr Phillips admitted that Dr Panico did exactly what any reasonable trustee would have done in enquiring of Mr Pinto on multiple occasions, and in circumstances where Mr Pinto's own defence in paragraph 6.9 said that Mr Pinto reasonably believed that the contents of the IB documents were genuine. Mr Phillips, in those circumstances, asked a rhetorical question as to how can Mr Pinto say that Dr Panico did not so reasonably believe. Mr Phillips also reminded me that Mr Gallucci's letter of 7 March 2020, effectively, said the same from Mr Gallucci's perspective and, indeed, it is Mr Miall's submission that Mr Gallucci regarded what Mr Pinto was saying to him as being entirely credible and such as ought to be accepted.
276. Fifthly, Mr Phillips asserted that Mr Pinto, firstly, had clearly manufactured the IB documents and, secondly, intended Dr Panico to rely on them precisely as Dr Panico did. Sixthly, Mr Phillips submitted that Dr Panico had acted exactly as any reasonable professional trustee would have done. He had received information which had concerned him. He had sought explanation from the relevant person in place - Mr Pinto. He had received a credible explanation, supported by credible documents, and which material provided a full answer which meant that Dr Panico did not need to carry out any detailed analysis of the Nerine and UBS Bank documents, and, even if he had carried out such analysis, that would only have led him back to Mr Pinto and more IB documents and assurances.
277. Sixthly, Mr Phillips submitted, regarding the question of the Nerine and Bank documents being inconsistent with trust monies having been withdrawn from the funds, and the suggestion that they were only consistent with the values of the shares and the sums having fallen, that, firstly, such analysis was not such an exercise that a professional trustee would do. Rather, they would ask their fund manager to do it - namely, Mr Pinto - and that is exactly what Dr Panico did. Secondly, that it lies ill in

the mouth of a fraudster to say that a victim should have enquired further, especially where the fraudster is an apparently respectable fund manager.

278. Seventhly, Mr Phillips said that the question of the tax regulatory regimes and enquiries being made for their purposes, is of little relevance as that is simply a matter of fiscal reporting and it is not a matter asking whether or not there have been any losses. Eighth, Mr Phillips confirmed with regards to the second conspiracy that he did not rely on any assurance given after 2015 as being causative of any recoverable loss. Ninth, Mr Phillips summarised by saying this was a case where Dr Panico and PTL had clearly exercised reasonable diligence, and that to have discovered what had happened actually happened in these circumstances would clearly have regarded the taking of exceptional measures beyond reasonable diligence.

279. I found some elements of this to be very difficult, although others to be more clear cut. I have borne in mind all the submissions and evidence, even if not expressly mentioned in this judgment. It seems to me that as far as the law is concerned, firstly, for the reasons given above, as a matter of law, for the claimant to succeed in there being jurisdiction to grant permission to amend; where these are all new claims, not arising out of the same or substantially similar facts to those already in issue, and where the primary limitation period for them has now expired, but had not when the claim form was issued; that it does need to be beyond reasonable argument that either the claim is based on fraud and the exercise of reasonable diligence could not have discovered that less than six years ago, or that there has been deliberate concealment of the key fact(s) forming part of the cause of action by the relevant defendant or their agent, and where the exercise of reasonable diligence could not have discovered it more than six years ago.

280. Secondly, and also as a matter of law: (a) the claimant victim cannot unlearn something as a result of the defendant's action where the claimant has already known it; but (b) the defendant's actions may affect the questions of both (1) what further enquiries might form part of reasonable diligence, and (2) what those further enquiries might reveal.

281. Thirdly, and again as a matter of law, reasonable diligence is to be seen in the light of the resources and role and responsibilities of Dr Panico and PTL as a professional trustee, but: firstly, reasonable diligence has its limits; and secondly, a client has to be able -at least in some circumstances - to trust their own professional, and for the client merely, with substantial reason, to strongly suspect something, is not the same as their discovering it, especially where, as here, the professional fiercely denies it. That is exactly what is said in the *Collins* decision, albeit in the context of a solicitor/client relationship.
282. I do find, on the basis of the evidence before me, that two matters are clear. These are decisions for my purposes only of the application to amend. They do not amount to findings for substantive purposes, but are based on what the defendants have chosen to put before me and where they have had the fullness opportunity in the circumstances to add to it, if they had so chosen. They do not involve my drawing any inferences, including from the fact that further evidence is not being adduced. Rather, it is my simple conclusion on what, on the evidence before me, is beyond reasonable argument.
283. Firstly, is that Mr Pinto, at all material times - that is to say, until at least after March 2020 - was held out by BGB as BGB's agent, for all purposes of communicating with Dr Panico and PTL regarding the trust money and investments. That, it seems to me, is clear from the following. Firstly, the use by Mr Pinto of the business card describing Mr Pinto as BGB's "Investment Manager" and of which Mr Gallucci clearly had knowledge and to which Mr Gallucci clearly, at least impliedly, assented by not stating otherwise. Secondly, the possession and use by Mr Pinto of his BGB email account; and of which method of communication by Mr Pinto with Dr Panico, Mr Gallucci clearly had knowledge, and to which Mr Gallucci clearly, at least impliedly, assented. Thirdly, the placing by BGB and Mr Gallucci of Mr Pinto as the primary method of communication between BGB and Dr Panico and PTL. Fourthly, the dealing between Mr Pinto and Dr Panico/PTL regarding the trust's investment to which Mr Gallucci was a party without Mr Gallucci dissenting - for example, to the email of 24 June 2015. Fifthly, the knowledge of Mr Gallucci of Mr Pinto dealing with Dr Panico's queries about the funds - for example, in October 2015 from which Mr Gallucci did not dissent, and I refer, in particular, to the emails of 5 October 2015

timed at 17.15 and 8.08 p.m., and the email of 13 October timed at 5.31 p.m. I also refer to Mr Pinto's own statement of relationship in his email of 18 February 2020, from which Mr Gallucci did not, in any way, dissent, including in March 2020.

284. It seems to me that Mr Pinto clearly had an ostensible (if not also actual) authority to communicate on behalf of BGB and as Mr Pinto was purporting to do, but I do note that little or nothing in the documents shows that Mr Pinto either had authority to, or was purporting to communicate on behalf of Mr Gallucci.
285. Secondly, it seems to me to be clear beyond reasonable argument that the IB documents are fraudulent, forged inventions with no basis either as documents, or as to their contents, in any reality. I say this, in particular: firstly, because IB denied that they are genuine and has made clear that the documents do not exist on a genuine IB template and do not emanate from them; secondly, because it seems clear that no trust money or assets ever went to IB; and, thirdly, it is also now clear and common ground that the trust money went into and stayed in the funds and there suffered massive losses.
286. Thirdly, it seems to me to be clear beyond reasonable argument on the evidence before me, that the IB documents and the related communications from Mr Pinto as to both the IB documents and their contents, were deliberate known inventions of Mr Pinto.
287. I am conscious that I am coming to that conclusion on summary judgment, and that it is somewhat equivalent to fraud, albeit only of deliberate wrongdoing, and that I am deciding it for the purposes of an amendment application; but it seems to me that I need to proceed on the basis of the evidence before me where the parties have had full opportunity to adduce evidence and address me on this limitation issue. I base this conclusion, in particular, on the following matters.
288. Firstly, the IB documents are forgeries and therefore must have emanated from someone. Secondly, it was Mr Pinto who produced the IB documents, first, on 13 October 2015 and thereafter, and which documents showed great detail. Thus, Mr Pinto is the apparent source of detailed documents which have no basis in reality. Thirdly, Mr Pinto is the person who directed the uses of the trust money by informing

the bank as to what was required and how they were to be transmitted into the JG funds, and of which Mr Pinto was, in practice, the fund manager. Even if the instruction was actually given by Dr Panico, it was, effectively, an instruction from Dr Panico on the basis of information obtained from Mr Pinto. Thus, the money, effectively, went into Mr Pinto's control and, equally importantly, knowledge.

289. Fourthly, the documents, including Mr Pinto's own reports to JG Capital in relation to the performance of the JG funds, of which Mr Pinto was the fund manager in practice, in July and September 2015 and thereafter, set out that the funds had suffered heavy losses, which, when the question of the existence of those losses were queried by Dr Panico in October 2015, resulted in Mr Pinto sending the IB documents to Dr Panico. Thus, was Mr Pinto who had both practical control of what was happening, and full knowledge of what was happening, including that the trust's assets had suffered major losses, but who chose, when queries were raised, to send what I have held to be forged documents, and thereafter maintained his assertions as to what had actually happened to the trust monies, with repeated provision of forged IB documents, for a number of years.
290. There is no evidence before me which could suggest any other source for the IB documents than Mr Pinto himself, and which Mr Pinto sent out in circumstances where he knew that the JG funds and, by extension, the trust, had suffered very substantial losses. It is Mr Pinto who would have known how the funds had been invested from time to time and what their performance had been. It is also Mr Pinto who would have known whether or not any trust monies had actually been removed from the JG funds, and as to where those trust monies would have gone. In circumstances where the evidence before me is that no trust monies, or no relevant trust monies, actually had exited JG funds, and where it then follows that Mr Pinto would have known that, it seems to me that the only and obvious conclusion is that Mr Pinto created the IB documents as pieces of paper, physical and electronic, designed to hide the truth from Dr Panico and PTL.
291. Fifthly, in relation to what happened in 2020, on 18 February 2020, Mr Pinto sent out further IB documents saying that Mr Pinto continued "to constantly monitor the position," a matter which Mr Pinto restated to Mr Gallucci, as Mr Gallucci set out in

his email of 7 March 2020. It seems to me, again, here that Mr Pinto was in complete control and knowledge of the situation, but was advancing forged documents which had no basis in reality to seek to assuage Dr Panico's queries, where it was Mr Pinto who was the person who had dealt with and managed the trust funds.

292. Sixthly, as I have already said, I have no evidence of any other source for, or creator of, the IB documents than Mr Pinto.
293. Seventhly, I bear in mind that Mr Pinto was prepared to be a party to the backdating of documents, the main example of which is the written IMA. Eighth, I also bear in mind that there is also something of a mystery in so far as Mr Pinto procured the payment to the trust of in excess of €1m from the Blue Anchor company, and which is Mr Pinto's creature. That, again, suggests that one should have considerable doubts about the propriety of Mr Pinto's actions. However, since there is a variety of possible explanations of what happened there, it does not seem to me that I should place much weight on that aspect.
294. I have to form my conclusion from the evidence the parties have deployed before me, and in the situation where there is no suggestion that the claimant has any further material documents of its own which impact on this. It seems to me that, in all the circumstances, that it is clear that Mr Pinto forged the IB documents and advanced them, and made continued statements regarding the trust assets which he knew to be untrue, and with a view to, effectively, keeping Dr Panico and Private Trustees Limited quiet until the time actually passed the long stop date of 31 December 2019, which long-stop date Mr Pinto had himself deceitfully created as being the redemption date of supposed (but actually non-existent) Italian government bonds and various derivative assets.
295. It seems to me that each sending of the IB documents was both a concealment and, as Mr Pinto knew the truth and that the IB documents were fraudulent forgeries, a deliberate concealment on the part of Mr Pinto. Those matters, it seems to me, are clear-cut.
296. It seems to me that I also should find that it is clear, and proceed on the basis, that Dr Panico and PTL were told in July and September 2015 that the trust investments in the



JG funds were worth much less than the sums paid into those funds by the bank, and that each individual share in each relevant fund was worth much less than when the trust purchased it. That is what those documents simply say. It is what Nerine and UBS and the bank directly or indirectly told Dr Panico and PTL at those points in times and, therefore, although I regard it as clear, it must, in any event, be at least reasonably arguable that they then knew it.

297. The same is the case at various points after then, as the bank and also Nerine and UBS kept telling Dr Panico and PTL that; namely, that the net asset values had fallen and the trust's investments in the fund were much less than the monies the trusts had put into the funds. Mr Phillips, as I said, does not contest, and it does not seem to me can contest, that such earlier knowledge is deemed under section 32 to remain in the claimant victim's mind for the purposes, at least, that the claimant, having learned it, that information cannot be re-concealed, so that they no longer know it. As I have said already in this judgment, I have some doubts as to how far that point leads and, in any event, I have concluded as a matter of law that the mere fact that somebody is deemed, for those purposes, to know those facts, does not necessarily mean that it is reasonable diligence for them to conduct further investigations, dependent on the following circumstances.
298. It also seems to me that various further matters are clear. Firstly, that Dr Panico and PTL did not appreciate in their own minds that the trust money had been invested in high-risk investments. I conclude that: firstly, because nobody suggested that they did think that; secondly, they never suggested that in any document; and thirdly, for them to have thought that, would have been entirely contrary to both their own emails enquiring as to what had happened, and the fact that they were comforted by Mr Pinto and by his provision of the IB documents.
299. Secondly, that Dr Panico and PTL both repeatedly, from after when Nerine and UBS had informed them of the apparent, very substantial losses, asked Mr Pinto for what was the actual situation, and were told by Mr Pinto, backed up by what appeared to be apparently genuine IB documents, that much of the trust's money had been taken out of the funds and placed in low risk private equity investments and, eventually, low risk Italian government bonds. The course of the documentation shows that exactly that

occurred from at least the 13 October 2015 Mr Pinto email, attaching the first IB statement, to at least the 26 February 2020 Mr Pinto email attaching still more IB statements; although it was also effectively said, at least by implication, that those events had occurred in Mr Gallucci's letter of 7 March 2020.

300. The first key question for me is whether or not it is reasonably arguable that, with the exercise of reasonable diligence, Dr Panico and PTL could have discovered the relevant truths by 22 May 2017 - that is to say, six years ago. That raises the question of what were the relevant truths? For the breach of contract claim, they are threefold. Firstly, the acts constituting the alleged breach of contract - essentially, that the trust money had been directed into high-risk investments. Secondly, that the trust has suffered financial loss. I do not see that purely nominal loss which would lead to a nominal damages award only would be sufficient for sections 32 purposes, although, ultimately, that would seem to me to make no difference. Thirdly, that the loss had been due to the high-risk nature of the investment. I note that the breach of contract claim is against BGB alone.
301. The relevant truths for the first conspiracy claim are twofold. Firstly, that the 3 October Misrepresentations and the Bespoke Investment Misrepresentations were fraudulent and made by way of conspiracy - that is to say, that both Mr Gallucci and Mr Pinto did not intend, and had not intended, the trust's money to be invested in, first, low-risk investments, or, second, in a bespoke investment package. Secondly, that the trust has suffered loss as a result. I note that this claim is against Mr Pinto and Mr Gallucci, as well as BGB, and depends on the knowledge of both Mr Pinto and Mr Gallucci.
302. For the second conspiracy claim, again the requirements are twofold. Firstly, that the IB statements and other statements from Mr Pinto were fraudulent and by way of conspiracy - that is, both Mr Gallucci and Mr Pinto had conspired to send known false statements to Dr Panico and PTL. Secondly, that the trust suffered loss as a result. Again, this claim is not only against Mr Pinto and BGB, but also against Mr Gallucci and the depends on the subjective knowledge and intentions of both Mr Pinto and Mr Gallucci.

303. Although a full analysis of each of these aspects could be longer, I feel that I only need to deal with certain to come to a conclusion on the limitation aspect to the amendment application. As far as the contract claim is concerned, the facts constituting breach are a key element of the cause of action (and mere knowledge, actual or deemed, of fall in value or even of loss is not enough – a matter which can be simply tested by considering that even low-risk investments (where there would be no breach on any basis) could sustain losses), and as fraud is not an element to the cause of action, this is not an aspect as to where section 32(1)(a) is relevant, but only deliberate concealment and section 32(1)(b) are relevant. The question is whether it is reasonably arguable that with the exercise of reasonable diligence, Dr Panico and PTL could have discovered the fact of investment into high risk funds (the alleged breach) before 22 May 2017, notwithstanding Mr Pinto’s provision of the IB documents and his related statements to the effect that that had not occurred and that the money was in low risk investments - firstly, private equity, and then Italian government bonds.
304. Here, firstly, I have held that Mr Pinto was the agent with ostensible authority of the relevant defendant - BGB, the other contracting party in relation to the asserted breach of contract claim. Secondly, it seems to me that it is clear that Mr Pinto deliberately concealed the losses, as I have held above that it is clear that he knew that the IB statements were forgeries and knew that his various statements as to what had happened to the trust’s investments being transferred into low-risk investments in private equity and Italian government bonds were untrue. Thirdly, it seems to me clear that by doing so he deliberately concealed both the fact of the losses and also the fact that the trust’s investments had in fact been made into high-risk investments which had resulting in the sustaining of the losses. Fourthly, in my judgment it is clear that Mr Pinto thereby deliberately concealed not only the fact of the losses but also the facts which amounted to the (now alleged) breach of contract and causation i.e. that the trust’s funds had actually been invested in high-risk investments and which high-risk investments had sustained the losses. Fifthly, it seems to me clear that Mr Pinto thereby deliberately concealed key facts of the breach of contract claim, being in particular the facts which amounted to the breach and also those which amounted to the causative link between breach and loss, but also the fact of relevant loss itself, without the knowledge of which such a breach of contract claim could not be brought.

Sixthly, it seems to me that the deliberate concealment is for section 32 purposes that of BGB, as I have held that it is clear that Mr Pinto was a relevant agent of BGB.

305. However, I still come back to the question as to whether, with the exercise of reasonable diligence, Dr Panico and PTL could have discovered the fact of investment into high-risk funds before 22 May 2017. I have to ask myself whether or not that is merely reasonably arguable. If it is not, then section 32 applies and there is jurisdiction to permit the amendment. If it is so, it seems to me that it must be reasonably arguable that Dr Panico and PTL could have discovered, with the exercise of reasonable diligence, the rest of what they would have needed to bring a claim, even if they were deemed not to know it already, and so that there would be no jurisdiction to permit an amendment.
306. I have concluded, again, with some hesitation, that it is not reasonably arguable that Dr Panico and PTL could have discovered, with the exercise of reasonable diligence, that the trust money had been invested in high-risk investments (and so that in consequence they could not have discovered that there had been a relevant breach or causation whatever knowledge they may be deemed in law to have had of falls in value in JG funds under the Sheldon principle), and that the claimant has, on the evidence, shown that to be the case. I have considered all the evidence and submissions, but my essential reasoning is as follows.
307. Firstly, when Nerine/UBS/the bank raised the depreciation in the various share prices of each of the JG funds, and the depreciation of the value of the trust's investment in each of the JG funds, Dr Panico and PTL did, indeed, speedily go to Mr Pinto. That was following the September 2015 statements. I do not see the April 2015 statements as suggesting any substantial loss that would trigger a need to enquire, although if there had been an inquiry, that would simply have been to Mr Pinto, and it seems to me almost certain that Mr Pinto would simply have started his deliberate concealment earlier.
308. Secondly, Mr Pinto was the obvious person for Dr Panico and PTL to go to. He is, and was, a professional and a regulated professional. He was *the* relevant regulated professional as: firstly, Dr Panico and PTL had dealt with Mr Pinto as their primary

contact at BGB; secondly, Mr Pinto was described as the “investment manager”; and, thirdly, Mr Pinto was the fund manager of the JG funds, and he was exactly the person who would know the reality and what had occurred. Fourthly, Mr Pinto produced not merely his own statements as to what had happened, but also the IB documents. They are detailed and look, at first sight, to make sense. They say that the vast majority of the trust money was held in low-risk investments and were entirely consistent with what Dr Panico and PTL thought; and with what they thought that they had instructed BGB, and thought that BGB was going, to do. Fifthly, Mr Gallucci seemed happy for Mr Pinto to deal with the situation and the various communications and had, in fact, been copied into many of them in October 2015 and following. Sixthly, drawing those threads together, Dr Panico and PTL had gone to the obvious person, Mr Pinto, to enquire. They were told a documented story which made apparent sense to them and revealed what they expected to be the case, and an absence of any breach of contract, and Mr Gallucci appeared to know what was going on and to approve.

309. In those circumstances, that leaves an obvious question, in effect, for BGB to answer of why Dr Panico and PTL should not have accepted that, and to which question I will return. However, I also need to consider as to what, if anything, any other enquiry made by Dr Panico and PTL could or would have revealed. It is very difficult to see as to how any enquiry to BGB could have led to Dr Panico and PTL obtaining anything other than more forgeries from Mr Pinto. It is true that Dr Panico and PTL could have approached IB themselves, but their doing so would have, at first sight, evinced total distrust of their professional expert fund manager and have, at least potentially, suggested that Mr Pinto was a fraudster, something which would not easily come to the mind of any reasonable professional in Dr Panico and PTL’s positions.
310. I have, however, carefully considered Mr Miall’s points as to why Dr Panico and PTL should not have accepted what Mr Pinto was saying; however, as to this, I have come to the following consideration and conclusions.
311. Firstly, it is clear that Dr Panico and PTL knew that there had been substantial changes in the JG fund values and that such was always clear. Indeed, Mr Pinto never denied that to them, and it seems to me that the *Sheldon* decision deems, at least for some section 32 purposes, Dr Panico and PTL to have continued to know that. But I accept

two elements of Mr Phillips's submissions. Firstly, that the mere change, or negative change, in the fund share values, does not, of itself, mean that the trust had suffered losses. It all depends on what other financial transactions had occurred, including such matters as capital buybacks or capital dividends, being a variety of methods which would have allowed the trust money to exit the funds and to be invested elsewhere - that is to say, in private equity, or Italian government bonds. What had happened though, it seems to me, was all within the province of Mr Pinto. He was the expert professional and the relevant manager of the funds. It seems to me that it is Mr Pinto who would know what was going on, and that he was the person for Dr Panico and PTL to ask, and unless and until Mr Pinto stated that the trust had suffered substantial losses, it was perfectly reasonable and obviously reasonable for those enquirers to believe what Mr Pinto was telling them.

312. Secondly, I accept Mr Phillips's submission that that knowledge did not reveal the facts required to demonstrate a breach of contract. As I have said earlier, as a matter of law, I do not see the *Sheldon* doctrine that there cannot subsequently be concealed what has already been revealed means that the fraudster or wrongdoer cannot subsequently conceal what has not yet been revealed, and do so by sending the victim - here, Dr Panico, PTL and the trust - on to a false path by giving the victim a set of false answers to their enquiries.
313. Thirdly, I have considered Mr Miall's submission that if Dr Panico and PTL had closely analysed the Nerine/UBS material, they could and should have asked Mr Pinto as to precisely how such material was consistent with the trust money having been withdrawn to be put into safer investments. It seems to me that raising such questions is precisely what is not reasonable diligence for a person in the position of the trustee to pursue with the person who is in the position of the regulated fund manager. I do not see why even a very well resourced professional trustee should question the regulated expert, or ask them as to whether they are actually not telling the truth but a lie. It seems to me that much more is required for it to be reasonable to make that sort of enquiry than is before me, where a distinctly close and questioning analysis would be required to identify apparent inconsistency, and I am only concerned with reasonable diligence.

314. Fourthly, there was Mr Miall's point that Dr Panico had signed documents setting out a new strategy for JG funds which allowed for high-risk investments, and also an authorisation for the bank to allow for high-risk investments. Even ignoring the fact that it seems to me that parties may have very different concept of what "high-risk" means for these purposes, it seems to me the mere fact that Dr Panico can be regarded as having signed up to a strategy for the funds which would enable high risk investments to occur, does not mean that Dr Panico and PTL would or reasonably could know that high risk investments had actually been made and suffered substantial losses, in circumstances where they were dealing with the actual fund manager of the funds who was telling them that that was not what had occurred. Merely because somebody gives a power to somebody else of a general nature which would authorise, in some circumstances, high risk dealing, does not mean, it seems to me, that that person should or could be taken as knowing that the person to whom the power had been given had actually engaged in high risk dealing which had resulted in substantial losses when that person was saying that that was precisely what they had not done, and when that person had produced apparently convincing documents saying that they had done something else.
315. Fifthly, there is Mr Miall's point that IMT and Ms Chappia, and then Mr Pettinari, had raised various questions about what had happened for tax purposes. Again, Dr Panico and PTL had put those matters to Mr Pinto and where the questions were not on the basis as to what had actually happened with regards to the assets but only with regards to asking particular limited questions about income for tax purposes, Mr Pinto had continued to maintain and repeat his position supported by apparently convincing documents. I do not see that there was any absence of reasonable diligence, or that even if that was wrong, some further exercise of reasonable diligence could and might have resulted in more being discovered when Mr Pinto would clearly just have repeated his position with the same or more forged IB documents (as he did whenever any questions were raised).
316. Sixthly, there Mr Miall's point that the bank's spreadsheet and details were continually different from those produced by Mr Pinto. However, again Dr Panico and PTL had gone to Mr Pinto, the regulated fund manager who was responsible for and had full knowledge of what had occurred, and Mr Pinto had responded that the bank only had

visibility of part of what had occurred and that the private equity (and then Italian government bonds) and IB side was simply outwith the bank's knowledge and responsibilities. It seemed to me that Mr Amari was adopting a position of saying that the bank did not even want to know about assets of this particular nature, let alone record them; and therefore it does not seem to me that it was anything other than reasonable diligence for Dr Panico and PTL to have asked Mr Pinto as to where were the assets and what had happened and to assume that what he was telling them, supported by the IB documents, was anything other than the truth.

317. Looking at everything together, it seems to me that this is simply the financial fund manager equivalent of the Court of Appeal's points made in *Collins* with regards to the effect of a solicitor/client relationship. It seems to me that the defendant's position is effectively that the client, here the claimant, should know that the regulated professional, here the fund manager, Mr Pinto, is lying to them and producing forged, fraudulent documents, or at least that the client is under some duty as a matter of reasonable diligence to ask questions about it. It seems to me that it is simply unreal to say that these clients could have discovered the truth simply by the exercise of reasonable diligence. It seems to me that what they did by posing the questions repeatedly to Mr Pinto, and in circumstances where Mr Pinto continually repeated that the trust assets existed and produced apparently genuine statements to that effect, was, clearly, exactly the carrying out of reasonable diligence. Indeed, on Mr Gallucci's own case he himself accepted that that was the case, not merely in 2015 but in 2020, and he also, it seems to me, is an expert in this area. It seems to me that this is, clearly and obviously, a *Collins* situation. It is not the *Ezekiel* situation of a client forgetting what they have told their own professional.
318. I have considered Mr Miall's submissions that disclosure (or the rest of the procedural process including cross-examination) might well reveal something which showed that Dr Panico actually believed that there were losses arising from high-risk investments or which would (or even just could) have rendered it reasonable diligence to make further inquiries (e.g. directly by PTL to IB). Mr Miall was unable to point to anything further to the above in the mass of material which has been disclosed by the claimant which would seem to me to form any real basis for such submissions. The documents do show recurrent concerns on the part of Dr Panico but also exactly how



they were allayed so at each time Dr Panico accepted what was provided in a manner very similar to what happened in *Collins* and which seems to me, for the reasons given above, to have been entirely rational. Although it is open to a deliberate concealer (here, on my findings, BGB through, at least, Mr Pinto as I have found) to assert that the victim had seen or should have seen through the concealment, or exercised some form of reasonable diligence to do so; I see Mr Miall's submission (where BGB and Mr Gallucci have had a full opportunity to locate any document held by them which they might advance (or disclose) to assist them) as lacking any real basis or foundation and to essentially be "Micawberism" i.e. a mere hope that something might turn up, and insufficient to render it reasonably arguable that the key facts of breach were or with the exercise of reasonable diligence could have become known by PTL and Dr Panico not less than six years before today.

319. I do not regard myself as having conducted a mini-trial of these various section 32 matters. I have started off from the basis (as I have held) that the evidential material before me makes it clear that the IB documents were forgeries and their contents simply untrue (and is common-ground) but were repeatedly sent by Mr Pinto (purportedly acting on behalf of BGB) to Dr Panico and PTL to seek to persuade them both that there were no real substantial losses and that the trust monies were invested in specific safe low-risk investments. In the circumstances, it does seem to me that the rhetorical question arises as to why someone in Dr Panico's and PTL's position should have done any more and which "more" would have revealed the true position, and I do not regard anything which has been produced to me as sufficient to raise a reasonable argument so as to answer that question against the claimant. While the material before me has been voluminous, that has been because the claimant has sought to show the history and that it does not have documentation which could give rise to such an answer (as well as the claimant seeking to justify the amendments apart from the limitation point and to deal with the abuse application). I have had to analyse the material in order to deal with the relevant questions, and which has taken substantial time, but I do not see this as having been an impermissible conducting of a mini-trial.
320. For all those reasons, and notwithstanding that I accept that there is a distinctly heavy burden on a claimant to show that it is not reasonably arguable that they could have discovered the breaches with the exercise of reasonable diligence, I do find that the

claimant has discharged that burden and that there is no limitation bar on amendment regarding a breach of contract claim.

321. I turn then to the conspiracy claims; and firstly in so far as those claims are sought to be brought against Mr Pinto. Here the claims are in fraud and therefore deliberate concealment is not required. But, notwithstanding that, I come back to the question whether if Dr Panico and PTL could, with the exercise of reasonable diligence, have discovered both the first conspiracy that Mr Pinto and Mr Gallucci truly intended investment in high risk investments rather than low risk ones and, with regards to the second conspiracy, that Mr Pinto and Mr Gallucci had conspired to produce forged and fraudulent IB statements. For effectively the same reasons which I have given earlier with regards to the breach of contract claim, I am satisfied that Dr Panico and PTL could not with the exercise of reasonable diligence have discovered those matters before 22 May 2017.
322. I then consider those claims insofar as they are put against BGB. Here again it seems to me that Mr Pinto as an agent of BGB and therefore BGB is bound by Mr Pinto's deliberate concealment and also by his fraud.
323. I then consider those claims with regards to Mr Gallucci. It seems to me in relation to deliberate concealment that Mr Gallucci is in a potentially different position from BGB and Mr Pinto. While I find that it is clear that Mr Pinto deliberately concealed and that he is the agent of BGB, I have not seen material which satisfies me that it is not reasonably arguable that Mr Gallucci did not. I say this in particular as, firstly, it is perfectly possible that Mr Gallucci was duped by Mr Pinto just as much as was Dr Panico and others. Secondly, there is no link between Mr Gallucci and the IB documents of the nature that there is between Mr Pinto and the IB documents. Mr Pinto was clearly their creator on the evidence which is before me. Thirdly, while Mr Phillips relied on various matters against Mr Gallucci, I do not see them as being anything like conclusive.
324. In particular Mr Phillips asserts, firstly, that Mr Gallucci was much more involved in initial stages than perhaps he says in his witness statements. That point is certainly arguable, as Mr Gallucci in his first witness statement in paragraph 22 says he had

relatively little involvement, but, as I have gone through the history, it seems to me that he is party to many emails and discussions. However, that is only an indirect argument based on general credibility. It does not in any way show that Mr Gallucci knew that Mr Pinto was lying or producing forged documents.

325. Secondly Mr Phillips relied on the fact that Mr Gallucci had written in the 7 March 2020 letter the words: "I confirmed", implying, according to Mr Phillips, that Mr Gallucci had carefully investigated the matter himself personally. However, it seems to me that the letter can perfectly well mean that Mr Gallucci had tasked Mr Pinto to do the work. The letter does not say that Mr Gallucci had spoken to Interactive Brokers, and it seems to me that it is perfectly possible for a trusting managing director, where I have already held that it was natural and reasonable for everyone to trust Mr Pinto, would instruct Mr Pinto to investigate, and then write a letter saying: "I confirm".
326. In relation to this aspect I have been concerned as to whether I should assume for limitation purposes, including for the purposes of deliberate concealment, that Mr Gallucci was a fraudulent conspirator with Mr Pinto, and so that it might follow that Mr Gallucci had authorised Mr Pinto to engage in deliberate concealments. I do not think that I should do so as a matter of law for two main reasons. Firstly, deliberate concealment is a separate matter from the underlying cause of action or wrong; and even if I should in some way assume the existence of the underlying cause of action or wrong for these purposes, I should not utilise that assumption for the purposes of assessing the separate question of whether deliberate concealment has taken place or (which is the actual question before me) whether it is clear that deliberate concealment has taken place by the relevant person (here Mr Gallucci). Secondly, it seems to me that in law the limitation position regarding deliberate concealment is not dependent on the underlying cause of action or even related to it. The limitation position enables the alleged defendant to escape from the claim. It does not assume that the claim is or is not justified. Therefore, if deliberate concealment was the only basis for the claimant relying on Section 32 against Mr Gallucci, I would take the view that I had no jurisdiction to allow the amendment against Mr Gallucci.

327. However, the underlying claim is based on fraudulent conspiracy, that is to say, conspiracy to make fraudulent misrepresentations. It therefore seems to me that the claim against Mr Gallucci is based on fraud within Section 32(1)(a). Here the focus is not on the acts of Mr Gallucci but on whether Dr Panico and PTL could with the exercise of reasonable diligence have discovered the key facts for pleading and advancing the fraud claim more than six years before today's date. It seems to me that I have already held it is clear that they could not have done and that it is not reasonably arguable that they could have done. It therefore seems to me that I should come to the conclusion that section 32(1)(a) (and not section 32(1)(b)) is made out as against Mr Gallucci and so that I have jurisdiction to permit the amendment. I do note very much that it is only because the claim is based on fraud.
328. I further add that with regard to the conspiracy amendments (in like manner and for the same reasons as with regard to the breach of contract amendments) I have rejected Mr Miall's submissions that something relevant may be revealed on disclosure (or otherwise during the procedural process and including in cross-examination) and that I have had to conduct an impermissible mini-trial.
329. As I have said, these three claims are advanced on particular bases and I need to be clear that, subject to the next part of the judgment, I only allow amendment on the basis that in these proceedings these are the only claims advanced and that there are no secondary alternative claims of lesser wrongs. So, for example, if at trial the claimant fails to establish either fraud or conspiracy, that is to say, fails to establish that both Mr Gallucci and Mr Pinto were fraudulent conspirators, then the conspiracy claims will fail against both Mr Gallucci and Mr Pinto (as there will have been no actionable conspiracy). And there is no possibility of either of them being found to be liable for mere negligence or breach of fiduciary duty, or even mere fraudulent misrepresentation without conspiracy. Any permission which I give to amend will be on the basis that it will be a condition of such permission that there shall be no application to amend to bring in such lesser claims. If the claimant wishes in the future to advance any such lesser claims, the claimant will have to bring a second set of proceedings which will be subject to whatever limitation defences may be available to whoever are the defendants to it, and which second set of proceedings will have their own issue date which will operate for limitation purposes. That is the basis on

which Mr Phillips has sought for the court to exercise its discretion to permit amendment and it seems right to me both to record that basis and insist upon it where the court is affording the claimant very considerable licence in restructuring its case and which makes very serious allegations.<sup>1</sup>

330. For all those reasons in principle and subject to what I have said, I have taken the view that I can and should grant permission to amend where, on the basis of the findings I have made, the CNN case and its reasoning effectively requires me to do so.

331. I make clear that I have decided in effect that the effect of section 32 of the Limitation Act 1980 is effectively that no limitation period ever started to run from a date more than six years before today, and in doing so have applied my first reason (see above) for limiting the Sheldon principle (i.e. that it does not apply where the concealer/fraudster persuaded the victim not to investigate further and so that the victim, with the exercise of reasonable diligence, did not discover further key facts to those facts (being facts which were insufficient of themselves to know of and bring a claim) of which they had previously actually learnt). If my second reason (see above) for limiting the Sheldon principle (i.e. that it does not apply where the concealer/fraudster on a later occasion deliberately concealed then actually unknown key facts at a time when, had reasonable diligence been previously exercised such key facts could have been discovered by that time but had not been) were correct as a matter of law, I strongly suspect that I would have concluded that, had I been wrong in my above conclusions, new limitation periods would have started to run (on each provision by Mr Pinto of forged IB documents, each amounting to a deliberate concealment) on various occasions less than six years before today; however, Mr Phillips did not put his case on that basis and so I am not basing my decision to permit amendment on that analysis.

332. However, Mr Miall for BGB and Mr Gallucci seek to persuade me to strike out on a further ground, namely, that Dr Panico and PTL engaged in such an abuse of process that IMT as their successor, and I have directed with consent that IMT is in no better position than Dr Panico and PTL, should have the claim struck out and so that amendment is pointless. The basis of BGB and Mr Gallucci's submission is that Dr

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<sup>1</sup> The claimant sought for me to vary this approach at the consequential hearing but which I refused to do for reasons set out in a judgment given at that hearing.

Panico and PTL by Dr Panico advanced claims originally by the claim form and particulars of claim and obtained the WFO on the basis that the written IMA had been executed in November 2014 when they knew and appreciated that it had been backdated from January 2018. Mr Pinto did not join into this application, his stance being likely to have been because Mr Pinto was himself a party to the backdating, but there is no point in my speculating as to that and I do not give it any weight in my decision.

333. Mr Miall submitted, firstly, that this was an abuse of process, being a deliberate deception of the court, and possibly also BGB and Mr Gallucci, for tactical advantage resulting in the court granting what is a draconian worldwide freezing order. Secondly, that it was such an abuse that it should lead to a strike out even if it did not prevent a fair trial of the claim, although Mr Miall also submitted that it did prevent a fair trial of the claim.
334. In relation to this Mr Miall and Mr Phillips took me to a number of authorities. The first in time was *Arrow v Blackledge* [2000] 2 BCLC 167. There a director of the petitioner in a Companies Act unfair prejudice petition had disclosed documents which they had themselves forged and a consequent application to strike out for abuse of process had been adjourned to the trial, at which the petitioner by its director had continued to lie on oath about the forged documents. The first instance judge held that a fair trial was possible with regards to some allegations and refused to strike out the claim on that basis. The Court of Appeal allowed an appeal on various grounds, including that there had been such an abuse that striking out should take place even if a fair trial had remained possible. Chadwick LJ delivered the leading judgment.
335. Paragraph 44 set out the effect of forged documents and continued lies on the trial itself:
- “44. The judge’s conclusion as to the extent and effect of Nigel Tobias’ fraudulent conduct is challenged by a respondents’ notice served by the petitioners. But, to my mind, that challenge must fail. There was ample material before the judge to justify his conclusion that Nigel Tobias had continued to lie on oath as to the extent of his fraudulent activity in relation to documents. The judge had the advantage, which this

court did not have, of hearing and seeing Nigel Tobias give oral evidence at the trial under cross examination. There is no basis on which this court could interfere with the judge's finding of fact. Nor can it be said that the judge was wrong to take the view that the existence of forged documentary material is likely to infect the oral evidence. In a case of this nature it is inevitable that documents will provide the basis for recollection. It is likely to be very difficult for a witness – even for a witness doing his or her best to tell the truth under oath – to accept that what the witness now thinks that he or she recalls from memory may, in truth, be based on a document which has been shown to be false, or in relation to which there is suspicion. The effect of forged documentary material on a trial is pernicious, because witnesses who have, at one stage in the process of preparing for trial, believed that documentary evidence to be genuine are unlikely to be able to evaluate, objectively, the effect which it has had on their recall of the events to which it relates.”

336. In paragraph 53 Chadwick LJ held that the effect of the forgery had meant that a fair trial had not actually been possible with regards to any allegation and effectively that a ground of appeal that the claim should have been struck out in any event on that basis succeeded:

“53. In those circumstances I take the view that it was wrong for the judge to allow the petition to proceed once he had reached the conclusion that there was a substantial risk that the allegations in relation to the disputed terms of the 1994 agreement were incapable of a fair trial. He recognised, correctly, that a claim to relief based on allegations of abuse by the Blackledge respondents of their powers as directors and shareholder after 1997 would not require an investigation into what had or had not been agreed in 1994. But, as it seems to me, he failed to appreciate that, on a true analysis, the allegations made in the petition were allegations of oppressive conduct by Blackledge plc as supplier or as lender; and were not allegations of oppressive conduct by Blackledge plc as majority shareholder. In so far as there were general allegations of breach of duty by Graham and Margaret Blackledge as directors, those allegations were not supported by any evidence which the judge identified; and are contradicted by the material which was put before this court. In my view the judge ought to have reached the conclusion that, once the allegations in respect of which there was a substantial risk that Nigel Tobias' fraudulent conduct had made a fair trial impossible

were put on one side and left out of account, there was no case for relief which remained to be tried.”

337. However, in paragraphs 54 to 56 Chadwick LJ dealt with the situation as to what he would have concluded had a fair trial been possible in relation to some allegations and held that nonetheless a full striking out of the entire claim would have occurred:
- “54. It would be open to this court to allow the appeal against the judge’s refusal to strike out the petition on that ground alone. But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant’s conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court’s function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which



the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was ‘hijacked’ by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners’ case occupied far more of the court’s time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.

56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents, and in the interests of the administration of justice generally, to allow the trial to continue. If he had considered that question, then, as it seems to me, he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court’s desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court’s function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise.”

338. Chadwick LJ also dealt with the correct approach to be taken on an interim application to strike out before trial in paragraph 61 of his judgment:

“61. But I should not leave the matter without this comment. The judge’s observation, in the final paragraph of his first judgment, that ‘if in the course of the trial further evidence emerges that . . . other documents have been suppressed or fraudulently altered, the application to strike out can then be renewed and is highly likely to be successful’ must be taken to have led, in some measure, to the trial thereafter taking the course that it did. It seems to me that it may well be more satisfactory, in a case where there has been admitted forgery or destruction of relevant documents, to decide,

on the application to strike out, whether the full extent of the fraudulent conduct has been revealed, even if that requires oral evidence at that stage. The judge recognised that cross-examination could have been sought on the application in October 1999. It is, of course, a matter of case management for the judge in each case whether to invite cross-examination on an interlocutory application, or to leave the point until trial. But I venture to suggest that a judge faced with an application to strike out in circumstances such as those in the present case ought to address the question whether the better course would not be to resolve the issue, before the trial begins (or, perhaps, as a preliminary issue at the start of the trial), whether full disclosure of the fraudulent conduct has been made. If, in the absence of cross-examination, the judge cannot resolve that issue at the interlocutory stage, then he is left in the position that he cannot be confident that there is no substantial risk that the trial (if it proceeds) will be a fair trial. Indeed, he can be reasonably confident that it will be unfair, in the sense that it will give rise to a detailed examination of issues which ought not, properly, to be occupying the time of the court at the trial. If, on the other hand, he is able to resolve that issue before trial (after cross-examination if necessary) then it will not require further investigation at the trial. If the judge is satisfied, in the light of what he accepts is full disclosure, that there is no substantial risk that the admitted forgery or destruction of documents will lead to a result which is unsafe then he will allow the trial to proceed. But, if he is not satisfied that there has been full and frank disclosure of the fraudulent conduct, then, for the reasons which I have already given, it seems to me that the correct response is to refuse to allow the party in default from taking any further part in the proceedings, with whatever consequences follow from that.”

339. Ward LJ agreed with Chadwick LJ and at paragraph 70 said:

“The trend of the authorities before the CPR was increasingly to support the notion that as the court became more pro-active, so greater importance was given to the need to emphasise and to protect the court’s own interest in administering justice fairly not only as between the parties before the court but to all others using the court service. Access to the courts was open to all but the time of the courts was a precious resource which needed to be managed rigorously in order to be fair to all. The CPR is the apotheosis of those ideals.”

340. In paragraph 73 he said:

“The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing. The matter has become hugely more expensive (to an extent we did not appreciate until we were told when application was made for a freezing order that the amount of the appellants’ costs overall and on a solicitor and own client basis may be in the region of £1.5m). The judge commented at the beginning of his judgment that the hearing had run for 29 days greatly exceeding the parties’ estimate. The original estimate was three weeks and we were told another week to ten days would be required to conclude the matter even on the limited basis that the judge would still permit. The judge did not, however, treat cost and time as elements of the overriding objective. He did not appear to allot to the case an appropriate share of the court’s resources while taking into account the need to allot resources to other cases. In this day and age they are elements of case management which must not only be seen to have been placed in the scales but also given due and proper weight when assessing how justice is to be done to the parties and to other litigants. The balance must be struck so that the case is dealt with in a way which is proportionate to the amount of money involved in the case, its importance and complexity and the financial position of the parties. Mr Tobias stood to gain much had his fraud gone undetected. He was seeking on behalf of the minority shareholders to wrest control of the company from the majority and he persisted in that claim even to the point of his cross-appeal. He bolstered his claim by what the judge found to be a campaign of forgery and, more importantly, the judge was not satisfied with the explanation given for it. He found: ‘In his evidence Nigel sought to give the impression that his forgeries came about as a result of an impulsive moment of madness flowing from his disappointment that his case was not adequately supported by the documents. In my judgment, so far from that being the case, it is apparent that the process of forgery, which Nigel admitted to, was sophisticated and must have taken some time to complete including the special manufacture of headed note paper of the defunct Tobias family company. But for the slip up with relation to the telephone number shown on the headings it would, in all probability, not have been discovered.’ Any notion that this was a petitioner coming to the Court of Equity with clean hands is utterly dispelled by the devastating conclusion in para 44: ‘I am not satisfied that I have received from Nigel a truthful picture of the circumstances of the forgeries which he admits.’

341. And he went on in paragraphs 74 to 75 to say:

“74. This was, therefore, a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour.

75. Even if the judge were correct in his analysis that all effect of the 1994 agreement could be excised from the petition and a prima facie case could be made out of what remained, I am quite clear that, if the CPR are to receive a correct start, then this court must make the clear statement that deception of this scale and magnitude will result in a party's forfeiting his right to continue to be heard.”

342. Then in paragraph 77 he said:

“I have had the opportunity to read in draft the copy of the judgment of Chadwick LJ and I agree with it. I have added these words of my own simply to underline that the principles to apply are those in the new procedural code. They are encapsulated by the need to do justice, case by case. In this case it is no more than justice in that broad sense that the petitioners should be denied the relief which they sought to obtain by persistent cheating.”

343. The next authority was *Masood v Zahoor* [2009] EWCA Civ 650. There, there had been a trial where both sides had relied on forged and false written evidence but the judge had decided that to strike out the claim was not the appropriate sanction for abuse in those circumstances (see paragraph 63 of the Court of Appeal judgment). Mummery LJ reviewed *Arrow* and in paragraph 71 said:

"71. In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In *Arrow Nominees*, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. There is a valuable discussion of the principles by

Professor Adrian Zuckerman in his editor's note entitled 'Access to justice for litigants who advance their case by forgery and perjury' in CLQ [2008] 27 p 419."

344. Then in paragraph 72 he said that it was a very rare case to strike out at the end of a trial and considered that as follows:

"72. We accept that, in theory, it would have been open to the judge, even at the conclusion of the hearing, to find that Mr Masood had forged documents and given fraudulent evidence, to hold that he had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them. We say 'in theory' because it must be a very rare case where, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.

"73. One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and determining the issues in the usual way. If he finds that the claim is based on forgeries and fraudulent evidence, he will presumably dismiss the claim and make appropriate orders for costs. In a bad case, he can refer the papers to the relevant authorities for them to consider whether to prosecute for a criminal offence: we understand that this was done in the present case.

"74. In his note, Professor Zuckerman comments on the judgment of Peter Smith J that, if the judge had struck out the claims, 'he would have spared the legal system considerable resources and would have delivered a clear message to those who might be tempted to use suppression, forgery and perjury to advance their cause'. We can see that, if an application to strike out had been made at an earlier stage of the proceedings, this might well have been the case. Indeed, Professor Zuckerman himself says that the adoption of the 'forfeiture approach would require the court to be alert to the possibility of fraud on the court and take the necessary measures at an early stage' (emphasis added). In a complex case (such as the present) which requires a good deal of evidence before the fraud can be established to the requisite standard of proof, it may be difficult to avoid a full trial.

"75. The judge said at [150] that he would have struck out all the claims if he was dealing solely with the misconduct of Mr Masood. As we have said, we think that it was too late to take that course. But the judge was wrong to hold that the fact that the defendants had also been guilty of misconduct was a reason for him not to exercise the power to strike out the claims on the grounds of Mr Masood's misconduct. In our judgment, the defendants' misconduct was irrelevant. On the assumption that it was not too late to consider striking out the claim, the sole question was whether, by reason of Mr Masood's forgeries and fraudulent evidence, the claimants had forfeited the right to have an adjudication of their claims. The answer to that question did not involve an exercise of weighing the misconduct of the claimants against that of the defendants. The defendants did not start the proceedings. They did not seek relief from the court. They were merely defending the claims brought by the claimants.

"76. It follows that we reject the first ground of appeal. The judge was right not to strike out the claims, although we do not agree with the reasons that he gave for refusing to do so."

345. The point then came before the Supreme Court in *Summers v Fairclough Homes* [2012] UKSC 26 where a claimant had dishonestly exaggerated issues suffered from an accident at work for which the defendant had conceded liability. The question arose as to whether that should result in the claim for damages for the injuries the claimant had in fact suffered being struck out, this being before Parliament introduced a new regime of fundamental dishonesty in personal injuries by Section 57 of the Criminal Justice and Courts Act 2015. The judge refused to strike out and both the Court of Appeal and the Supreme Court upheld that conclusion and the decision. Lord Clarke delivered the Supreme Court's judgment. He dealt with the jurisdiction to strike out in paragraphs 22 to 24:

"22. As stated at the outset, it was submitted on behalf of the defendant that the court has power to strike out the claim both under CPR 3.4(2) and under its inherent jurisdiction.

"CPR 3.4(2) provides:

'The court may strike out a statement of case if it appears to the court

- a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- (c) that there has been a failure to comply with a rule, practice direction or court order.'

"23. Attention was also drawn, both to the overriding objective stated in CPR 1.1 and 1.2 that the court must deal with cases justly, and to the court's general powers of case management in CPR 3.1(2), which includes a power in CPR 3.1(2)(m) to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'.

"24. It was submitted that under those rules the court has ample power to strike out the claimant's claim as an abuse of process. It was further submitted that CPR 3.4(2) should be seen as a codified expression of the pre existing inherent jurisdiction to strike a claim out as an abuse of process. It was correctly accepted on behalf of the claimant that, in making false statements of truth which he knew to be false and in presenting a dishonest case as to the effect of his injuries and on quantum, he was guilty of a serious abuse of process. It was initially submitted on his behalf that there was nevertheless no power to strike the claim out for the reasons given by the Court of Appeal in *Ul Haq v Shah* and *Widlake v BAA*. In the alternative, it was submitted either that the court has no power, or that it would be wrong in principle, for the court to strike the claim out after a trial at which the court has held that a defendant is liable to the claimant in an ascertained sum. In the further alternative, it was submitted that the court should not strike the claim out on the facts of this case."

346. Lord Clarke held that the court could strike out even following a fair trial but only in exceptional circumstances, in paragraph 33. He then considered the authorities relating to the Civil Procedure Rules in paragraphs 34 to 35:

"34. We are conscious of the fact that there are now many cases decided since the advent of the CPR where it has been held that the court should approach the CPR as a code and that it should decline to have regard to decisions under the RSC. However, this is an exceptional class of case and it seems to us that it is appropriate to have

regard to the way in which the inherent jurisdiction of the court was exercised in cases of abuse of process before the CPR came into force.

"35. The pre CPR authorities established a number of propositions as follows:

- i) The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was 'intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court': *Birkett v James* [1978] AC 297 per Lord Diplock at p 318F G. In the latter case it was not necessary to show that a fair trial was not possible or that there was prejudice to the defendant. See also, for example, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, per Lord Woolf MR (with whom Waller and Robert Walker LJ agreed) at p 1436H.
- ii) In a classic, much followed, statement in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 Lord Diplock described the court's power to deal with abuse of process thus at p 536C:  
'This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied. ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'
- iii) The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in *Birkett v James* that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order.
- iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability



and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2959 (Comm), where he summarised the position thus in paras 27 and 28:

'27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.

28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR 3.4 or 24.2 and determined well in advance of the trial.'

v) We agree with Colman J. His conclusions are consistent with *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293, *Webster v Bakewell RDC* (1916) 115 LT 678, *Harrow LBC v Johnstone* [1997] 1 WLR 459, *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 per Latham LJ at para 75 and *The Royal Brompton Hospital NHST v Hammond* [2001] EWCA Civ 550; [2001] Lloyd's Rep PN 526, per Clarke LJ at paras 104 – 109, especially at para 107."

347. He returned to the Civil Procedure Rule position and *Arrow* and *Masood* in paragraphs 36 to 40:

"36. As we see it, the present position is that, whether under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances. Some assistance is to be derived from *Masood v Zahoor* [2009] EWCA Civ 650, [2010] 1 WLR 746, where the judgment of the Court of Appeal (comprising Mummery, Dyson and Jacob LJJ) was given by Mummery LJ. It had been argued that the judge should have struck the claim out as an abuse of process on the ground that some at least of the claims were based on forged documents and false written and oral evidence.

"37. The Court of Appeal referred extensively to the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* and held at para 71 that it was authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. It noted that in the *Arrow* case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. It held that the question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It added that it was not necessary to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. It then referred to what this Court agrees is a valuable discussion by Professor Zuckerman in a note entitled 'Access to Justice for Litigants who Advance their case by Forgery and Perjury' in (2008) 27 CQJ 419.

"38. The Court of Appeal expressed its conclusions of principle as follows:

'72. We accept that, in theory, it would have been open to the judge, even at the conclusion of the hearing, to find that Mr Masood had forged documents and given fraudulent evidence, to hold that he had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them. We say 'in theory' because it must be a very rare case where, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.

73. One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult to see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and determining the issues in the usual way. If he finds that the claim is based on forgeries and fraudulent evidence, he will presumably dismiss the claim and make appropriate orders for costs. In a bad case, he can refer the papers to the relevant authorities for them to consider whether to prosecute for a criminal offence: we understand that this was done in the present case.'

"39. In para 74 the Court of Appeal stressed the importance, if possible, of making an application to strike out at an early stage in order to preserve court resources and save costs. However, it also appreciated that in a complex case it might not be possible to avoid a full trial.

"40. It appears to us that the approach identified in paras 71 74 of *Masood v Zahoor* is somewhat different from that in *Ul Haq v Shah*. It recognises the possibility of striking out a claim at the end of a trial, whereas, as we read *Ul Haq v Shah*, it was there held that such a course was not permissible. We prefer the approach of *Masood v Zahoor*. We can summarise what we see as the correct approach in this way."

348. Those paragraphs included, as in *Arrow*, a reference to the Professor Zuckerman article referred to in *Arrow* and *Masood* as being valuable. And he reiterated that it was possible to strike out for abuse even after a fair trial had taken place. He returned to the width of the Civil Procedure Rules discretion in paragraphs 41 to 45:

"41. The language of the CPR supports the existence of a jurisdiction to strike a claim out for abuse of process even where to do so would defeat a substantive claim. The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made. The only restriction is that contained in CPR 1.1 and 1.2 that the court must decide cases in accordance with the overriding objective, which is to determine cases justly.

"42. Under the CPR the court has a wide discretion as to how its powers should be exercised: see e.g. *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926. So the position is that the court has the power to strike out a statement of case for abuse of process but at the same time has a wide discretion as to which of its many powers to exercise. The position is the same under the inherent jurisdiction of the court, so that in the future it is sufficient for applications to be made under the CPR. We can see no reason why the

conclusion reached should be any different, whether the application is made under the CPR or the inherent jurisdiction of the court.

"43. We agree with the Court of Appeal in *Masood v Zahoor* at para 72 quoted above that, while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability.

"44. We have considered whether the possibility is so theoretical that it should be rejected as beyond the powers of the court. However it was ultimately accepted on behalf of the claimant that one should never say never. Moreover we are mindful of Lord Diplock's warning in *Hunter* quoted at para 35 above that it would be unwise to limit in advance the kinds of circumstances in which abuse might be found. See also the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 31.

"45. It was submitted that an ascertained claim for damages could only be removed by Parliament and not by the courts. We are unable to accept that submission. It is for the court, not for Parliament, to protect the court's process. The power to strike out is not a power to punish but to protect the court's process."

349. I note that Lord Clarke stressed both the width of the court's powers to respond to an abuse and that the power to strike out is not here being used to punish but to protect the court's process.

350. The Supreme Court then referred to the human rights considerations and need to insure that strike out is a proportionate means to control the court's process and to decide cases justly, in paragraphs 46 to 48. The Supreme Court returned to how the court should approach the exercise of the power, although in the context where a fair trial

had occurred, in paragraphs 49 to 53. The Supreme Court referred to the ability and potential for a defendant to protect their position by Part 36 offers in paragraph 54, although that related to the personal injuries claim situation in *Summers* and which does not seem to me to be analogous to the situation here. The Supreme Court referred to the power of depriving a successful claimant of interest in paragraph 55. The Supreme Court referred the potential value of the punishment and penalties available by way of committal, in paragraphs 56 to 59. The Supreme Court referred to the potential value of criminal proceedings in paragraph 60.

351. The Supreme Court then summed up its position with regards to the type of cases before it where there had actually taken place a fair trial in paragraph 61:

"61. The test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial. The more appropriate course in the civil proceedings will be that proposed in both *Masood v Zahoor* and *Ul Haq v Shah*. Judgment will be given on the claim if the claimant's case is established on the facts. All proper inferences can be drawn against the claimant. The claimant may be held entitled to some costs but is likely to face a substantial order for indemnity costs in respect of time wasted by his fraudulent claims. The defendant may well be able to protect itself against costs by making a Calderbank offer. Moreover, it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful. It seems to us that the combination of these consequences is like to be a very effective deterrent to claimants bringing dishonest or fraudulent claims, especially if (as should of course happen in appropriate cases) the risks are explained by the claimant's solicitor. It further seems to us that it is in principle more appropriate to penalise such a claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability."

352. The Supreme Court then made clear that its judgment was dealing with that type of case and situation in paragraph 62:

"62. We note two points by way of postscript. First, nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. As the Court of Appeal put it in *Masood v*

Zahoor at para 73 (set out above) in a passage with which we agree, one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Secondly, nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim. In that event, if the court is aware of it before the end of the trial, judgment will be given for the defendant and, if it comes to light afterwards, it will be open to a defendant to raise the issue in an appeal."

353. That final cited paragraph led Mr Miall to submit that *Summers v Fairclough* was only of limited relevance to me, which is true to an extent as this case is at an early stage, but it does seem to me that the decision contains various important statements of general application.

354. In both *Masood* and *Summers* reference was made to Professor Zuckerman's article in "Access to Justice for Litigants who Advance their case by Forgery and Perjury" (2008) 27 C.J.Q. 419 and said that it was a valuable discussion but without fully stating the extent to which the courts approved it or all of its contents.

355. In his article Professor Zuckerman suggested, at the paragraph starting at the end of page 419, that three possible approaches existed for the court where a fair trial was possible:

"There are three discernible approaches to this problem in the case law. The first is that the court should seek to try the issues between the parties as long as the litigant's fraudulent conduct has not rendered it impossible to hold a fair trial upon such evidence that has not been contaminated by the litigant's fraudulent practices. We may refer to this as the justice on the merits approach. The second is the forfeiture approach, which holds that a litigant who seeks to subvert the court process by suppression of evidence, forgery and perjury has forfeited his right to an adjudication of his cause and his statement of case should be struck out on this ground alone. A third approach brings to bear on the issue the overriding objective of the CPR. It holds that a litigant who suppresses or forges documents or adduces false testimony is imposing a greater and unjustified burden on court resources, because such subversive practice would oblige the court to devote more time and effort to disentangling reliable evidence from false evidence. According to this approach a litigant who employs such

practices does not deserve the investment of the court's scarce resources to his case and it should therefore be dismissed without adjudication on the merits. The third approach is a modern compromise between the two approaches; it allows the court to proceed with the case provided that the contaminated evidence does not necessitate the investment of disproportionate court resources in determining the facts.”

356. Professor Zuckerman applied those three approaches to the judgments in *Arrow* in the first two paragraphs of page 422 of the article:

“The striking out of the petitioner's case was thus justified on three grounds. First, that once the contaminated evidence has been excluded, insufficient evidence remained to support the judge's findings in favour of the petitioners and consequently a fair trial was no longer possible. The second ground was that the petitioner had forfeited his right to a trial of his case because he had not come to court with clean hands but rather determined to subvert the legal process. The third ground was that the petitioner's fraudulent conduct of the proceedings had led to unjustified waste of court resources and his action should have been stopped.

Each of these principles has different implications and may point to different outcomes in a given case. The justice on the merits approach will require the court to give a fraudulent litigant an opportunity to prove his case provided he can do so by evidence which is uncontaminated by his fraudulent practices. By contrast, the forfeiture approach would deny the fraudulent litigant such opportunity. The outcome of the application of the overriding objective would depend on the extent to which the litigant's fraudulent practices have increased the court's burden of determining the truth.”

357. Professor Zuckerman then considered the approach of the first instance judge in *Masood* in the third and fourth full paragraphs on page 424 of the article:

“There is, however, a more fundamental point to be made about the decision and it concerns the implied rejection of the forfeiture approach. What held the judge back from striking out the claimant's case was the fact that the defendant was equally guilty. “The difficulty I have”, Peter Smith J. said, “is with the application of an appropriate sanction” (at [151]).

To regard striking out as a sanction or a punishment for wholesale and flagrant subversion of the court process is to misunderstand the forfeiture approach.

Striking out in such circumstances does not amount to a denial of access to court, as the judge seemed to think. It is merely an acknowledgement of the litigant's refusal to participate in a properly conducted fact-finding process. By declining to entertain the litigant's case in such a situation the court merely draws the logical conclusion from the litigant's refusal to accept the rules of the institution the protection of which he seeks. Sending away a litigant without adjudicating the merits of his case in this situation is no different from refusing a driving licence to a person who, in order to secure a favourable outcome, distracts and obstructs the driving instructor during the driving test."

358. Professor Zuckerman then sought to affirm his conclusion that the forfeiture approach was the correct one in the first two full paragraphs on page 425 of the article:
- "A number of legal rules have developed which implement this maxim of equity by denying relief regardless of whether an undeserving opponent will benefit as a result. Two rules in particular should have provided guidance for dealing with the situation in this case. The first is embodied in the maxim *in pari delicto potior est conditio defendentis*; namely, where both parties are equally at fault the position of the defendant is the stronger. For example, where the parties are on an equal footing as regards an illegal contract neither can recover any property or money transferred to the other in pursuance of the contract. The other is in the maxim *ex turpi causa non oritur actio*; namely, no court will lend its aid to a man who founds his action upon an immoral or an illegal act. Thus the court will refuse to entertain an action founded on an illegal or immoral cause, even if this will benefit an undeserving or even equally guilty defendant. Finally, a defendant may rely on the illegality of a transaction as a defence to a restitutionary claim, when it would otherwise succeed. 4 Common to these rules is the recognition that justice is best served by refusing to allow court adjudication to be used for disentangling illegal or immoral transactions. Parties who embark on enterprises which violate the law or good public order are not entitled to demand protection from the institutions whose function is to uphold the law. The same should apply to litigants who seek court adjudication but at the same time employ fraudulent means to divert the court from the truth. And there is the further consideration of the overriding objective, highlighted by the Court of Appeal in the



Arrow Nominees case. Litigants who forge documents and adduce perjured evidence not only discredit the legal process but impose an extra burden on it which diverts resources from more deserving litigants.”

359. Professor Zuckerman then came to his own conclusion in the paragraph on page 426 of the article:

“The adoption of the forfeiture approach would require the court to be alert to the possibility of fraud on the court and take the necessary measures at an early stage. In the Arrow Nominees case Chadwick L.J. made helpful remarks about the appropriate procedural course to be followed (at [64]). Where there has been admitted forgery or destruction of relevant documents and a striking out application has been made, the court should investigate there and then whether the full extent of the fraudulent conduct has been revealed, even if that requires oral evidence at that stage, and should resolve the issue before the trial if possible, or even as a preliminary issue at the start of the trial. Chadwick L.J. was of the view that if at the end of the hearing the judge cannot be confident that there is no substantial risk that the trial would be a fair trial, he should conclude that the trial would be unfair, if only because it would give rise to a detailed examination of issues which ought not, properly, to be occupying the time of the court at the trial. By following this procedure and applying the forfeiture approach the court will save itself much unnecessary trouble and promote more effectively the interests of the administration of justice than it would by trying to adjudicate between liars and forgers.”

360. Thus Professor Zuckerman favoured the approach that a dishonest litigant forfeits the right to have his claim tried rather than adopting what he calls the simple merits approach or the more nuanced CPR approach.

361. Professor Zuckerman returned to this theme in a further article, "Must a fraudulent litigant be allowed to think: if the fraud is successful I will gain much, if it is not I will still recover my legitimate claim?" in 2011 CJQ 30(1), 1 to 14. Here Professor Zuckerman disapproved of the outcome of *Masood* in the Court of Appeal and restated his preferred forfeiture approach. He stated in effect that the law should simply treat the loss of a valid claim as being the consequence of a breach of relevant rules, in the same way as a claim may be struck-out for breaches of the rule requiring someone to

sign a genuine statement of truth or the rule requiring someone to give disclosure only of genuine documents. He referred to striking out for abuse being possible in other contexts, for example, in the context of the Henderson principle that a party who lacks a sufficiently valid reason for not bringing all their claims in a single set of proceedings may be barred from later bringing a valid claim in a second set of proceedings.

362. Mr Miall also referred me to the White Book notes at 3.4.17. These make clear that the court's approach is a two stage one. Firstly, as to whether there is an abuse and, secondly, as to what is a proportionate response (see the paragraph beginning "Cases on Forms of Abuse" and the citations from *Cable v Liverpool Victoria* [2022] EWCA Civ 1105 and *Michael Wilson v Sinclair* [2017] EWCA Civ 3):

“4.17 Most of the cases noted in paras 3.4.4 to 3.4.16 deal with particular instances of a fundamental principle that the court will not allow its process to be abused (and see also paras 3.1.17 to 3.1.17.6; the limits on the court’s power to vary or revoke orders; and paras 3.11.1 to 3.11.7 concerning the court’s powers to make civil restraint orders). The court’s objectives in all of these topics are to counteract any deliberate or incorrigible behaviour which would otherwise cause injustice and to protect litigants and also the court itself from the unnecessary waste and delay that such behaviour may cause.

Proceedings can be struck out as an abuse of process even if there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct (*JSC VTB Bank v Skurikhin* [2020] EWCA Civ 1337 at [51]; *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 7/0 noted in para.3.4.18, breach of a pre-action protocol may amount to an abuse of process). As to whether a deliberate underpayment of the court fee is payable on the issue of a claim, see the conflicting decisions in *Lewis v Ward Hadaway (A Firm)* [2015] EWHC 3503 (Ch); [2016] 4 W.L.R. 6 and *Atha & Co Solicitors v Liddle* [2018] EWHC 1751 (QB); [2018] 1 W.L.R. 4953. (In *Hayes v Butters* [2021] EWCA Civ 252; [2021] 1 W.L.R. 2886 Peter Jackson LJ expressed a provisional view against the disallowance of a claim on limitation grounds because of an inadvertent miscalculation of a court fee ([24]). In

*Citysprint UK Ltd v Barts Health NHS Trust* [2021] EWHC 2618 (TCC), Fraser J ruled that an inadvertent underpayment of a court fee at the time issue of a claim form did not, in that case, invalidate the issue of the claim form. It was a minor mistake which was corrected administratively (shortly after the steps taken to serve the claim form had been taken ([7], and see further, para.3.10.4)).

A decision made by a trial court that part of a claim is dishonest or fraudulent is unlikely to lead to a striking out of the whole claim under r.3.4(2) or under the inherent jurisdiction if the court can still make a proper assessment of both liability and quantum. The draconian step of striking a claim out is always a last resort. Instead the trial court can ensure that the dishonesty does not increase the award of damages and can make orders penalising the claimant in costs, interest and by way of proceedings for contempt and criminal proceedings, it being open to a judge to refer the case to the CPS or DPP (*Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004; the Supreme Court's ruling in this case was subsequently negated by Parliament in respect of personal injury claims: the Criminal Justice and Courts Act 2015 s.57, as to which see para.16.5.2 and Vol.2 para.3F-32.3).

Cases on forms of abuse falling outside the preceding paragraphs of this commentary are legion. Many are briefly summarised below. However it is not appropriate to treat these cases as settled precedents. Decisions as to abuse are extremely fact-sensitive. Whilst the circumstances of a particular case may, at first sight, raise an appearance of abuse, appearances can be deceptive.

There is a two-stage test. First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (*Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110 at [63]). It is at the second stage that a balancing exercise, and considerations of proportionality, become relevant. The court must engage in a close "merits based" analysis of all the facts. "This will take into account the private and public interests involved, and will focus on the crucial question:

whether in all the circumstances a party is abusing or misusing the court's process" (Michael Wilson & Partners Ltd v Sinclair [2017] EWCA Civ 3; [2017] 1 W.L.R. 2646 at [48(3)] citing two earlier judgments).

In each of the following cases a claim was struck out as an abuse.

- Carter Commercial Developments v Bedford BC [2001] EWHC Admin 669; [2001] 34 E.G. 99 (C.S.), attempting to bring a Part 8 claim instead of judicial review proceedings in order to avoid the time limits applicable to judicial review (and see Clark v University of Lincolnshire and Humberside [2000] 1 W.L.R. 1988, CA, obiter).
- Ashraf v Secretary of State for the Home Department [2013] EWHC 4028 (Admin) including an unmeritorious unlawful detention claim in judicial review proceedings solely to avoid a transfer from the Administrative Court to the Upper Tribunal.
- Nomura International Pic v Granada Group Ltd [2007] EWHC 642 (Comm); [2008] Bus. L.R. 1, issuing a claim for an illegitimate benefit, namely the prevention of further time running under the Limitation Acts for a claim C could not properly identify or plead.
- Pickthall v Hill Dickinson LLP [2009] EWCA Civ 543; [2009] P.N.L.R. 31, issue of a claim by a bankrupt knowing he lacked title to do so but hoping would be assigned to him later (for contrary cases where no actual knowledge was proved, see Pathania v Adedeji [2014] EWCA Civ 681 and Munday v Hilburn [2014] EWHC 4496 (Ch); [2015] B.P.I.R. 684).
- Towler v Wills [2010] EWHC 1209 (Comm) serving particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial in circumstances showing that even after attempting amendments, C is unable to put forward a coherently pleaded and intelligible claim (but note, (i) the word "obstruct" in r.3.4(2)(b) means "impede to a high extent" and thus the court will not strike out a statement of case merely because it raises some irrelevant issues or otherwise generates some untidiness in the pleadings (Alas Consulting Ltd v Avis Europe Pic [2005] EWHC 982 (TCC)); and (ii) the importance of giving C an opportunity to amend a defective claim (Kim v Park [2011] EWHC 1781 (OB)).
- Tchenguiz v Grant Thornton UK LLP [2015] EWHC 405 (Comm); [2015] 1 All E.R. (Comm) 961, particulars of claim which, at 94 pages, failed to comply with the

principles set out in the Admiralty and Commercial Court Guide (which states that statements of case must be no longer than 25 pages unless the court has given permission for a longer document); Leggatt J struck out the particulars of claim, disallowed the costs of drafting them and ordered fresh compliant particulars of claim to be served.

- *Município De Mariana v BHP Group Pic* [2020] EWHC 2930 (TCC); a group action relating to a dam failure in Brazil was commenced on behalf of many thousands of individuals and organisations against companies alleged to be indirect polluters. Similar proceedings involving many of these claimants were already on foot in Brazil against companies alleged to be direct polluters and some high-value judgments had been obtained and some compensation had been paid out to some claimants. Turner J ruled that there was no reason in principle why Henderson considerations should not be relevant in circumstances in which a claimant seeks to run two sufficiently related actions in two different jurisdictions whether sequentially or in parallel ([56]). Given the enormous overlap of issues raised in both sets of proceedings, the learned judge described the task facing the managing judge in England would be “akin to trying to build a house of cards in a wind tunnel” ([93]). For this and several other reasons the claims were struck out as an abuse of the court process. Following the grant of permission to appeal ([ 2021] EWCA Civ 1156 ) this case was listed for an appeal hearing but that listing has now been vacated.”

363. The White Book does list a number of examples where striking out took place, none of which is directly relevant to this case.

364. Mr Miall in relation to the law emphasised from the above citations: firstly, the ways in which forged documents can corrupt the entire procedural process, especially the trial itself; secondly, that even where there can be a trial (a) a party can be said to have forfeited their right to pursue their claim by non-compliance with the rules and/or dishonestly and, also, there is still a requirement to protect the integrity of the court process which can justify a striking out. Mr Miall accepted that there was a two stage process and that there was a need to show an abuse of process, but said even to make a statement recklessly as to whether it was true or false might be a contempt and thus an abuse of process, relying on the decision in *Berry v Sheer* [2013] EWHC 347. Mr

Miall said that in this case Dr Panico and through him PTL had advanced a case based on a 2014 written IMA which they knew to be false.

365. Mr Phillips chose to emphasise the care that the court should take in imposing a draconian sanction to strike out.
366. I have considered all the authorities cited and the submissions of law and extract the following principles. Various of these are from *Summers* where I accept that the Supreme Court made clear that its judgment related to the situation of considering a strike out after a trial had taken place, but the Supreme Court referred to the CPR and the CPR approach on human rights. It seems to me that those matters have a general application including as to applications, as here, to strike out before trial.
367. I do not see the Professor Zuckerman articles as being authoritative, in particular regarding his strict forfeiture approach, for the following reasons. Firstly, the Court of Appeal and the Supreme Court do not say that the court should adopt a forfeiture approach. They merely say that the first article is a valuable discussion and they do not refer to the second article at all.
368. Second, even Professor Zuckerman seems to accept that there is a third course between his merits approach and his forfeiture approach, which he calls a CPR compromise approach. It seems to me that that is precisely the approach that the Court of Appeal and the Supreme Court adopt. They too reject the merits approach of all that matters is whether or not there can be a fair trial, but they do go on to say that the question is what is appropriate and proportionate to preserve the court's process and its integrity.
369. Thirdly, Professor Zuckerman's own criticism in 2011 of the Court of Appeal in *Masood* shows that the Court of Appeal did not adopt his forfeiture approach.
370. Fourthly, Professor Zuckerman relies on the law of illegality to provide for a forfeiture approach, but there the court now adopts a nuanced approach based on applying various underlying policies to what has occurred (see *Patel v Mirza* [2017] AC 467).

371. Fifthly, Professor Zuckerman relies on a proposition that a breach of a rule will require a strike out. However, generally a breach of the rule does not require a strike out and the rules do not themselves provide for automatic strike out and contain their own power to waive breaches (see CPR 3, rule 10). And even if there is a strike out or other sanction imposed by a rule, there is a power to grant relief (see CPR 3.9 and *Denton v White* [2014] 1 WLR 3926). Likewise in relation to the application of the Henderson principle, that itself is nuanced, as appears from the decision in *Johnson v Gore Wood*.
372. I do, however, extract the following principles from the case law. Firstly, where there is an abuse of process there is a jurisdiction to strike out or to make another responsive order.
373. Secondly, included within the categories of abuse of process are: (i) advancing a contention of fact known to be false or doing so reckless as to whether or not the fact is true or false; (ii) signing a statement of truth for a factual statement which is known to be false or where the maker is reckless as to the truth or falsity; and (iii) relying on a document where one knows of its untruth or where one is reckless as to the truth of its contents.
374. Thirdly, if the abuse of process is established, the court will decide what is the appropriate response.
375. Fourthly, the appropriate response can take many forms, including for the payment of costs, including on the indemnity basis, and also including striking out the claim, but the response must be proportionate to the circumstances.
376. Fifthly, if the abuse directly or indirectly renders there to be a real risk of a fair trial being impossible, then strike out is very likely to be and to be the only appropriate response. That situation may arise from the abuse tainting the documentary or witness evidence, including by an indirect process permutation.
377. Sixthly, the abuse may be such, whether or not a fair trial is possible, that the court should conclude that it and/or its consequences are so serious, especially where the abuse is a flagrant and continuing one or is an affront to the court, that the relevant

party has forfeited the right to bring their claim in order for the court to properly protect the court process and its integrity.

378. Seventhly, nevertheless striking out is still a draconian remedy. The jurisdiction to respond to abuse is a flexible one and the response must be a proportionate one of achieving the aims of controlling the process, preserving its integrity and deciding cases justly.
379. Eighthly, this flexible approach involves striking a balance while realising that all reasonable steps should be taken to deter relevant abuses, but bearing in mind that there are various ways to do that within the processes of both law generally and the procedural process of the individual case.
380. Ninthly, if the fraud or dishonesty can be seen to taint the whole claim, that alone will justify a strike out.
381. Tenthly, if there has already been a trial, it will be an exceptional case which would justify a strike out. That, however, is not the situation here as there has been no trial and the court should consider the application now rather than deferring it to a trial or later stage.
382. Eleventhly, in general the fact that another party has advanced forged documents or been guilty of abuse is irrelevant and is not part of the balancing exercise.
383. Twelfthly, the court should bear in mind that stopping the proceedings will lead to various benefits, including saving time, cost and judicial and court resource.
384. I have applied those principles and approach in the remainder of this judgment.
385. Mr Miall first identified the abuse on which he seeks to rely and he referred to PTL, by Dr Panico, advancing a case and obtaining a worldwide freezing injunction based on there having been a written investment management agreement in November 2014. It is now common ground that the written IMA only came into existence in January 2018. In any event, that is amply demonstrated on the documents before me, including those that I referred to earlier. The written IMA document was simply backdated to November 2014.



386. Mr Miall based his contention on four documents in the proceedings. The first is the claim form which contains the words:  
"The claimant also seeks rescission of a contract of the first defendant dated 30 November 2014."
387. It is technically true that that is only an assertion that the document was so dated, but it clearly implies that it was made then. Mr Miall submits that any reasonable observer would see that as obvious.
388. The second is the particulars of claim. Paragraphs 15 to 20 refer to discussions. Paragraph 21 says:  
"21. As a consequence of the abovementioned discussions and representations and induced thereby, the Trustee, as trustee of Jacaranda, entered into an investment management agreement dated 30 November 2014 ("the IMA") a copy of which is annexed hereto at pages 1 – 3. The IMA, which was produced on BGB letterhead was signed by Mr Pinto on behalf of BGB (which is described by Mr Pinto's signature as "The Manager")."
389. The words "the IMA" are there defined. Subsequent paragraphs, for example, paragraphs 22, 25 and 26, refer to matters consequent on "the IMA". In paragraph 26, it is stated that pursuant to the IMA on 18 December 2014 PTL instructed the bank to transfer 8.7 million euros to the funds. Mr Miall says that it is clearly being stated that the IMA document was actually signed on 30 November 2014 or at least thereabouts.
390. Paragraphs 62 and 64 then seek to rely on the terms of the IMA which are said to have been breached, although also other duties apart from the IMA were pleaded.
391. The document has a full statement of truth in modern CPR form:  
"The claimant believes that the facts stated in these particulars of claim are true. I understand that proceedings for contempt of court may be brought against anyone who makes or causes to be made a false statement in a document verified by a statement of truth without an honest belief in its truth. I am duly authorised by the claimant to sign this statement."

And it is signed by Dr Panico.

392. The third document is Dr Panico's first affidavit of 29 August 2020 used to obtain the worldwide freezing injunction and sworn by Dr Panico, though not in front of a solicitor. Paragraphs 10 to 13 deal with discussions in autumn 2014. The first sentence of paragraph 14 reads:

"[PTL] as trustee of the Jacaranda trust entered into an investment management agreement dated 30 November 2014 which agreement was signed by Mr Pinto in the circumstances I explain in the next paragraph. [And he then went on to refer to the investment strategy contained in it]"

393. Paragraph 15 of the affidavit read:

"15. The IMA was drawn up on BGB letterheaded paper and it was provided to me by Gennaro Pinto via email. The IMA is headed "Addendum" but that is a misleading heading. In fact, that document was the only one executed and the Addendum does not form part of a larger document. It does, however, include the risk profile set out in Appendix 1 to the Addendum (which I have also exhibited). I had the impression that the IMA was in a standard form prepared by BGB and that there was no room for myself on behalf of Private Trustees to negotiate any of its terms. In the course of preparing this affidavit it has been drawn to my attention that, notwithstanding the fact that the IMA bore the logo and registered office address of BGB and that it was signed on behalf of "BGB Weston" by Gennaro Pinto, with whom I had only ever communicated in his capacity as a representative of 8GB, the IMA states that it has been entered into by Private Trustees and a party described as BGB Weston Asset Management Ltd. I had not noticed this to be the case before it was brought to my attention and at no point in the 5 years since the IMA was signed did anybody acting for BGB mention BGB Weston Asset Management Ltd to me or so far as I am aware (having made enquiries) to any other person representing Private Trustees."

394. Mr Miall referred with force to the final sentence, which contains the phrase: "At no point in the five years since the IMA was signed", which he submits clearly implies that the actual signature took place five years prior to the swearing of the affidavit on 28 August 2020 and hence at some point in 2014 or 2015. In paragraph 18 reliance

was placed by Dr Panico on the investment policy as contained in the IMA document. In paragraph 69 he verified the particulars of claim.

395. Mr Miall further relies on a fourth document, being the third affidavit of Mr Panico, which was now properly sworn before a solicitor on 16 November 2020. He refers to paragraph 7:

“I was troubled by this possibility as I had devoted a significant amount of time to the preparation of the Affidavit in order to ensure that Private Trustees S.A. complied with the obligation to make full and frank disclosure in its submissions to the court.”

396. Mr Miall also relies on paragraph 8, where Dr Panico said that he had now re-sworn his first affidavit. He also relies on paragraph 10 and in particular its first sentence, where Dr Panico used the words:

"In order to comply with the claimant's obligation to make full and frank disclosure."

397. Mr Miall referred to paragraph 11 and its final sentence to the effect that because of timing considerations he had asked his wife, a qualified chemical engineer:

"To attend on me as I swore an oath to the truth of the contents of my affidavit and its exhibits."

398. Mr Miall then relied on paragraph 12 of the third affidavit which read:

“12. I would like to make clear to the court that I am and always have been acutely aware of Private Trustees’ and my obligation to provide full and frank disclosure to the court and trust that this witness statement and the re-sworn affidavit and exhibit demonstrate our continuing commitment to those obligations.”

399. The obligation on a without notice application for a worldwide freezing injunction is to make full and frank disclosure. It is of course a matter which is fundamental to the court being prepared to exercise its jurisdiction to grant what is a draconian interim remedy with only having heard one side and not having heard the person or persons against whom the remedy and the worldwide freezing order is directed.

400. Mr Miall submits that each of those documents states and clearly conveys as their only meaning the written IMA document was signed on 30 November 2014 and in any event prior to the trust monies being first transferred in December 2014. Mr Phillips's response to this was along the lines that the written IMA reflected what had been agreed in 2014. I am not sure that this is any response at all to Mr Miall's contention that those four documents contained incorrect statements and meanings. However, I accept Mr Miall's submissions; firstly, that each document would be read by any and every reasonable reader to the effect that the written IMA had been signed on or about 30 December 2014 and that it contained specific terms on an investment strategy which BGB had breached and also that its signing had been induced by fraudulent misrepresentations. Secondly, that Dr Panico would also be seen by any reasonable reader and by any judge dealing with the application for a worldwide freezing injunction as saying that Dr Panico had provided full and frank disclosure, that is to say that Dr Panico had told the entire relevant history without missing any elements out.

401. Mr Miall next submitted that those statements were made fraudulently and, if not deliberately deceitfully, then recklessly by Dr Panico and thus PTL and so as to amount to an abuse of process. The general rule where subjective fraud or wrongdoing is alleged is that a person must both appreciate in their own mind or be reckless as to the true meaning and must appreciate in their own mind or be reckless as to its being false. Dishonesty is, following the Supreme Court of *Ivey v Genting* [2018] AC391, somewhat different. The court needs to ask with regards to dishonesty as to what was in Dr Panico's mind and then consider objectively if his actions in the light of his mental beliefs, including both regarding the history of the matter and the meaning of his documents, were dishonest according to the standards of honest and reasonable people.

402. In previous judgments in this matter I explained that where allegations of this nature were being made there should be opportunity for cross-examination of Dr Panico; and I made my order of 15 February 2022 to provide, firstly, that BGB and Mr Gallucci should supply their statement of matters relied upon to justify their contentions as to Dr Panico's state of mind, and secondly, that Dr Panico must attend these hearings to be cross-examined, and that if he did not attend then his recent witness statement

seeking to explain his state of mind and conduct would not be read. When Dr Panico did not attend this hearing, I refused Mr Phillips' application for those witness statements to be read.

403. Mr Miall made lengthy submissions as to Dr Panico having had a fraudulent and dishonest state of mind, and that he had deliberately, and if not deliberately then recklessly, deceived the court, which were in summary as follows. Firstly, Dr Panico is a qualified lawyer, albeit in other jurisdictions, and an author of books on international trust law, and therefore he should understand the importance of being honest to the court and of affidavits and of statements of truth.
404. Secondly, Dr Panico would have known of the importance that the entry into the written IMA had in numerous respects, including: firstly, with regards to the case in contract as otherwise there would be a very real argument that there had been no contract between BGB and PTL; secondly, in relation to the contract claim as the written IMA document contained the investment strategy with the terms which PTL were relying upon and which it was also alleged would give rise to relevant fiduciary duties; thirdly, in relation to the conspiracy claims as the written IMA was said to have been signed as a result of inducements made to PTL for it to do so by way of fraudulent misrepresentations.
405. Thirdly, Mr Miall submitted that the creation of the written IMA and the circumstances of its creation must have been in Dr Panico's mind at the time of preparation and signature of the claim form, original particulars of claim and affidavits; as, firstly, its creation in January 2018 had been fraught, being incircumstances where Dr Panico had realised there was no written IMA and also where there was no suggestion ever that a previous written IMA had existed and been lost. At that point in time Dr Panico was under pressure from the trust beneficiaries and others to produce a written contractual document. Secondly, that in January 2018, as a result of the matters which I have just mentioned, the need for a written IMA document was seen by Dr Panico as being important. Thirdly, Dr Panico had further had to produce a written IMA document to the beneficiaries and others in November 2019. Fourthly, it was specifically recorded in the minutes of the 21 November

meeting that the IMA had been signed on 30 November 2014, which meeting took place only some ten months after the actual signature of the written IMA document in January 2018. Fifthly, the subsequent requests for production of the written IMA document resulted in Dr Panico and Mr Pinto engaging in some form of re-signing of the written IMA document in November 2019 as the 2018 version was not then available, even though it must have been later found in order for it to be exhibited to Dr Panico's first affidavit. Mr Miall submits that this course of events, being relatively recent in 2020, must have been present to Dr Panico's mind in 2020.

406. Fourthly, PTL and thus Dr Panico must have gone through a lengthy process in 2020 of investigating and considering the history before the claim was actually brought. The problems with regards to the falsity of the IB documents were identified in May 2020. PTL then made an abortive without notice application for a worldwide freezing order in July 2020 but withdrew it, and Mr Miall submits that it was withdrawn then presumably in order that the factual history could be considered still further and in further detail. Mr Miall points to the statements in Dr Panico's third affidavit to the effect that he had spent a lengthy time checking the then version of the history which he was then advancing.
407. Fifthly, Mr Miall submits that Dr Panico must have searched his and PTL's emails and documents' history during the course of all this and which would have revealed what had happened with regards to the written IMA document clearly and apparently. Mr Miall pointed to the fact that Dr Panico repeatedly said that he knew and appreciated the obligations of full and frank disclosure, and Mr Miall submits that if Dr Panico had not done his best to research and locate the full history then his statements with regards to having complied with the obligation of full and frank disclosure would themselves be false and fraudulent. Mr Miall particularly points to what must have been the process of locating the original written and signed IMA document for the purpose of attaching it as an exhibit to Dr Panico's first affidavit, and submits that that process itself must have involved both a search and an ascertainment of the true history. Mr Miall specifically points to the wording of Dr Panico's first affidavit and the reference "in the five years since the IMA was signed" and submits that the entire process of the creation of the documents in the claim must have involved a detailed investigation and set of statements to the solicitors and counsel instructed. In all those circumstances,

Mr Miall says that Dr Panico must have reminded himself and been reminded of the actual history with regards to the written IMA document, even if in some way (which Mr Miall would submit would be inconceivable) Dr Panico had forgotten at some point what had happened.

408. Mr Miall next points out to me that in the circumstances of my having excluded from consideration Dr Panico's recent witness statements I have no explanation before me from Dr Panico or the claimant's side as to how or why the various documents referred to by Mr Miall, being the claim form, original particulars of claim and Dr Panico's affidavits, came to contain the wordings that they did. As Dr Panico has not attended notwithstanding his opportunity to do so, I have no oral explanation either.
409. Next Mr Miall submits that I should draw the inference from Dr Panico's non-attendance that he has deliberately chosen to absent himself because either he would have had to explain on oath that he had deliberately made known mis-statements or, alternatively, he would have known what he would end up perjuring himself in denying that in cross-examination.
410. Mr Miall further points me to what Mr Miall says are other deceptions by Dr Panico in this area and which Mr Miall submits demonstrate a propensity on the part of Dr Panico to deliberately lie in relation to the written IMA. Mr Miall refers firstly to the fact that Dr Panico chose to backdate to 2014 the written IMA document in January 2018. Secondly, that Dr Panico appears to have told the beneficiaries in 2018, 2019 and onwards that the written IMA document had been signed in 2014 when he knew that it was not, and further that he was prepared to have the IMA document re-signed by Mr Pinto, again in backdated form.
411. Mr Miall further relies on the fact that when the defendants advanced the true history following the grant of the worldwide freezing injunction, Dr Panico seemingly simply instructed PTL just to agree to a discharge of the injunction and to pay costs, but did not either: (i) confess and apologise to the court or the defendants; or (ii) seek to amend the claimant's case until over a year had passed and only did so following the first and second defendants making their application to strike out and for reverse summary judgment.

412. Mr Miall submits that all of this was an outrageous abuse of process at the upper end of the scale, relying in summary on submissions that: firstly, it was both dishonest and fraudulent; secondly, that it took place in the context of the then claimant PTL, itself a professional trust company, seeking a worldwide freezing injunction without notice but with understanding of the associated duty to make full and frank disclosure; thirdly, it was in practice a result of previous deceptions of PTL's own beneficiaries; and fourthly, there is simply no contrition shown by Dr Panico, and Mr Miall submits that the recent resignation of PTL as trustee and replacement by IMT may be a consequence of what has happened but does not in any way show any repentance on the part of PTL.
413. Mr Phillips submitted in answer, firstly, that Dr Panico had taken the view reasonably that the date of the IMA's signature did not matter because Mr Pinto, the then agent of BGB, had been happy to sign a backdated agreement which effectively, as Mr Pinto accepts even if Mr Gallucci does not, reflected the actual agreement and relationship in 2014. Secondly, that in general Dr Panico is likely simply to have been panicking in 2020 in view of what appeared to be the massive damage that the trust had suffered, and which the claimant says was the fault of the defendants. Thirdly, that the court should not lightly infer subjective deceit or wrongdoing or an objectively dishonest subjective state of mind. Fourthly, that there is an explanation for Dr Panico's non-attendance, being that PTL had had to resign as trustee as a result of what has in any event been a disaster for the trust, and in those circumstances had no reason to put itself out by attending, and especially in circumstances where Dr Panico would find attending to be cross-examined highly embarrassing in view of the history, whatever had been his past states of mind.
414. I have had to consider on the civil standard of proof, that is on the balance of probabilities as to what is more likely than not, these questions of Dr Panico's subjective state of mind, although I have done so bearing in mind that people tend more often to act in a non-fraudulent manner and a non-dishonest manner, although the test is still one of balance of probabilities where the burden is on the first and second defendants who are advancing this case.



415. I have considered all the evidence and submissions before me. My conclusion is that the first and defendants have shown that it is more likely than not that Dr Panico made his various false statements to the court knowingly, that is to say knowing both how they would be understood and what the meaning was, that is that the written IMA had been signed on or about 30 November 2014, and that that understanding and meaning was false.
416. I conclude that in general, but not entirely, for the reasons given by Mr Miall but I give the main weight to the following matters. Firstly, Dr Panico is and was an experienced lawyer in a commercial, that is to say international trust, context who would know of the importance of written contracts and the importance of precision as to documentary and legal matters. There is no suggestion that Dr Panico had any lack of grasp of English, even if his first language is and was Italian.
417. Secondly, the process of creating the claim form, original particulars of claim and the first affidavit must have been lengthy and substantial. It took place over a number of months with solicitors and counsel and where Dr Panico expressly recognised the duties of full and frank disclosure and had clearly been told what they meant, that is that there should be set out all that might, not simply all that would be relevant. That process must have involved a search and review of the email and documentary history, both generally and, as Dr Panico had to do and have done, in order to locate the original version of the signed written IMA from January 2018 where it had previously been mislaid. That process must, it seems to me, have involved Dr Panico reminding himself of what was the true date on which the written IMA had been signed.
418. Thirdly, not only was the written IMA created in January 2018, only some 26 to 30 months before the various court documents, but also the creation of the IMA had been gone over in late 2019, being only some 7 to 10 months before the preparation of the court documents. It seems to me that the true history is very likely to have been present in Dr Panico's mind in 2020 for that reason.
419. Fourthly, I do draw inferences here and elsewhere against Dr Panico as a result of his non-attendance for cross-examination. This is for the following particular reasons. Firstly, no good reason has been given for that non-attendance, nothing, for example,

of a medical nature. In fact no explanation has been given to me even of any efforts made by IMT, the present claimant, to have Dr Panico to attend; rather, I gave Dr Panico a full opportunity to attend and indeed ordered him to do so. Secondly, it seems to me that the fact PTL has ceased to be a trustee is of little weight. Dr Panico appears to have decided not to seek to defend his conduct, and in any event if the severance of the relationship was because the beneficiaries may be complaining about the conduct of PTL as trustee, then Dr Panico's not attending to justify himself or to seek to protect the interests of the trust by explaining how he was supposedly being honest itself suggests that Dr Panico knows that he was being dishonest. It seems to me that an honest man would have attended the hearing, firstly to explain himself, secondly to protect the trust beneficiaries and thirdly to protect himself by protecting the beneficiaries from a strike out application. Thirdly, with regards to the suggestion that Dr Panico's non-attendance was due to embarrassment, it seems to me that the same points exist, and I accept Mr Miall's submission that any embarrassment is likely to be due to Dr Panico realising that he could not give any explanation which would apparently be credible. I therefore do draw the inference that Dr Panico has not attended as he knew cross-examination would involve one or more of his having to admit deceit or dishonesty, or his perjuring himself. But it seems to me that even if I did not draw this inference I would come to the same conclusion on the balance of probabilities test as the effect of my order and the application of Civil Procedure Rule 32.7 is that I simply have no evidence before me as to Dr Panico's mindset which would or could justify the wordings used by him in those documents.

420. Fifthly, the wordings of the documents themselves are absolutely clear. The clearest is the phrase I have quoted from paragraph 15 of the first affidavit: "In the five years since the IMA was signed." It seems to me that Dr Panico must have understood that he was saying that the written IMA had been signed in 2014 or possibly 2015 when he clearly knew, it seems to me from the matters which I have referred to above, that that was not the case. It also seems to me that Dr Panico must have known that using that phrase involved him not providing full and frank disclosure as to what had happened.
421. Sixthly, I also give weight to the fact that Dr Panico was prepared to deceive others, including his own beneficiaries, with regards to the creation and history of the written IMA. He did that by backdating the written IMA in the first place; he also did that in

2018 and 2019 when he both affirmed that the written IMA had been signed on 30 November 2014 and also again that Mr Pinto signed a further backdated version. It does seem to me that his doing all that was probably due to embarrassment but it was still to my mind fraudulent and on an objective analysis dishonest, because those actions clearly were misleading and did actually mislead relevant people. I see less weight here in relation to Dr Panico's absence of contrition. An absence of contrition would itself be consistent with a belief that Dr Panico had believed the statements true when made.

422. On this aspect I do not see any great weight in Mr Phillips' contention that Dr Panico could have seen the dating of the signing as making no difference, in circumstances where, on Dr Panico's case, the written IMA reflected the reality in 2014 and where Mr Pinto had been prepared to sign the backdated IMA. I give that little weight, firstly because that itself is not the question. Even if Dr Panico had thought the 2018 document reflected the 2014 reality, he acted to my mind fraudulently as he knew that his own statements were false and potentially dishonest when he did not explain what had actually happened. This was all the more so when Dr Panico knew that he was under a duty of full and frank disclosure to mention everything that might be relevant, whether or not he thought that it was actually going to turn out to be relevant. Secondly, Mr Phillips' contention ignores the fact that Dr Panico actually used the words "in the five years since the IMA was signed." Thirdly, it further seems to me on the balance of probabilities that Dr Panico would have realised and did realise that the fact that the written IMA was backdated was at least a potential weakness to the claimant's case, whether or not it was a real weakness at the end of the day. That is precisely the sort of matter I think is likely to have been explained to Dr Panico by his then solicitors and counsel needed to be revealed to the court if the duty of full and frank disclosure was to be complied with. It seems to me that Dr Panico would have known that, and I note and give weight to the fact that he confirmed his compliance with the duty of full and frank disclosure in both the first affidavit and then in the third affidavit, a document sworn after some further months had passed.

423. I turn then to the question as to how serious an abuse of process this was. It seems to me that it was a very serious abuse but not at the absolute top of the scale. I say very serious as, firstly, it involved fraud, deceit and objective dishonesty. Secondly, the

question of the contractual relationship between BGB and PTL was a key element of the claim, and still is, and that is the case both as to the question of the contract, i.e. whether there was a contract at all, and also with regard to what, if anything, was the agreed investment strategy. Thirdly, this was all done in the context of a without notice application for a worldwide freezing injunction, the grant of which has draconian effects on the defendants' use of money and is potentially oppressive, both with regards to those effects and with regard to the requirements to provide affidavits disclosing all that party's assets, matters all of which are deeply personally invasive, albeit somewhat less so than if the injunction had included search and seizure provisions. Fourthly, I do not see the absence of contrition on the part of Dr Panico as mattering that much to the abuse, which speaks for itself, and in circumstances where Dr Panico has left the litigation, but nonetheless there is such an absence. I do not see the fact that Dr Panico deceived his own beneficiaries as mattering particularly in this context because the context is one of the defendants seeking to strike out a claim which has been brought for the benefit of the beneficiaries and which they themselves support. I do not see why the fact that Dr Panico deceived the beneficiaries should be a matter which should prejudice the beneficiaries in this context. Nonetheless, for all these reasons it seems to me that the abuse is a very serious one.

424. On the other hand, I do not see it as being absolutely at the top end of the scale, for various reasons. Firstly, I do think that Dr Panico is likely to have believed that the written 2018 IMA document reflected the 2014 relationship, even though it was clear that some terms must have been new and different and that aspects, although not the gist of the investment strategy to be adopted by BGB under any such contractual relationship, must have been different.
425. Secondly, it is true that Mr Pinto had actually signed the written IMA in June 2018 and re-signed it in November 2019, both occasions where the document itself was clearly being backdated. Mr Pinto was both the primary person dealing with the matter from the BGB side and an agent of BGB with apparently considerable ostensible authority. It therefore seems to me that Dr Panico would, or at least could, expect that BGB would accept that the terms of the 2018 document were the same or at least similar to the relationship which existed in 2014.

426. Thirdly, that set of beliefs by Dr Panico could well receive support via the 2020 correspondence. Dr Panico's letter of 27 February 2020 was addressed not only to Mr Pinto but also to Mr Gallucci. Mr Pinto did know the truth then and, as far as Dr Panico is concerned, Mr Gallucci might well have known the truth then. That letter referred to "the IMA signed on 30 November 2014." Mr Gallucci did not in any way challenge that statement at the time, including in his letter of 7 March 2020. Mr Miall says that Mr Gallucci was simply keeping his powder dry at that point and not seeking to commit himself in any direction. However, his absence of doing so seems to me could well have led Dr Panico to have properly seen the question of the dating of the written IMA as not being an issue, and rather that all the defendants were accepting that the written IMA document actually reflected the 2014 legal relationship.
427. It therefore seems to me that I can see this as something of what might be termed a gilding of the lily rather than a pure invention of a fraudulent case, but nonetheless it still seems to me to have been a very serious abuse, for the reasons which I have given.
428. Having established a very serious abuse of process, Mr Miall next comes to the second stage of what would be the appropriate and proportionate response to the abuse. Mr Miall's first submission is that this has given rise to a real risk as to the fairness of an eventual trial, referring in particular to the following matters. Firstly, that Dr Panico as the claimant, now IMT's potential key witness, he is the person who was at the relevant meetings with the defendants and the person who, if anyone, was influenced by the defendants and their alleged fraudulent misrepresentations. However, Dr Panico is: (a) unlikely to voluntarily participate; (b) may conceal documents; and (c) may not give evidence at all. Secondly, Mr Miall submitted that if Dr Panico forged or at least backdated one document, he may well have forged or backdated others, including in particular the trustee resolution purportedly dated 14 November 2014 but the authenticity of which Mr Miall doubts. Mr Miall submits that that will result in the need for extensive investigation at the trial of the authenticity of that and other documents. Thirdly, Mr Miall submits that there may be problems with regards to disclosure in relation to Dr Panico, although Mr Miall accepts that the claimant's side has already disclosed a very considerable number of documents and may disclose more. Fourthly, Mr Miall submits that Dr Panico may have tainted the recollections of the beneficiaries and other relevant persons by making fraudulent statements to them.

Fifthly, Mr Miall refers to the *Arrow*' decision and in particular paragraph 44 regarding the potential infecting by forged documents of oral evidence, and paragraph 61 of the need for the court when considering an abuse of process and its consequences to ascertain the extent of any forgery and to be satisfied that it will know the true position, which Mr Miall submits remains uncertain. Sixthly, Mr Miall submits the burden is on the claimant's side to show that there is no real risk to the fairness of an ultimate trial.

429. Mr Phillips submits that there is no prejudice or real risk to the fairness of an eventual trial and essentially for the following reasons. Firstly, that the underlying claim can and is being pleaded on the basis that the 2018 written IMA actually reflected the 2014 situation and relationship. Secondly, that the key documents are likely to be those held by BGB, and in any event the claimant's side has already provided a plethora of documents. Thirdly, this is not a situation of a party continuing or possibly continuing to advance forged documents as in the *Arrow*' case. Fourthly, that this is in fact not really a case of forgery at all as Mr Pinto did sign the 2018 written IMA document on behalf of BGB; it is simply a question of backdating. Fifthly, that if anyone was going to have a problem in proving their case at an eventual trial as a result of all this, it is the claimant, which is going to be relying on Dr Panico's evidence, and not the defendants.

430. Here I prefer the submissions of Mr Phillips and I do not see any real risk to the fairness of an eventual trial arising from this set of abuses. I have considered all the evidence and submissions but my essential reasons are as follows. Firstly, I think the burden of showing the real risk is on Mr Miall as it is he who is seeking to persuade the court that that is the situation. However, I would come to the same conclusion if the burden was on Mr Phillips, namely that there is no real risk to the fairness of an eventual trial. It seems to me that Mr Phillips and his reasons, from what I am about to say, sufficiently discharge any such burden.

431. Secondly, it seems to me that the situation here is altogether different from that in the *Arrow* case. Firstly, the 2018 written IMA document is not a forged document made up by and created by a party in the course of litigation in order to deceive the court. It is in fact a perfectly genuine document signed in January 2018 by Dr Panico and Mr

Pinto. It has simply been backdated to 30 November 2014, but backdated at the time. It is thus still a genuine document and a potentially important part of the history and evidence in the litigation. It is not like the *Arrow* documents which should never have been produced to the court at all as they were simply recent inventions. This document, and in fact the re-signed 2019 version, are a part of the evidence in this case and part of the genuine evidence in this case.

432. Secondly, there are in fact no "invented" documents as in *Arrow*. I cannot see any likelihood that anyone, at least on the claimant's side, would create new forgeries and seek to use them at an eventual trial. The claimant has already said in effect what has happened and the email chains are full, and I do not see what "new" invented documents Dr Panico could possibly produce which could mislead anyone. The submission that he could and would is pure speculation, it seems to me. The defendants will be able to challenge the authenticity, or at least the dates, of the "old" documents, including those before me, but that is a part of the process of any trial and it does not seem to me that there is any risk to fairness.
433. Thirdly, it is true that the defendants have real, and I will assume reasonable, doubts as to the authenticity of the 14 November 2014 trustee resolution, but that document is still an historic one which forms part of the evidence in this case, whatever its true date. No-one has suggested that it is a recently created invention, as were the documents in *Arrow*. Further, the question of its authenticity and dating will need to be investigated at the trial in any event, and I do also note that there is a second signatory to it who can be called to give evidence as to it in addition to Dr Panico.
434. Fourthly, the fact that Dr Panico may not give evidence is the claimant's problem, not the defendants'. If Dr Panico does not give evidence, including being cross-examined, the claimant's case may simply fail because they may fail to prove the facts that they assert, and the claimant's side will have to consider that very carefully. Likewise, the fact that Dr Panico's credibility may have been damaged by what has happened regarding the obtaining of the freezing injunction and his non-attendance at this hearing are again, it seems to me, matters which will be problems for the claimant's side, not the defendants'.

435. Fifthly, with regard to Mr Miall's doubts about the claimant's ability to provide disclosure and the possibility that Dr Panico may destroy or withhold historic documents, that all seems to me to be speculative. The documents before me suggest something of a complete history from the claimant's side, and in any event I do not see any real risk which is actually related to the abuse with which I am concerned arising. That abuse is simply about the 2018 written IMA document.
436. Sixthly, as far as Mr Miall's fear that witnesses' recollections may have been tainted, it seems to me that any such taint would again arise from the original backdating, not, as in *Arrow*, the provision of new forged documents. I do not see any such taint as arising from the abuse, being the misleading of the court on the obtaining of the worldwide freezing injunction and subsequently. It seems to me that any taint would arise from the decision to backdate and not to explain the backdating at the time, all of which are simply historic. In any event, I accept Mr Phillips' submission there is no real risk to the fairness of an eventual trial arising from this abuse.
437. Mr Miall, however, also submits that, notwithstanding that there is no real risk to the fairness of an eventual trial, that the abuse itself deserves a sanction and that the appropriate sanction here should be striking out. Mr Miall submits, firstly, that the abuse is a very serious one, as I have held. Secondly, that no contrition has been shown, rather than the opposite; there was instead both a great delay on the claimant's part in seeking to amend the case and the claimant's side has chosen, rather than to concede Dr Panico's fraudulent, deceitful and dishonest state of mind, to seek to persuade the court otherwise. Thirdly, that what has happened as a result of the then claimant's conduct has resulted in vast expenditures of cost and also time. Mr Miall points to the fact that the claimant has paid out £200,000 in relation to the defendant's costs at the freezing injunction stage, and suggests that since then over another £420,000 has been incurred. Fourthly, the claimant is having to wholly reconstruct the claim as a result of the abuse and Mr Miall submits it would be much better to end this claim now, have the claimant pay all the costs and leave the question of the effect of the abuse to a second claim, including leaving the question as to whether or not a second claim would be an abuse where a first claim has been struck out for abuse. Fifthly, Mr Miall submits that even if the claim in any event has to proceed against Mr Pinto, that should not prejudice BGB and Mr Gallucci, who are entitled to have this



claim brought to an end where the abuse has occurred and left them subject to the effects of a WFO for some months. Sixthly, Mr Miall submits that striking out is the proper way for the court to control and prevent fraudulent claims.

438. Mr Phillips submits, firstly, that this is an abuse which has not tainted the whole claim. Secondly, that the claimant and the trust have already paid for the abuse because they have paid £200,000 in costs and that, while the defendants were content to release the undertaking in damages, that was a matter of their own choice. Thirdly, that the real victims of a strike out would not be Dr Panico and PTL, the abusing parties, but rather the beneficiaries who are already victims. He submits that the real claimant is in fact the beneficiaries themselves and that they should not be struck out as a result of the failings and abuse of their trustee. Mr Miall counters to say that the legal title to the claim is in the trustee and that it is simply an inherent risk of trust law and trust concepts that beneficiaries may be harmed by a trustee's misdoings, being here an abuse, but in the same way as if a trustee engages in an unwise contract or investment. Fourthly, Mr Phillips submits that the delay in amending is not itself an abuse. Fifthly, he submits that it is not proportionate to adopt the draconian solution of striking out, but rather I should allow what I have held to be a claim with real prospects of success to proceed. Sixthly, he submits that it would be wrong even to impose further cost penalties in circumstances where the actual persons having to pay will directly or indirectly be the beneficiaries.

439. I have borne in mind all the evidence and submissions and my findings and the legal principles which are set out above, and I have concluded that it is not appropriate or proportionate to strike out but that it is appropriate and proportionate to impose a further costs sanction that the claimant will pay all the costs of the abuse application and quite possibly further costs, but where with regards to other costs I will need to consider them as part of decisions relating to (a) what I should direct with regards to the costs of the applications, and (b) what, if anything, I should direct with regards to the other costs incurred to date which have not been covered by the costs payment included in the order discharging the WFO.

440. My main reasons for coming to those conclusions are as follows. Firstly, striking out is draconian and, as made clear in the *Summers* decision, the court has a wide range of

penalties and deterrents available to it to deal with an abuse, and needs to consider carefully which is the most appropriate and whether any particular sanction is proportionate. The only alternative that anyone has suggested to striking out as a sanction is a costs sanction.

441. Secondly, the abuse is very serious, both in terms of its nature and its effects as stated above, which relate not merely to costs but also to the very considerable expenditures of time and court and judicial resource as a result of what has happened. However, it does not seem to me that this abuse is at the highest end, for the reasons which I have given.
442. Thirdly, the abuse is confined in nature. It is only regarding the date of a document which is otherwise genuine. I bear in mind the document is possibly one of the most important documents in the claim, at least as it was presented originally, and that its dating is very important. But Mr Pinto, the then ostensible agent of BGB, had signed the document and Mr Gallucci had, at the relevant time, decided not to dispute it or its effect in correspondence. Therefore not only is this abuse confined but, as I have already said, Dr Panico could understandably, whether or not reasonably, have thought that the dating did not give rise to a substantive issue that anyone cared about. However, in any event the abuse is self-contained.
443. Fourthly, it is now clear what is the actual true dating of the document and it is only a single document.
444. Fifthly, while I accept that in trust law as far as outside world is concerned, persons deal with the trustee not the beneficiaries, here it is the beneficiaries who would be the victims of a strike out. While they may have numerous remedies against Dr Panico and PTL, I have no evidence that Dr Panico and PTL would be able to meet any large claim, especially in view of the facts that it would arise, at least in part, from a deliberate misleading of the court and such a misleading might well prejudice any professional insurance indemnity policy. Further, the defendants all knew throughout that they were dealing with a trust and that they were engaged with the beneficiaries' money and not Dr Panico or PTL's money. It seems to me that in the circumstances

for there to be a strike out of the beneficiaries' claim as a result of fault on the part of their trustee would be all the more draconian.

445. Sixthly, although the abuse resulted in the grant of a worldwide freezing injunction and associated orders and requirements, the claimant's side have paid by that by an agreed order as to costs. It does seem to me that although the defendants gave up the benefit of the undertaking in damages, they did so as a matter of conscious and informed choice.
446. Seventhly, the beneficiaries have gained no real advantage from this; rather, they have lost a large amount of money in costs and possibly also their key witness.
447. Eighthly, I have been concerned to a degree both by the lack of contrition, including the fact that the claimant's side sought to contest whether there was an abuse at all and whether Dr Panico had actually committed acts of deceit and dishonesty, and also by the substantial delay on the claimant's part in failing to reconstruct the claim once the backdating of the written IMA document had been raised and, it would seem to me, confirmed by the claimant's decision to abandon the WFO. On the other hand, this has all taken place at a very early stage of the litigation, and the delay and maintaining of what were bad points seem to me to give rise more to questions of costs rather than to render a striking out appropriate.
448. Ninthly, I do regard BGB and Mr Gallucci as having been perfectly justified in taking the course of having it established what Dr Panico and PTL wrongfully did, whether or not that would lead to a sanction. The court encourages there being ventilated and established the fact that there has been a serious abuse. However, it seems to me that those points more justify the making of appropriate costs orders (to compensate BGB and Mr Gallucci for their expenditures in establishing what had happened and bringing it before the court) rather than striking out.
449. Tenthly, I do not see in these circumstances there having been any tainting of the whole claim. What has happened has forced the claimant to reconstruct the claim and to engage in a wholesale amendment. The claim is at an early stage and what has

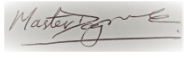
happened, it seems to me, is normally a matter to be dealt with by costs orders rather than striking out.

450. Eleventhly, I do accept that substantial time, resource and costs have been wasted but, as I have said, the case is at a very early stage. The first and second defendants can be compensated as costs and it seems to me that what has happened is all very much to be seen as more of an amendment situation where the payment of costs is the usual price of any amendment, rather than a situation which really justifies the draconian remedy of striking out.
451. Twelfthly, as I have mentioned, Mr Pinto was a party to the backdating. I do think that that is relevant, notwithstanding the *Masood* principle that the fact that both sides have adduced forged documents is not relevant to the question as to whether one, or for that matter the other, should be struck out, because this is a single document rather than a case of each side producing their own different forged documents, and, moreover and as I have held above, Mr Pinto was an agent of BGB. It seems to me that that is a relevant feature which goes against striking out, notwithstanding the *Masood* decision, but I would have come to the same conclusion even if I had ignored that aspect.
452. I have therefore conducted a full balancing exercise. I do see costs sanctions as appropriate, but I see striking out as not being appropriate. I also conclude that it would be disproportionate for the beneficiaries to have their claim struck out and therefore to lose their entire claim simply because of this particular abuse by their then trustee.
453. It does seem to me that it is appropriate for me and the court to come to those conclusions now at this point in this litigation, rather than leaving matters over to a second claim being brought by the claimant: firstly, because I have heard full argument and considered full evidence and submissions; secondly, because it seems to me that case law generally takes the approach that if one claim is struck out for abuse of process then it is likely to be inevitable that any second claim should be struck out for abuse of process; and I do not regard Mr Miall's alternative approach, of there being two claims and the matter being reconsidered in the context of a second claim,

as being either an efficient use of judicial resources and the parties' time and costs or a course which would work in law in the light of the usual principle.

454. I have therefore come to the conclusion that I will not strike out and, as various matters of costs will remain to be decided, that I will simply say at this point that I will impose in any event a sanction that the claimant pays all the first defendant and second defendant's costs of bringing the abuse application to and it being heard by the court; but also that I will in any event bear in mind these various conclusions as a potential relevant matter of conduct when I come to consider other costs matters under the provisions of Civil Procedure Rules 44.2, and it may be that either as a matter of further sanction or by way of taking into account as relevant conduct, that I will consider further costs consequences flowing from this abuse. However, that is all to be a matter for the consequentials hearing.
455. Therefore, subject to what I have said earlier in this judgment, I will grant the claimant's application for permission to amend. I will not strike out the claim. I will require the claimant to pay the first and second defendants' costs of bringing the abuse application to and it being heard by the court, and I will consider the question of any further sanction in relation to costs and what I have already considered in relation to conduct when it comes to decide other costs points at the consequentials hearing.
456. I now propose to adjourn this hearing to adjourn, as I have done before, all questions of permission to appeal and time for appealing to extend the time for appealing generally all matters of the continued extension of time for appealing and permission to appeal to be considered at the consequentials hearing, which, I think, is to take place on 25 July.
457. If any party wishes a formal order to be drawn up to that effect then they may do so on the usual basis of liaising with the other sides and sending the proposed form, identifying any differences between them and alternative wordings, in a Word file in an email copied to the other parties and sent to me at my and my clerk's email addresses. Otherwise what I have said by way of adjournments and other matters can simply be incorporated in the final order to be drawn up following the consequentials hearing. The parties are of course encouraged to liaise between each other over the

intervening period and to communicate to each other what orders they propose and seek, and why, and seek to reach relevant agreements.

A handwritten signature in black ink, appearing to read "Masterpiece", is enclosed in a light grey rectangular box.

16.10.2023