Neutral Citation Number: [2020] EWHC 1757 (Ch)

Case No: BL-2019-001189

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 22 July 2020

Before:

CHIEF MASTER MARSH

- -

Between:

GOLDTRAIL TRAVEL LIMITED (in liquidation)	**Claimant**
- and -	
MALCOLM GRUMBRIDGE	**Defendant**

- -
- -

Hilary Stonefrost (instructed by **Fieldfisher LLP**) for the **Claimant**
Paul Lowenstein QC (instructed by **Brown Rudnick LLP**) for the **Defendant**

Hearing dates: 20 May 2020

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Approved Judgment

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

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CHIEF MASTER MARSH

Chief Master Marsh:

1. On 18 February 2020 the defendant ("Mr Grumbridge") issued an application seeking an order that the particulars of claim be struck out and/or that the court grant summary judgment under CPR 24.2. The defendant says that the claim can be summarily disposed of because the primary limitation period expired long before the claim was issued and the claimant cannot bring itself within section 32(1) of the Limitation Act 1980 ("the 1980 Act"). Mr Grumbridge's application was made before serving a defence and he advances the application without prejudice to any substantive defences he may have.

2. Hilary Stonefrost appeared for the claimant and Paul Lowenstein QC appeared for Mr Grumbridge.

3. Section 32(1) of the 1980 Act so far as material provides that:

> *"**Postponement of limitation period in case of fraud, concealment or mistake.***
>
> *(1) …where in the case of any action for which a period of limitation is prescribed by this Act, either –*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; …*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."*

4. By an application notice dated 5 May 2020, the claimant seeks permission to amend its particulars of claim. However, the application only falls to be considered if Mr Grumbridge's application is dismissed.

5. The claim follows earlier proceedings ("the first claim") in which Rose J (as she then was) handed down a judgment[1] on 22 May 2014 in favour of the claimant against six defendants. Mr Grumbridge was not a party to that claim. This claim, however, was described in the pre-action letter sent by Fieldfisher LLP to Mr Grumbridge on 13 May 2019 as "the very same or a very similar claim" to the first claim. The claimant was represented in the first claim by the same solicitors and counsel.

6. It was also asserted by Fieldfisher LLP in the pre-action letter to Mr Grumbridge that the claimant is entitled to the benefit of section 32(1)(b) of the 1980 Act, although the letter did not explain why that was. In Ms Stonefrost's skeleton argument the possibility of relying on section 32(1)(a) of the 1980 Act was raised. However, that submission was not developed in the course of the hearing.

7. It is a curious feature of this claim, and the claimant's response to Mr Grumbridge's application, that despite limitation having been clearly flagged as an issue well before the claim was issued in June 2019, the claimant has not at any time set out its case on limitation. It is not pleaded in the particulars of claim and, even following the issue

[1] [2014] EWHC 1587 (Ch)

and service of the application to strike out the claim, the draft amended particulars of claim remain silent on this subject. Given that the onus of proof at a trial is on the claimant[2], the absence of any pleaded case on the point is unhelpful to the claimant.

8. Mr Grumbridge's application is put forward on the basis that there are only two relevant questions for the court:

   (1) Has the claimant identified any "fact relevant to the plaintiff's right of action" which the plaintiff did not know because it was deliberately concealed? If the claimant has not identified relevant facts that were concealed, section 32(1)(b) has no effect, and there is no postponement of the date from which time starts to run.

   (2) It is only if the court concludes that the claimant was unable to pursue a claim within the primary limitation period because a fact or facts relevant to the cause of action were deliberately concealed, the court needs to go on to consider whether the claimant established that it could not have discovered the concealment earlier by the exercise of reasonable diligence?

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

The statement of claim test

10. As to the first question, Sir Terence Etherton C (with whom Richards and Patten LJJ agreed) in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 summarised what is known as the 'statement of claim' test at [49]:

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

11. The test was considered previously by the Court of Appeal in *The Kriti Palm* [2006] EWCA Civ 1601. Rix LJ at [307] discussed the policy that underlies section 32(1)(b) and said:

[2] *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15 (CA) at 30d-e per Ralph Gibson LJ and 34h per Sir Denys Buckley

> "… the purpose of section 32(1)(b) appears to be designed to cater for 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)."

12. Rix LJ later observed at [323]:

> "In this connection it is clear from authority that the statutory words "any fact relevant to a plaintiff's right of action" are to be given a narrow rather than a wide interpretation. [emphasis added] Thus in *Johnson v Chief Constable of Surrey* (CA, unreported, 19 October 1992) where the claim was in false imprisonment and the police had deliberately concealed facts relevant to the absence of reasonable cause, this court accepted the defendant's submission that "the relevant fact must be a fact without which the cause of action is incomplete", contrasting a fact relevant to an action and to a right of action (5A, 6C). [emphasis in the original] Thus Rose LJ said "Facts which improve prospects of success are not, it seems to me, facts relevant to his right of action" (at 6E). He accepted that the interpretation was a narrow one (at 6G). Russell LJ agreed, saying (at 7E): "Accordingly, whilst I acknowledge that the 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. And Neill LJ emphasised that although absence of reasonable cause was an element in the tort of false imprisonment, the "gist of the action" is in the imprisonment itself, which establishes a prima facie case and puts the burden of proving justification on the defendant. Therefore the statutory words "must mean any fact which the plaintiff has to prove to establish a *prima facie* case" (at 8E/H).
> 324. Moreover, in *C v. Mirror Group Newspapers [1997] 1 WLR 131 (CA)*, where the same words fell to be applied, this time as found in section 32A of the 1980 Act, this court again applied the narrow test determined in *Johnson*. Neill LJ, with whom Morritt and Pill LJJ agreed, said "The relevant facts are those which the plaintiff has to prove to establish a prima facie case" (at 138H). He again contrasted such facts with evidence which relates "to the proving of the case rather than the existence of the right of action", citing as further authority (at 138D) a dictum of Sir John Donaldson MR in *Frisby v. Theodore Goddard & Co* (CA, unreported, 7 March 1984)."

13. Buxton LJ at [453] agreed with this approach:

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

14. This claim is based upon a breach in 2010 by Mr Abdulkadir Aydin of section 175 of the Companies Act 2006 and the allegation that Mr Grumbridge dishonestly assisted that breach. The claimant was successful in its claim against Mr Aydin in the first claim and relies on the findings made against Mr Aydin by Rose J.

15. The claimant must establish after establishing primary liability on the part of Mr Aydin that: (a) Mr Grumbridge assisted in or procured the breach of section 175 by Mr Aydin; (b) Mr Grumbridge acted dishonestly; and (c) loss resulted to the claimant.[3] It is only the first two of these elements that need to be considered. The claimant says in paragraph 19 of the particulars of claim that the claim for dishonest assistance is brought against Mr Grumbridge primarily by reference to the facts and matters set out in documents that were not disclosed, but should have been disclosed, in the first claim. It will be necessary to consider whether that premise for the claim leads to the conclusion that the claimant was unable to bring the claim earlier due to facts having been concealed by Mr Grumbridge.

16. When considering the statement of claim test, it is also helpful to have in mind the requirements of pleading a cause of action that alleges dishonesty because it might appear there is some tension between giving the words in section 32(1)(b) of the 1980 Act a narrow interpretation (per Rix LJ), or looking for "the gist of the cause of action" (per Buxton LJ), and the need to provide adequate particulars of a cause of action of which dishonesty is an essential part. A helpful reference point is the judgment of Flaux J (as he then was) in *JSC Bank Moscow v Kekhman and others* [2015] EWHC 3073 (Comm) at [15]-[23]. He cites there well-known passages from the speeches of Lords Hope, Hobhouse and Millett in *Three Rivers District Council v Bank of England* [2001] UKHL 16 (which I do not need to set out in this judgment) and goes on at [20] to remark:

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

17. It seems to me the distinction Flaux J draws between whether the facts pleaded justify a plea of fraud and whether the evidence the claimant wishes to rely on at a trial will establish fraud go a long way to resolve the apparent tension identified above. For the purposes of the exercise with which the court is engaged in dealing with the first stage of Mr Grumbridge's application, the court is only concerned to see whether the claimant had in its possession during the currency of the primary limitation period sufficient facts to enable it to plead knowledge and dishonesty on the part of Mr Grumbridge in a manner that would have produced a viable claim. As Buxton LJ put it in *The Kriti Palm*, the court is looking for the gist of the cause of action the claimant is asserting and seeing whether it was available to the claimant without knowledge of the (allegedly) concealed material. It is irrelevant that the claimant's liquidators did not address their minds within the primary limitation period to whether they had sufficient facts in their possession or that they wished to plead a case to a

[3] A summary of the constituent elements of the cause of action can be found at Snell's Equity 34th ed. 30-77 to 30-80.

level that exceeded the minimum that was required to produce a viable claim. The question for the court is whether the material was available to the claimant. For these purposes, based upon the authorities cited above, the proper test is whether the facts available to the claimant were sufficient to show reasonable grounds for bringing the claim. In other words, the test is the one under CPR 3.4(2)(a) rather than under the first limb of CPR 24.2.

18. For the reasons given later in this judgment, and although I was addressed in detail on the legal principles that arise in connection with constructive knowledge under section 32(1) of the 1980 Act, I do not need to deal with them.

Strike out or summary judgment?

19. It is necessary to consider the basis upon which the court is asked to deal with the application (as opposed to the legal test concerning limitation it should apply). Where an application is made to strike out a claim based on the claimant failing to show reasonable grounds for pursuing the claim, the primary focus is on the way in which the claim is put forward in the claim form and the particulars of claim. The applicant must show that the claim is bound to fail. In the strictest sense, a claimant is not obliged to plead its limitation case because the limitation point is there to be taken at the option of the defendant. Taking the claim form and particulars of claim in isolation, it cannot be said the claim is bound to fail, albeit that it is most unwise, as it seems to me, for a claimant not to take the opportunity to set out its case on limitation from the outset where it is obvious that limitation is in issue. The claimant's case on limitation can then be addressed in the defence. I propose, therefore, to deal with the application solely under CPR 24.2 and to consider whether Mr Grumbridge is able to show that the claimant has no real prospect of success in the claim and there is no other compelling reason why the claim should go to a trial.

20. The judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] provides a convenient summary of the principles the court must apply when dealing with an application under CPR 24.2. They are well known and do not need to be cited here. There is however one further well-established principle to which reference needs to be made that is summarised at paragraph 24.2.5 in Civil Procedure 2020:

> "…the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial.
>
> …
>
> The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial."

21. This is followed by a passage that deals with the position where the applicant's case has crossed the evidential threshold. If the respondent does not make out a case showing some real prospect of success, the applicant will be entitled to judgment. This principle is explained in the notes in the following way:

> "If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief."

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

Cast of characters

23. The starting point is to examine the persons and corporate entities who are connected to the claim:

(1) Mr Abdulkadir Aydin was the sole director and shareholder in the claimant. He was also the controller and sole beneficial owner of Morning Light Limited ("MLL") a company incorporated in the Seychelles on 12 February 2010. The claimant's case has always been that MLL was formed for the purposes of entering into what the claimant says was a dishonest agreement (the "Viking Agreement"). The date of incorporation of MLL is significant because it is close to the date when the Viking Agreement was entered into.

(2) Black Pearl Investments Limited ("BPI") is a company incorporated in Hong Kong. Mr Grumbridge (appointed 11 July 2007) and Mr Magnus Stephenson (appointed 8 January 2009) were directors of BPI at the material time and Mr Grumbridge was, or claimed to be, the beneficial owner. At the outset of the claim the claimant's liquidators believed that Mr Grumbridge held only a minority stake, but they knew by the time of trial in 2014 that he claimed to be the beneficial owner of BPI.

(3) BPI UK Limited was incorporated in England and was a wholly owned subsidiary of BPI. Its directors were Mr Halldor Sigurdarson and Mr Philip Wyatt.

(4) BPI Iceland Ehf was incorporated in Iceland was also a wholly owned subsidiary of BPI. Mr Sigurdarson and Mr Stephenson were its directors.

(5) Viking Airlines AB was a Swedish charter airline serving United Kingdom and European tour operators. Prior to late 2008 it was a wholly owned subsidiary of European Aviation and Technical Services ('EATS') and EATS was in turn wholly owned by Mr Christian Tadjeran. Viking had a wholly owned subsidiary called Viking Airlines (UK) Ltd ("Viking (UK)"). In late 2008 BPI Iceland bought 50 per cent of the shares in Viking. This purchase was financed in part by Mr Philip Wyatt who injected about £2.9 million into the company and in part by BPI Iceland drawing on funds from its own

trading activities. Thereafter BPI took an active role in trying to boost the business of Viking by finding it new customers.

(6) Viking was operated on a day to day basis by Mr Tadjeran.

(7) Meridian Aviation UK Ltd ("Meridian") was a charter agent and an aviation seat and flight broker. It also acted as a collector of payments made for flights to airlines such as Viking by tour operators such as Goldtrail. 66.6 per cent of the shares in Meridian were owned by Jim Wyatt, Mr Philip Wyatt's brother[4], and the remainder by Mr Andre Cachia. Meridian went into administration in July 2013 after the collapse of Goldtrail.

The first claim

24. The first claim, so far as material, concerned two agreements made in 2010:

(1) A share purchase agreement dated 19 February 2010 under which Mr Aydin sold a 50% shareholding in the claimant to BPI for £500,000. The SPA was signed by Mr Aydin and Mr Stephensen on behalf of BPI. It recorded that the claimant had made a commitment to purchase 100,000 seats a year from Viking via Meridian.

(2) The "Viking Agreement" that was entered into on 19 February 2010 made between MLL and Viking pursuant to which Viking agreed to pay MLL £1.4 million by instalments with the last payment in June 2010. The payments were described as commission.

25. It was alleged Mr Aydin had breached his fiduciary duties and section 175 of the Companies Act 2006 by entering into the Viking Agreement and that the defendants BPI, Mr Stephensen, Mr Sigurdarson and Mr Philip Wyatt had provided dishonest assistance to Mr Aydin. In short, it was said that the Viking Agreement was a device by which Viking paid Mr Aydin through MLL additional consideration for the purchase of a 50% interest by BPI. It is notable that although BPI and Mr Stephensen, were defendants to the first claim, BPI's other director, Mr Grumbridge, was not joined as a party.

26. At paragraph 7 of the amended particulars of claim the claimant alleged that BPI (not BPI UK or BPI Iceland) directed and controlled Viking in its dealings with the claimant. Paragraph 9 pleaded the connections between Mr Stephensen, Mr Sigurdarson and Mr Philip Wyatt and BPI and Viking. It relies on the following as being a basis of their knowledge being attributed to BPI. That:

(1) Mr Stephensen was a director of BPI.

(2) Mr Sigdarson and Mr Wyatt were directors of BPI UK.

(3) All three of them were shareholders in what is described as BPI's parent company (the Swiss company that held the shares in BPI).

[4] Where I refer to Mr Wyatt in this judgment I am referring to Mr Philip Wyatt.

27. Paragraph 9 of the amended particulars of claim further pleads that BPI in conjunction with Mr Stephensen, Mr Sigurdarson and Mr Wyatt "… effectively had day-to-day operational control of [BPI] and also of Viking in its dealings with the Claimant and [Mr Aydin]." No mention is made of the fact that Mr Grumbridge and Mr Stephensen were both directors of BPI and that they jointly had direct control of BPI, in contrast with Mr Sigurdarson and Mr Wyatt.

28. The claimant pleaded its case in dishonest assistance against BPI, Mr Stephensen, Mr Sigurdarson and Mr Philip Wyatt in fairly general terms. The material paragraphs in the amended particulars of claim (omitting elements that are irrelevant) are:

(1) Assistance in the misapplication of the claimant's money

"46 …

(1) The Fourth, Fifth and Sixth Defendants [Mr Stephensen, Mr Sigurdarson and Mr Wyatt] advised on the structure of the transaction and provided some assistance to [Mr Aydin] to set up MLL.

(2) Viking in receiving monies from the Claimant and in making payments to MLL for the benefit of [Mr Aydin] acted on the instructions of [BPI] acting by the Directors (the Fourth, Fifth and Sixth Defendants)."

(2) Assistance in the breach of section 175

"48…

(1) The Claimant repeats sub-paragraph (1) of paragraph 46.

(2) Viking entered into the Viking Agreement and/or made payments to MLL for the benefit of [Mr Aydin] and in doing so acted on the instructions of [BPI] acting by the Directors (the Fourth, Fifth and Sixth Defendants)."

(3) Knowledge of the payments made by the Claimant to MLL or through Viking

"50. The Fourth, Fifth and Sixth Defendants knew or would have suspected and/or were wilfully blind to the following matters:

(1) The services of a broker were not required to introduce the Claimant to Viking because Viking had a pre-existing commercial relationship with the Claimant.

(2) MLL did not provide any brokerage services pursuant to the Viking Agreement or at all.

(3) MLL was set up for the benefit of the First Defendant and was beneficially owned by him.

(4) On the present information available to the Claimant, at least a large majority of the monies received by Viking in the period from February

2010 to May 2010 originated from the Claimant and were transferred by Viking to MLL for the benefit of [Mr Aydin]."

(4) Knowledge of the Viking Agreement and payments made thereunder

"51 ….

(1) Sub-paragraphs (1), (2) and (3) of the previous paragraph are repeated and:

(2) "The monies purported to be paid pursuant to the Viking Agreement were paid to [Mr Aydin] or to MLL for the benefit of [Mr Aydin]."

(5) **Dishonesty of the Fourth, Fifth and Sixth Defendants**

"53. In the circumstances

(1) The facts known to the Fourth, Fifth and Sixth Defendants in relation to the transactions involving the Claimant, [Mr Aydin], [BPI] and MLL were such as to amount to dishonesty for the purposes of the claims for dishonest assistance.

(2) The facts known to the Fourth, Fifth and Sixth Defendants in relation to the Viking Agreement and the payments that purported to be made thereunder were such as to amount to dishonesty for the purposes of the claims for dishonest assistance."

29. Mr Grumbridge was not a party to the first claim although as one of two directors of BPI, he had some involvement with it. BPI and Mr Stephensen, Mr Sigurdarson and Mr Wyatt (together the BPI Defendants) gave disclosure on 1 November 2013. The disclosure was provided late. The BPI disclosure statement was signed by Mr Stephensen. Reference is made to the possibility that additional documents might be held on the servers of Meridian which by then was in liquidation. Further disclosure was produced by the defendants up to and during the trial.

30. Mr Grumbridge made a witness statement and was cross-examined at the trial. However, because he was not a defendant, the part he played was limited. He said that:

(1) He organised the incorporation of BPI at the request of Mr Wyatt.

(2) BPI had done nothing other than to acquire a shareholding in the claimant and act as a holding company.

(3) He was the beneficial owner of BPI.

(4) In mid to late 2009 Mr Wyatt told Mr Grumbridge that he (Mr Wyatt) proposed to invest in the claimant and that BPI would be the investor.

(5) Mr Grumbridge played no part in the negotiations with Mr Aydin and had not met him.

(6) At Mr Stephensen's request he introduced Mr Aydin to an accountant to help him set up an offshore company.

31. At the trial the judge found Mr Grumbridge to be a truthful witness and summarised his evidence very briefly in the following way at [12]:

> "His evidence concerned the beneficial ownership of Black Pearl and his attendance at meetings. In the event I have not found it necessary to decide the issues in dispute between the parties as regards the ownership of Black Pearl. I regard him as a truthful witness though in the end his evidence was of limited relevance." [emphasis added]

32. The judge went on to say that the BPI Defendants were the persons primarily engaged in negotiating the 'Black Pearl Deal'.

33. The meeting held on 12 January 2010 was an important feature in the trial. Mr Grumbridge in answer to cross-examination said he could not recall such a meeting taking place. Mr Stephensen gave evidence saying that Mr Grumbridge was present. The judge's conclusions at [139] about the meeting were equivocal:

> "It is accepted that there was a meeting on 12 January 2010 because there was late disclosure of email traffic fixing the date and sending round an agenda. But I find that it was not a formal board meeting of Viking. It was a general meeting of the people involved in Black Pearl, Viking and Meridian to discuss various matters that they were all involved in including the Goldtrail deal."

34. This finding accords with closing submissions from Ms Stonefrost who appeared for the claimant. It is clear that the claimant believed, by the time the trial was drawing to a close, that Mr Grumbridge had attended the vital meeting on 12 January 2010. An email, dated 21 December 2009, referring to the meeting was copied to Mr Grumbridge. Furthermore, the claimant believed that Mr Grumbridge was much more closely involved in the management of BPI than he had suggested in his statement. He said there was a management board of BPI (that is all three BPI companies), that meetings took place every three months and there was a similar meeting in Athens in March 2010 for which meeting Mr Grumbridge had prepared the agenda.

35. The claimant was successful in obtaining judgment against BPI and the three individual defendants. There was therefore no need to reflect on the case that might have been made against Mr Grumbridge had he been joined as a defendant. It is clear, however, that the disclosure provided in the claim and the evidence that emerged made it difficult for Mr Grumbridge to distance himself from the Viking Agreement in that:

(1) He was one of two directors of BPI and its beneficial owner.

(2) BPI was engaged in a substantial acquisition that had two elements to it, one being the SPA and the other the Viking Agreement.

(3) Mr Grumbridge was actively involved in the management of BPI and its subsidiaries.

(4) BPI held through BPI Iceland a 50% interest in Viking.

(5) BPI was purchasing a 50% interest in the claimant for £500,000 and Viking had agreed to pay MLL £1.4 million under the Viking Agreement. It would be surprising for BPI management meetings not to have dealt with the expenditure of such sums and the way it was to be funded.

(6) Mr Grumbridge attended meetings of the management board of the BPI companies on 12 January 2010 and in March 2010 with Mr Stephensen, Mr Sigurdarson and Mr Wyatt who were held to have dishonestly assisted the implementation of the Viking Agreement.

The claim against Mr Grumbridge

36. This claim was issued on 24 June 2019. BPI had gone into liquidation in October 2017 and Mr Grumbridge was examined by its liquidators in cooperation with the claimant's liquidators. It is not in dispute that further information about Mr Grumbridge's involvement with the Viking Agreement came to light as a result of enquiries pursued after BPI went into liquidation.

37. There is no difficulty for the claimant in pleading its case concerning Mr Aydin's breach of duty or loss. The loss claimed falls into three categories:

(1) £659,351.03 being the balance of the value of the property transferred to Mr Aydin that was not recovered in the First Claim.

(2) Costs incurred in the First Claim amounting to £1,061,219.70.

(3) Costs of £76,567.50 incurred in respect of enforcement advice and insolvency proceedings against BPI.

38. Although the claimant relies on what is said to be misleading evidence given by Mr Grumbridge at the trial of the first claim, this does not assist the claimant because the test for the purposes of limitation is objective. The test is whether the claimant was able to plead a claim in dishonest assistance against Mr Grumbridge, not whether the claimant may have been distracted by the evidence of a person whom the claimant now says was dishonest.

39. The claimant does not plead any case on limitation. No case is alleged concerning any fact relevant to the cause of action having been concealed by Mr Grumbridge or when the claimant says by the operation of section 32(1)(b) of the 1980 Act the limitation period started to run. The closest the claimant comes to explaining why the claim against Mr Grumbridge was brought in 2019 is set out in paragraphs 17 to 20 under the heading: "The failure to give proper disclosure of the [sic] documents in the [First Claim]". The claimant first explains in paragraph 17 that the BPI Defendants have failed to pay the judgment sum of £1,720,570.70 in the First Claim and this caused BPI to go into liquidation. It is then said:

> "18. Following the BPI liquidation, the Liquidators (of the Claimant) obtained access to BPI documents and it has become apparent that the documents disclosed for the first instance trial were incomplete. In particular:

a. Documents that should have been disclosed, in particular those showing the Defendant's close involvement, in the BPI Deal had not been disclosed.

b. A key document was not disclosed which showed that the defence relied on by the BPI Defendants that the BPI Deal was a share sale and nothing more was clearly untrue.

19. The claim for dishonest assistance against the Defendant is brought primarily by reference to the facts and matters set out in the documents that were not disclosed but should have been disclosed in the [first claim].

20. The Defendant, who was a director of BPI and a practising solicitor at that time, said in his witness statement that he, for the first instance trial, had reviewed the disclosure provided by the BPI Defendants."

40. I observe that:

(1) Despite what is said in paragraph 20, these paragraphs stop short of alleging concealment by Mr Grumbridge. He was not a defendant in the First Claim and BPI's disclosure certificate was signed by his co-director, Mr Stephensen.

(2) The claimant does not specify in paragraph 18a. which documents that should have been disclosed were not disclosed.

(3) The claimant does not specify the "key document" that is referred to in paragraph 18b.

41. The particulars of claim go on to refer to a schedule of 17 documents in support of the claim that it is said could not have been found until after BPI went into liquidation. However, the schedule has proved to be woefully inaccurate. Ms Stonefrost accepted that in a case making serious allegations of dishonesty the inaccuracies were 'regrettable'. The true position is that 11 of the documents were disclosed to the claimant in whole in the first claim and two were disclosed in part. It is also said that such of the documents that were not in the hands of the claimant's liquidators at the time of the first claim were available to them via the Meridian server. The inaccuracies in the particulars of claim (more precisely, the schedule incorporated by reference into it) have led to much debate between the parties in very lengthy witness statements and occupied a good portion of the hearing before me.

42. Before leaving the particulars of claim, it is right to refer to the case that is put forward in paragraphs 48 to 51 of the particulars of claim in relation to one element of the claim for loss, the costs incurred in the First Claim. In paragraph 49 the claimant alleges that Mr Grumbridge, as a person who claims to be the beneficial owner of BPI in circumstances where he knew the BPI Deal was not a simple share sale, caused or permitted BPI to defend the First Claim. It is alleged at paragraph 50 there was a failure to disclose emails that are included in the schedule that show the extent of his involvement in the BPI deal. However, it appears from paragraph 52 that the failure of disclosure is alleged to be that of BPI, not Mr Grumbridge. In any event, this aspect of the particulars of claim is confined to pleading the claim for loss.

43. The witness statement made by Mr Christian Toms, who is a partner with Brown Rudnick who act for Mr Grumbridge, provides a careful and helpful analysis of the issues and why the schedule to the particulars of claim is inaccurate. In a lengthy witness statement in response, Mr Christopher Jarvis, a partner with Fieldfisher who act for the claimant, accepts that the schedule is inaccurate. However, his statement (running to 40 pages with nearly 1200 pages of exhibits) focuses on the merits of the claim and additional documents, neither of which are relevant to the issues that fall to be determined on the application. Mr Jarvis' witness statement does more to obfuscate than to address the relevant legal test. What is notably absent is an explanation about why the liquidators chose not to pursue Mr Grumbridge in the first claim, what facts they possessed, and what facts they say are essential to the pleading a case which they say they did not possess. Mr Toms' second statement draws together at paragraph 20.7 in table 3 a summary of the six documents that were arguably not known by the claimant in the first claim. These are documents 6, 8, 9, 10, 11 and 20.

44. Document 6 is an email exchange between Mr Grumbridge and Mr Wyatt on 3 January 2010 in which arrangements were made for them to have a "quiet hour" together before the meeting on 12 January 2010. Mr Grumbridge wanted to be able to understand Mr Wyatt's thinking and detail behind it and to ensure that they both were 'singing off the same hymn sheet' at the meeting. The 'quiet hour' email is relied upon heavily by the claimant as showing that Mr Grumbridge had knowledge of all elements of the BPI Deal.

45. Documents 8, 10 and 11 are email exchanges that provide further evidence of Mr Grumbridge's attendance at the meeting on 12 January 2010.

46. Document 9 shows that Mr Grumbridge had involvement with the agenda for the meeting and was relied upon to make the same point about Mr Grumbridge's attendance at the meeting.

47. Document 20 is an email dated 17 July 2010 showing that Mr Grumbridge was aware of the Viking Agreement.

48. The claimant relies upon seven elements to establish assistance. Put briefly they are that:

> (1) Mr Grumbridge put Mr Aydin in contact with an accountant who had previously been convicted of fraud to help Mr Aydin set up an offshore company and the fact that such arrangements were later implemented by Mr Aydin.
>
> (2) Mr Grumbridge put together the agenda for a meeting of the BPI Defendants on 12 January 2010.
>
> (3) Mr Grumbridge arranged to have a detailed discussion with Mr Wyatt before the meeting on 12 January 2010 so he could understand the thinking behind the BPI deal and ensure he was 'singing off the same hymn sheet' as Mr Wyatt.
>
> (4) Mr Grumbridge attended the meeting on 12 January 2010 at which the BPI deal was approved.

(5) On about 18 January 2010 Mr Grumbridge reviewed the Viking Agreement and SPA.

(6) Viking entered into the Viking Agreement and made payments to MLL acting on the instructions of BPI.

(7) On about 9 July 2010 Mr Grumbridge was about to sign a declaration of trust to hide the fact that 50% of Mr Aydin's shares in the claimant had been transferred to BPI.

49. As to dishonesty, the claimant relies on eight elements that are set out in paragraph 34 of the particulars of claim. The claimant pleads in each case that Mr Grumbridge "knew or suspected and/or was wilfully blind" to each element. Three of these elements match paragraphs 50(1), (2) and (3) of the particulars of claim in the first claim. The remaining elements are allegations that:

(1) Mr Grumbridge knew of the terms of the Viking Agreement on or before 4 September 2009.

(2) At some point between 21 December 2009 and 12 January 2010 Mr Grumbridge considered in detail the agreements that comprised the BPI deal.

(3) Mr Grumbridge knew that the claimant had made a commitment to purchase flight seats from Viking, that the claimant was not receiving payment for that commitment and that £1.4 million was being paid to Mr Aydin.

(4) The change of ownership of 50% of the shares in the claimant was going to be hidden from the CAA by the declaration of trust.

50. When considering whether the claimant was able to plead a case against Mr Grumbridge within the primary limitation period it is important to keep in mind five points:

(1) The level of detail in which the allegations of assistance and knowledge were pleaded in the first claim provides a touchstone for the manner in which a claim against Mr Grumbridge could have been pleaded. The particulars of claim in the first claim provided a basis for the trial and no application was made to strike them out.

(2) It was not necessary for the claimant to plead all the primary evidence upon which it now relies. Allegations of dishonesty, of course, need to be pleaded with particularity, but it is normal and usually essential for a claim of this type to be based upon inferences to be drawn from primary facts.

(3) The claimant expressly relies on an allegation that Mr Grumbridge was wilfully blind[5] to the elements that are relied upon.

(4) Although the findings made by the court at the first trial about Mr Grumbridge's reliability as a witness may well have coloured the way the

[5] See the test in *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614 at [58]-[59] LJJ Henderson, Peter Jackson and Asplin.

liquidators viewed him when the judgment was handed down; it was the claimant's choice not to join Mr Grumbridge as a defendant in the first claim and it follows from this decision that the focus of the trial of the first claim was not on him.

(5) The claimant has concentrated upon facts that it says it did not know before enquiries were made following BPI's liquidation but it has failed to examine what it did know and explain why those facts were insufficient to plead a case in dishonest assistance within the primary limitation period. As it seems to me, much of this application had involved the court being asked to look through the wrong end of the evidential telescope.

51. No positive case about section 32(1)(b) has been put forward by the claimant. The claimant has not set out the facts it possessed and explained which essential facts it was missing. In a claim of this type, it is not just the facts that have to be considered but also what inferences may reasonably be drawn from them. The claimant has not explained why Mr Grumbridge, as a director of and indirect shareholder in BPI, was not made a party to the First Claim. It is not for the court to speculate why that decision was taken and whether there were objectively justifiable grounds for it. The absence of such a case makes it impossible to assess what essential facts the claimant did not possess that might trigger reliance on section 32(1)(b) of the 1980 Act. In my judgment, the absence of any positive case about limitation is fatal to the claimant because the real prospect of success test is being applied to an issue in relation to which the burden of proof rest on the claimant. The burden is of course on the defendant to establish the grounds of the application, but where the claimant declines to explain its case on section 32(1)(b), the court is entitled to conclude that the usual limitation period applies. This suffices to determine the application in favour of Mr Grumbridge.

52. Although it is not an essential part of this determination, I would add that based upon what little the claimant has chosen to reveal, I consider it was able to plead an adequate case in dishonest assistance against Mr Grumbridge by joining him as a defendant to the first claim. By adequate case I mean one that was not vulnerable to being struck out. The essential facts put Mr Grumbridge firmly in the frame. He was, after all, the person who set up BPI. BPI wholly owned both subsidiaries, BPI UK and BPI Iceland. For a period he had been the sole director of BPI. At the material time in 2010 he was one of only two directors of BPI. BPI directed and controlled Viking (paragraph 7 of the amended particulars of claim in the first claim).

53. Mr Grumbridge later claimed to be the beneficial owner of BPI. However, at the date of commencement of the first claim, the claimant believed he was a minority shareholder. The SPA and the Viking Agreement involved a transaction with a substantial value. It is difficult to see how Mr Stephensen could, as Mr Grumbridge's co-director of BPI, have committed BPI to both the SPA and the Viking Agreement without Mr Grumbridge being aware of the substance of both agreements. The financial implications of the overall deal were significant for BPI and Mr Grumbridge would have been vitally interested in them whether as the beneficial owner or one of several beneficial owners. There was sufficient information in the hands of the liquidators when the claim was issued to plead both that Mr Grumbridge had the requisite knowledge and acted dishonestly based on inference to a level of specificity that is comparable to the case pursued against the BPI Defendants.

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

55. Judgment on the claim will be entered in favour of Mr Grumbridge.