Neutral Citation Number: (2021) EWHC 1044 (Ch)

Case No:BL-2019-LDS-000041

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG
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Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

RICHARD DIXON	**Claimant**
- and -	
(1) SANTANDER ASSET FINANCE PLC **(2) HANDELSBANKEN PLC**	**Defendants**

- -
- -

Mr Simon Myerson QC for the **Claimant**
Miss Tamara Oppenheimer QC for the **First Defendant**
Miss Eleanor Temple for the **Second Defendant**

Hearing date: 3 and 4 March 2021
Date draft circulated to the Parties: 19 March 2021
Date handed down: 26 April 2021

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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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JUDGMENT

Introduction

1. By a Claim Form issued on 1 October 2019, Mr Richard Dixon and Just Vans Self Drive Ltd (Just Vans), a company of which Mr Dixon was the sole director and shareholder, brought proceedings against Santander Asset Finance PLC and Handelsbanken PLC, the first and second defendants respectively. The claim by Just Vans is no longer proceeding.

2. Just Vans was initially set up with a view to conducting business in the buying and selling of motor vehicles but subsequently, from 2003, it was engaged in supplying vehicles for hire. Its activities were financed by Santander[1] and by Handelsbanken.

3. Santander provided the finance for a large number of vehicles which were let to Just Vans pursuant to the terms of certain hire purchase agreements and which were backed up by personal guarantees given by Mr Dixon. Handelsbanken provided more general finance facilities including an overdraft facility.

4. The finance agreements between Just Vans and Santander included provisions entitling Santander to treat as a repudiatory breach and terminate the agreements if sums due from Just Vans were not paid within 7 days or 14 days[2] of a demand for repayment.

5. Handelsbanken's exposure to Just Vans was secured by various forms of security including a debenture, guarantees and legal mortgages given by Mr Dixon. The overdraft facility letter governing the terms of Just Vans' overdraft with Handelsbanken provided, amongst other things, that sums outstanding under the overdraft were at all times repayable on demand and could be cancelled at any time upon notice.

6. In 2008 both Santander and Handelsbanken demanded repayment of their respective credit facilities and Santander called upon Mr Dixon to make good pursuant to the personal obligations into which he had entered.

7. Neither Just Vans nor Mr Dixon discharged the liabilities in respect of which demands had been made and, as a result, Just Vans was placed into administration by Handelsbanken on 25

[1] Initially through Alliance & Leicester Commercial Finance plc which was subsequently acquired by Santander.
[2] Depending on the particular agreement.

September 2008 pursuant to its power to do so under its debenture. Just Vans was subsequently placed into liquidation on 22 September 2009.

8. The claim by Mr Dixon against Santander as it is currently proposed is first, for breach of contract on the basis that Santander had agreed a moratorium subject to conditions which Just Vans had met. The demand for repayment was made during the moratorium and was accordingly made in breach of contract.

9. There is a second basis of claim against Santander revolving around allegations of negligent misstatement. The essence of this claim is that shortly before Handelsbanken called in its overdraft and took steps for the appointment of an administrator Santander provided Handelsbanken with a spreadsheet containing negligently inaccurate information about the location and ownership of certain vehicles which were the subject of the hire purchase agreements between Santander and Mr Dixon. It is contended by Mr Dixon that this spreadsheet will have given rise to suspicions of bad faith/dishonesty on the part of Just Vans. Mr Dixon asserts that a significant and operative cause of Handelsbanken resolving to place Just Vans into administration was the provision by Santander of this inaccurate spreadsheet which is referred to in the pleadings as "The Altered Spreadsheet".

10. The claim against Handelsbanken is confined to an allegation of breach of contract. It is centred first on the allegation that it was an implied term of the overdraft facility letter that Handelsbanken would not act irrationally, capriciously or otherwise than in good faith in exercising its right to demand repayment of the overdraft and that in making such a demand Handelsbanken has acted contrary to those implied terms.

11. It is also asserted that there was a second implied term to the effect that no demand would be made for repayment for as long as Just Vans acted in compliance with the terms of a debenture formula and the requirements of clause 8 of the overdraft facility letter[3].

12. Finally it is asserted that Handelsbanken represented to Just Vans that it would not reduce the overdraft facility at all or would reduce it only by £100,000 when the company had received monies arising from the re-mortgaging by Mr Dixon of a property known as The Boathouse and would not take steps that would put Just Vans into administration until it had received a report from an accountant instructed to consider the company's viability.

13. Santander deny that, in terminating the agreements and requiring repayment of outstanding amounts, it acted in breach of contract. It further denies any negligent misstatement in the Altered Spreadsheet and/or that any action taken by Handelsbanken was materially dependent upon receipt by it of this Altered Spreadsheet.

14. Handelsbanken denies that its arrangement with Just Vans was subject to any of the implied terms which are alleged but, even if they were, the action that it took in calling in its loans and appointing an administrator under the terms of its debenture were not a breach of those implied terms.

[3] The debenture formula required that the aggregate of stock in the possession of Just Vans and debts owed to it would be not less than 1.25 times the bank balance in the company's books. There was an obligation on Just Vans, pursuant to clause 8 of the facility letter, to provide, inter alia, monthly management information to Handelsbanken which would include details of the aggregate of stock and debts.

15. I am concerned with 3 applications:

    - Santander's application dated 2 April 2020 that the claim against it be struck out pursuant to CPR 3.4(2). Alternatively that summary judgment be entered for Santander pursuant to CPR 24.2 (The Santander Application). The application is supported by the first and second statements of Ms Sally Emerton dated 2 April 2020 and 20 November 2020 respectively. Mr Dixon has filed and served a witness statement in response dated 25 September 2020.

    - Handelsbanken's application dated 6 February 2020 that the claim be struck out and/or that summary judgment be entered for Handelsbanken (The Handelsbanken Application). That application is supported by the first and second witness statements of Mr Robert Payne dated 6 February 2020 and 19 November 2020. Mr Dixon has filed a separate witness statement in response to this application

    - An application by Mr Dixon dated 19 June 2020 to re-amend the Particulars of Claim (The Amendment Application)[4] . A further witness statement dated 25 September 2020 has been filed in support of this application.

16. The Santander Application does not seek to descend however into a consideration of the merits of Mr Dixon's claim or indeed the merits of Santander's defence to it. It is based upon the contention that the whole claim is time barred and that in those circumstances it has no prospect of success and should be struck out accordingly.

17. The Handelsbanken Application asserts with no less vigour that Mr Dixon's claim against it is time barred and should accordingly suffer the same fate as his claim against Santander. However, Handelsbanken pursues its application to strike out on the additional basis that, even if the claim is not time barred, it lacks any real prospect of success.

18. Both defendants' applications assert that in any event, the claims are an abuse of process.

19. As regards the Amendment Application, it is agreed that it stands or falls on the outcome of the defendants' applications. If the claims are struck out then the application becomes otiose[5]. If they are not, then it was not suggested that permission to amend ought not to be granted.

20. There is no dispute that the primary limitation period for the making of any claim based on the conduct of Santander and Handelsbanken in their dealings with Just Vans and/or Mr Dixon expired in September 2014, well before these proceedings were brought. Mr Dixon argues however that, by virtue of s32 Limitation Act 1980, the claims are not time barred because the limitation period was postponed by the operation of that section and that, in any event, there has been a waiver, at least by Santander, of its right to rely on a limitation defence.

21. Further, it is argued that the claim does not lend itself to an application for summary judgment and that the claimants' limitation point ought to be properly determined as a preliminary issue

[4] It is not asserted that the proposed amendments will altar the nature of the extant allegations as set out above. Indeed, the proposed amended Particulars of Claim formally abandon some subsidiary claims promulgated in earlier iterations of the Particulars of Claim.

[5] As is put in the skeleton argument submitted on behalf of Mr Dixon at paragraph 3c "whether the claimant's application to amend should be granted depends upon the other issues: if the defendants succeed, there will be no purpose in permitting the claimant to amend…"

where evidence can be called and scrutinised with a view to establishing whether in fact Mr Dixon has made out, on the facts, his assertion that the limitation period was postponed such as to render his claim one which was brought in time.

22. Santander is represented by leading counsel, Miss Tamara Oppenheimer QC, Handelsbanken by Miss Eleanor Temple of counsel and Mr Dixon by leading counsel, Mr Simon Myerson QC. I am grateful to all three for their very helpful skeleton arguments and oral submissions. I should add that Miss Temple made clear in the course of her oral submissions that she did not depart from the position she expresses in paragraph 66 of her skeleton argument to the effect that, if she succeeds on her limitation argument, she does not require the court to go on to consider her application based on the absence of merit in the claim.

Strike out pursuant to CPR 3.4 and CPR 24

23. By CPR 3.4(2)(a) the court has power to strike out a statement of case if it discloses no reasonable grounds for bringing or defending a claim. Pursuant to CPR 24.2 the court may give summary judgment against a claimant on the whole of the claim or on any particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue.

24. There is an inevitable overlap of the court's powers under both rules[6]. In the context of an application such as this, it is difficult to envisage a scenario where the defendants would satisfy the criteria for strike out under CPR 3.4 but not under CPR 24 or vice versa. I am fortified in that view by the observations of Coulson LJ in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at 20 and 21:

> *20. The Appellant's application before the judge sought an order pursuant to r.3.4(2)(a) that the particulars of claim disclosed "no reasonable grounds" for bringing the claim and should be struck out and, in the alternative, a claim for summary judgment pursuant to r.24.2(a)(i) that the Respondent had no real prospect of succeeding on the claim. There can sometimes be procedural consequences if applications are made under the 'wrong' rule (which do not arise here) but, in a case like this (where the striking-out is based on the nature of the pleading, not a failure to comply with an order), there is no difference between the tests to be applied by the court under the two rules.*
>
> *21. Accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is "less onerous from a defendant's perspective". In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see Global Asset Capital Inc v Aabar Block SARL [2017] EWCA Civ 37; [2017] 4 WLR 16 at [27]*

25. Nevertheless, in the context of 3.4. I was referred to the commentary in the White Book at 3.4.2 to the effect that:

> *"Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon (2000) CP Rep 70. A claim or defence may be struck out as not being a*

[6] See White Book 3.4.7

valid claim or defence as a matter of law (Price Meats Ltd v Barclays Bank plc [2000] 2 All ER (Comm).”

26. In the context of CPR 24 to which submissions focussed in a little more detail, I was referred to the analysis of the approach to a defendant's applications for summary judgment given by Lewison J, as he then was, in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] wherein it was stated that:

> *15 …….The court must be careful before giving summary judgment on a claim. 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] 1 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 725."

27. The White Book at paragraph 24.2.5 makes it clear that 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 but, if an applicant does adduce credible evidence in support of its application, the respondent then becomes subject to the evidential burden of establishing some realistic prospect of success. But that evidential burden is not an onerous one. All a respondent essentially has to establish is that its case is not false, fanciful or imaginary and is simply better than merely arguable. In this case all Mr Dixon has to establish on the limitation point is that his argument that s32 is engaged so as to bring this claim within time is one which is more than merely arguable.

28. Santander and Handelsbanken argue that this application falls within paragraph vii of the guidelines expressed in *EasyAir.* So far as Santander are concerned the application is based wholly on a short point of law namely whether the claim is time barred. So far as Handelsbanken are concerned this too is its primary position. Both say that it is the sort of case where the court ought to "*grasp the nettle and decide it*". They argue that there are no factual issues which preclude the court from striking out the claims and the assertion that there needs to be a determination of disputed primary facts as a precondition for striking out the claim on limitation grounds is a bad one.

29. It is also important to observe that CPR 3.4(2)(b) permits the court to strike out a statement of case if it is an abuse of the court's process. As I have said, both Santander and Handelsbanken contend that, independent of the limitation point, the claim is an abuse because it amounts to an impermissible attempt to resurrect earlier proceedings issued in 2014 and which have simply not been pursued by Mr Dixon since then. Therefore they both seek a strike out on the grounds that this claim is an abuse in the event the claims are not time barred.

The Limitation Issue

30. As I have said, it is not in dispute that, by a combination of the effect of ss2 and 5 Limitation Act 1980, the primary limitation period in respect of all the claims made by Mr Dixon had expired by the end of September 2014. This is because:

    a. On 18 September 2008 Santander sent to Just Vans notice of termination of the hire purchase agreements on the grounds of non-payment, and demanded £3,052,751.09 and a demand to Mr Dixon for the same amount under the guarantees.
    b. On 19 September 2008 Handelsbanken notified Just Vans that it was withdrawing the overdraft facility.
    c. On 22 September 2008 Handelsbanken issued a demand letter cancelling Just Vans' overdraft and demanding payment of £513,434.25.
    d. On 25 September 2008 Just Vans was placed into administration.

31. In those circumstances the breaches of contract which constitute the cause of action arose between 18 and 22 September 2008 and the loss in respect of the negligent misstatement crystallised on the appointment of the administrator on 25 September 2008.

32. However, as I have said, Mr Dixon argues that the provisions of s32(1)(b) Limitation Act 1980 are engaged whereby the date from which time starts to run for the purposes of limitation has been postponed with the effect that this claim has been brought in time.

33. Section 32 of the Act provides as follows so far as is relevant:

Section 32.— Postponement of limitation period in case of fraud, concealment or mistake

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

(a) ………………………….; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) ………………………….;

the period of limitation shall not begin to run until the plaintiff has discovered the …., concealment …………………. or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(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."

34. It is Mr Dixon's assertion that there has been deliberate concealment by the defendants of facts relevant to his right of action and that he has brought his proceedings within 6 years of his discovery of those concealed facts and he acted with reasonable diligence not only in discovering these facts but in not discovering them any earlier than the date when he actually came by them.

Deliberate concealment

35. Before I deal with the deliberate concealment alleged by Mr Dixon it is perhaps useful to set out the procedural history applicable to the relationship between these parties. Since essentially it is not in dispute, I propose simply to reproduce that history as set out in Miss Oppenheimer QC's skeleton argument at paragraph 20 but omitting therefrom the page references to the bundle.

   a. *"<u>The Civil Proceedings:</u> On 10 March 2009 Santander issued proceedings against Mr Dixon for payment of monies due under the Guarantees[7] ("**the Civil Proceedings**"). On 14 October 2011 HHJ Behrens gave judgment on liability in Santander's favour ("**the Civil Liability Judgment**"). The quantum trial took place in April 2015 (having been delayed due to intervening criminal proceedings and Mr Dixon's ill health) and on 28 May 2015 HHJ Behrens gave judgment on quantum in the sum of £93,874.72 in relation to two of the Guarantees [1/8/A526]. The Civil Liability Judgment was appealed later in 2015 as set out further below.*

   b. *<u>The Criminal Proceedings:</u> On 13 October 2008 Santander made a report to the Police raising concerns that vehicles belonging to it were being sold in Northern Ireland and that Santander were not receiving the funds. On 11 March 2010 Mr Dixon was charged with three counts in respect of trade for a fraudulent purpose and fraudulent trading. A criminal trial took place in early 2012 but was aborted as Mr Dixon collapsed during the trial. A second criminal trial took place in May 2013, and on 11 July 2013 Mr Dixon was acquitted. On 26 July Mr Dixon received the Crown's unused materials,*

[7] Those guarantees referred to in para 3 above

and Mr Dixon alleges he thereafter uncovered documents, namely the Moratorium Letter and the Release Letter[8]*, that gave grounds for a re-trial against the Civil Liability Judgment.*

c. *<u>The 2014 Claim Form:</u> On 13 August 2013, Simpson, Sissons & Brooke LLP ("SSB"), solicitors instructed by Mr Dixon, sent a letter to Santander entitled 'letter before action' stating that they were investigating a claim against Santander for personal injury and associated financial loss; and the issues being investigated "include allegations made by you against our client that he committed fraud, forgery and deception in the management of his business, Just Vans Self Drive Ltd... Our Client alleges that the investigations made by you were based on information which was incorrect and that you have been negligent in obtaining the same." On 17 September 2014 Mr Dixon and Just Vans issued a claim against the Defendants ("the 2014 Claim Form"), which to all intents and purposes is identical to the claim form issued in these proceedings on 1 October 2019. On 5 December 2014 SSB issued an application for time for service of the 2014 Claim Form to be extended to 17 July 2015. It is understood that that application was refused. The 2014 Claim Form was served on 16 January 2015 under cover of a letter from SSB which stated that "We will be issuing a further application for the proceedings to be stayed and will write to you again in the very near future*." *[1/8/A542] No application was ever served by SSB or Mr Dixon/Just Vans, and nor were Particulars of Claim served.*

d. *<u>The Bankruptcy Proceedings:</u> Mr Dixon's failure to pay certain costs of Santander in connection with the Civil Proceedings led to the institution of bankruptcy proceedings against Mr Dixon which spanned 2011 to 2015..*

e. *<u>Appeal of the Civil Liability Judgment/discontinuance of the Civil Proceedings</u>. On 11 February 2015 Mr Dixon applied for permission to appeal the Civil Liability Judgment on the basis that the Moratorium Letter constituted new evidence. Permission to appeal was granted on 23 June 2016 and the appeal was heard on 4 and 5 July 2017. The appeal was allowed and the Court of Appeal ordered a retrial of the Civil Proceedings, limited to the issues raised by the appeal. On 10 October 2018 Santander served a notice of discontinuance prior to the retrial taking place. Mr Dixon's entitlement to costs consequent upon Santander's discontinuance still remains to be determined."*

Concealed facts

36. There are 3 concealed facts asserted by Mr Dixon upon which he relies to establish his reliance on s32(1)(b).

The first alleged concealed fact

37. This is a letter dated 6 August 2008 allegedly sent by Santander Customer Service to Just Vans. In the course of these proceedings it has been referred to as the "Moratorium Letter". Mr Dixon's position is that this letter did not come to light until he had had the opportunity of going through the Crown's unused materials supplied to him following his acquittal in the criminal proceedings on 11 July 2013. The unused materials were not supplied until 26 July 2013 and, according to Mr Dixon, the unused materials amounted to about a million documents.

38. In order to understand the significance that Mr Dixon places on this letter it is important to describe events in the month or so preceding 6 August 2008.

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[8] Not relevant to this claim

39. It is not in dispute that by mid July 2008 Just Vans was suffering serious cash flow problems. On 9 July 2008 a Mr McLoughlin of Santander emailed Mr Dixon offering a "*payment reprieve*" (i.e. moratorium) for the months of August, September and October 2008 subject to a number of conditions including that all arrears were brought up to date and stay up-to-date to the end of July.

40. On 28 July Santander was requested by email to provide a breakdown of arrears to the end of July 2008. On the following date Just Vans was notified that "*current arrears*" amounted to £116,324.48.

41. On 31 July 2008 Just Vans paid that sum to Santander. It does not appear to be in dispute that there were payments due to Santander which did not figure in Santander's email of 29 July and which had fallen due between 28 and 31 July. In addition, a direct debit had been returned on 24 July 2008. Accordingly, notwithstanding the receipt by Santander of £116,324.48 at the end of July the company was still technically in arrears. It has consistently therefore been the position of Santander that the terms of the moratorium were not met because all arrears had not been brought up to date by the end of July.[9]

42. The Moratorium Letter however, if genuine[10], is said to undermine that position. This letter states "*after receiving payment of £116,324.48 for the arrears on repayments up until the end of July 2008 we confirm the payment reprieve for the months of August September and October 2008 is now in effect*".

43. As was observed by Gross LJ in the appeal to which I have referred above in paragraph 35e;

> "*The judge took a strict view of the exchanges (namely the email of 9 July and 28 July). He set out his view at (104) to (111) of the judgment. In essence what he said was that although the existing arrears had been paid, hence the sum of £116,000 odd, 3 additional items had slipped in between 28 and 31 July. Those had not been paid. Accordingly, the conditions had not been satisfied and there was not a moratorium. As he went on to say at (109) to (110) for that reason alone, in effect, there were arrears on 18 September 2008 and so A&L were entitled to terminate the agreements. It follows that the moratorium point is of importance both in itself and also for consequential reasons.*
>
> *The judge's approach in those paragraphs of his judgment is, with respect, understandable on the materials available to him, but the picture is undoubtedly affected if the moratorium letter is admitted in evidence. …….. I would have no real doubt in admitting the moratorium letter as fresh evidence …………. I need go no further than say that the moratorium letter would probably have an important influence on the result regardless of how the point is ultimately decided"*

44. Put simply, Mr Dixon's assertion is that Santander's demand for repayment in September 2008 constituted a breach of contract but his cause of action in respect of that breach was not complete until that moratorium letter came to light and that was not until November 2013 when,

[9] On 14 October 2011 in the civil proceedings set out at paragraph 34e above His Honour Judge Behrens made a finding that no payment holiday was in place notwithstanding Santander's email of 9 July and the payment of £116,000 odd pursuant to the email of 29 July because that payment did not eliminate all the arrears which were due as at the end of July. The moratorium letter was not in evidence at that hearing.

[10] Santander do not accept that it is but that is clearly a matter which cannot be resolved in the course of an application such as this. Indeed, this application must be approached on the basis that it is genuine.

as I have said, Mr Dixon says that he discovered it amongst the unused material that had been sent to him following his acquittal.

The second alleged concealed fact.

45. This relates to the Altered Spreadsheet. In paragraph 9 above I have already briefly set out the nature of the negligent misstatement claim, but from paragraph 46 of her skeleton argument Miss Oppenheimer QC analyses it in more detail and sets out, at paragraph 47, the concealment that Mr Dixon alleges. Her analysis of the claim was not challenged by Mr Myerson QC. I do not think I can improve on that analysis and so I simply reproduce it:

> 46 a. *Santander created the Altered Spreadsheet, which contained inaccurate information about Just Vans;*
> *b. Santander provided the Altered Spreadsheet to Handelsbanken and/or communicated its contents to Handelsbanken, thereby making false statements in connection with Just Vans; and*
> *c. the Altered Spreadsheet was the operative cause of the decision of Handelsbanken to put Just Vans into administration.*
>
> 47. *Mr Dixon's case as to the alleged deliberate concealment with respect to the Negligent Mis-Statement Claim is as follows:*
>
> *a. Mr Dixon states that the existence and significance of the Altered Spreadsheet "only emerged during the course of the criminal proceedings and thereafter when I received the unused material and had a chance to properly assimilate all of the documentary evidence." He relies on paragraph 43 of his Counsel's skeleton argument before the Court of Appeal in 2017 which is said to set out "the history of how the existence and significance of the Altered Spreadsheet emerged"*
> *b. Mr Dixon relies (at para 47) on the email he sent to SBB sent on 12 October 2013[2/12/A816] and says that before the date of that email "I was not aware of the facts which would enable me to plead my case against (Santander) properly."*
> *c. Mr Dixon asserts that it was not until he had an opportunity to consider all of the unused materials from the criminal trial that he knew he might have a potential cause of action against Santander (and Handelsbanken). In particular, he says "The facts and matters pleaded in (the amended Particulars of Claim) were only available to me as a result of the criminal trial and the provision of the unused material."*

The third alleged concealed fact

48. This is an allegation of concealment by Handelsbanken. Once again, in order to make sense of it, it is necessary to recount some of the background.

49. In September 2008 it is alleged that, at the behest of Handelsbanken, Mr Dixon on behalf of Just Vans agreed to the instruction of Mr Dermot Garvey, an accountant with Chadwicks LLP, to provide a financial assessment going forward of Just Vans. In his proposed Re-Amended Particulars of Claim at paragraph 64 Mr Dixon recites the terms of a letter dated 18 September 2008 sent to him from Handelsbanken in which it is confirmed that:

> "*Today we have formally appointed Chadwicks LLP (Dermot Garvey) to meet with you and (the company's accountant) on Friday 19 September. His initial brief will be to look at the companies (sic) current financial position, its solvency and to map out its long-term ability to trade ……..*"

50. Mr Garvey attended at the premises of Just Vans on 19 September, as agreed. At paragraph 67 of the proposed Re-Amended Statement of Claim Mr Dixon appears to concede that fundamentally the object of Mr Garvey's appointment was *"to obtain some information and see if it was a good idea for Handelsbanken to lend the company more money*".

51. At paragraph 120 of the proposed Re-Amended Particulars of Claim Mr Dixon asserts that an agreement was reached that Handelsbanken would not exercise its rights to appoint administrators until Mr Garvey had completed his review[11]. Indeed it is asserted by Mr Dixon that it was in reliance on these representations that, on behalf of Just Vans, he agreed to the appointment of Mr Garvey to examine the company's financial affairs.

52. What Mr Dixon says has now been revealed but which was previously concealed was the true reason for placing the company into administration on 25 September 2008. He deals with this in his witness statement dated 25 September 2020 paragraph 22. He has this to say:

> *"In the case of Handelsbanken, the true reasons for placing the company into administration were not disclosed to me and were deliberately withheld by Handelsbanken. It was only when Mr Fell, Mr Smith[12] and Mr Garvey were cross-examined at the second criminal trial that matters became clear and the true position was revealed. In particular the evidence of Mr Garvey, to the effect that he had not returned to meet Mr Fell and Mr Smith after leaving the premises of the company on 19 September and had only reported to them on 22 September 2008, a fact which had not only been concealed but deliberately concealed from me. When I received the unused material after the second criminal trial, it was only then that I was able to formulate the case against Handelsbanken".*

Handelsbanken notified Just Vans that it was withdrawing overdraft facilities on 19 September. The assertion is therefore that in doing so Handelsbanken acted contrary to a contractual commitment not to do so until, amongst other things, they had Mr Garvey's report.

53. It does not appear to me that Mr Dixon provides any detail in his witness statement about what he believes were the true reasons which prompted Handelsbanken to place the company into administration. However, at paragraph 80 of the proposed Re-Amended Particulars of Claim he states:

> *"It is the claimant's case that at least one major and important consideration for the decision of (Handelsbanken) to appoint administrators to the company was anecdotal information provided to (Handelsbanken) that there were 2 versions of the fleet hire spreadsheet in circulation and that therefore the financial accounting information provided to it was falsified*."

This is, as I understand it, a reference to the Altered Spreadsheet which Handelsbanken is said to have received from Santander.

Construction of s32(1)(b)

54. The claimant must establish that there has been a relevant "deliberate concealment" within the meaning of the section so as to give rise to a postponement of the date from which limitation begins to run. Equally, if it is established that there has been deliberate concealment, the burden is on the claimant to establish that that concealment was not discovered nor could have been discovered with reasonable diligence earlier than the date which is 6 years prior to the issue of proceedings.

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[11] For the sake of completeness, I also record that paragraph 120 sets out further representations said to have been made by Handelsbanken which had the effect of precluding it from calling in the overdraft when it did.

[12] 2 employees of Handelsbanken

55. It is important not to overlook the nature of the defendants' applications with which I am dealing. It would be inappropriate to strike out the claim on a summary basis unless I am satisfied that there is no real prospect of the claimant establishing either criteria. In other words, the claims do not fall to be struck out pursuant to either CPR 3 or 24 merely because I might take the view that it is unlikely, on balance, that the claimant will be able to establish that the onset of the limitation period has been postponed to 1 October 2013[13]. The defendants' applications must fail if it is simply better than merely arguable that there has been deliberate concealment of a relevant fact by Santander or Handelsbanken and that was not discovered until after 1 October 2013 and could not have been discovered earlier than that date, even with reasonable diligence.

56. I should also add that Mr Myerson QC argues that issues relating to deliberate concealment must, almost by definition, be fact sensitive. It is a basis upon which he asserts that this limitation issue lends itself to determination as a preliminary issue but does not lend itself to determination on this summary basis. Both Miss Oppenheimer QC and Miss Temple argue that this represents a misunderstanding of the basis of the application to strike out. It is not a question of whether or not there has been deliberate concealment in the sense of a deliberate act on the part of either Santander or Handelsbanken. It is rather a question of whether there has been deliberate concealment by the defendants of "*any fact relevant to Mr Dixon's right of action*". To put it another way, Miss Oppenheimer QC and Miss Temple argue that there is no real prospect of Mr Dixon establishing that any of the 3 alleged concealed facts were facts relevant to Mr Dixon's right of action, whether deliberately concealed or not. Secondly, they argue that, even if all or any of them are relevant facts, there is no real prospect that Mr Dixon can establish that they were not discovered or reasonably discoverable until after 1 October 2013.

What is meant by "any fact relevant to the plaintiff's right of action"?

57. The starting point to be adopted in answering this question is paragraphs 23 and 24 of the judgment of Simon J, as he then was, in *Arcadia Group Brands v Visa Inc* [2014] EWHC 3561 (Comm). The substance of this decision was approved on appeal at [2015] EWCA Civ 883.

> *23. There are a number of cases which throw light on the proper interpretation of s.32(1) of the 1980 Act: Johnson v. Chief Constable of Surrey (CA, unreported, 23 November 1992); C v. Mirror Group Newspapers Ltd [1997] 1 WLR 131 (CA); Gold v. Mincoff, Science & Gold [2001] Lloyd's Rep PN 423 (Neuberger J); AIC Ltd v. ITS Testing Services (UK) Ltd, The 'Kriti Palm' [2006] EWCA Civ 1601 and Williams v. Lishman, Sidwell, Campbell & Price Ltd [2010] EWCA Civ 418.*
> *24. 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. 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.139A.*
>
> *(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' at [323].*

[13] The date which is 6 years prior to the institution of proceedings

(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 LJJ 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 judgment 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 a 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 at [75] in the different context of s.14A of the 1980 Act, but referring to Johnson and C v. MGN.

58. In the Court of Appeal in that case, at paragraph 49, the principles were distilled to the following:

"(1) a fact relevant to the plaintiff's right of action within s32(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 relevant to the claimant's right of action.

59. In further summary, in order therefore to meet the requirements of s32(1)(b) the concealed fact must meet the "*statement of claim test",* which must be applied narrowly[14]. The statement of claim test requires the facts which have been concealed to be those which are essential for a claimant to prove in order to establish a prima facie case. The test is not met if the relevant fact merely makes a claimant's case stronger. This emphasises the need to distinguish between concealed *evidence* on the one hand and concealed *facts* without which the claim is incomplete, on the other. As was repeated in *Kimathi v FCO* [2018] EWHC 1169 (QB) at 36 per Stuart Smith J

"There is an important distinction which, on all the authorities must be preserved, between "facts without which the cause of action is incomplete" and "facts which

[14] Mr Myerson QC was constrained to accept that the test is a narrow one although, in his view, it ought not to be (see para 60 below).

merely improve prospects of success". The former are within s32(1)(b); the latter are not"

60. There are further extracts in *Kimathi* upon which Miss Oppenheimer QC and Miss Temple rely. These essentially deal with Mr Myerson QC's submission to me, and indeed to Stewart J in *Kimathi* where Mr Myerson QC acted for the claimants, to the effect that the statement of claim test has to be founded in reality and is broader than would appear at first blush. The assertion was summarised by Stuart Smith J in paragraph 39 as follows:

> *"39 The claimant's argument in respect of the present authorities rests on a number of interconnected points. In broad terms they are as follows:*
>
> - *The statement of claim test starts from the assumption that the mere assertion by a claimant is sufficient. That is not a fully considered view and in the present case mere assertion was never enough……*
>
> - *In fact the principle underlying the statement of claim test is to reflect reality. The test is not whether or not a mere assertion could be made. There has to be consideration of the prospects of success. The statement of claim test is a means of describing that rationale and should not be applied mechanistically, as it would produce an absurd result, because the concealment was successful in preventing the claimants from taking action. Properly viewed, the statement of claim test is merely shorthand for the rationale behind s32, rather than its straitjacket".*

61. In fact, this assertion appears to have got fairly short shrift from Stewart J. At paragraphs 43, 45 and 51(d) he states:

> *43 …… I see no reason for distinguishing the Court of Appeal authorities on the ground that in the present case mere assertion was never enough because the assertions were not admitted as the documentary record is not admitted to be complete……*
>
> *45 I now turn to the suggestion that the principle underpinning the test is to "reflect reality". Reliance is placed on what Neill LJ said in <u>Mirror Group Newspapers</u> in relation to the <u>Johnson</u> case namely "it is clear that Rose LJ accepted what in this court has been described as the statement of claim test, that is knowledge of the facts which should be pleaded in the statement of claim. From this they submit that the test is not one of mere assertion but some consideration of the prospect of success. Neill LJ and Russell LJJ in <u>Johnson</u>. There is nothing in this extract to support the claimant's submission. Indeed everything is directly to the contrary....*
>
> *51(d) For the purpose of s31(1)(b), if a claimant has the knowledge to plead his or her cause of action, then that is sufficient to obviate any adverse consequences of deliberate concealment by the defendants."*

62. Miss Oppenheimer QC cites 2 further cases. In *Jalla v Royal Dutch Shell* [2020] EWHC 459 (TCC) the claimants brought proceedings on behalf of Nigerian ocean side communities that had been affected by an oil spill. When limitation was raised they argued that time did not begin to run until they had received a report (the FUGRO report) and that was received within 6 years the bringing of the claim. At paragraph 82 Stuart Smith J observed:

> *"Finally, on this issue, the FUGRO report is not "a fact relevant to the claimant's right of action" and withholding the report (if it were to be proved) would not amount to concealment of the right of action. At its highest it is evidence that may enhance the claimant's claim. It is of course necessary for the claimants in due course to prove that Bonga oil from the December 2011 spill reached their land and waters; but that is a fact which they have always asserted vigorously so that it cannot be said that they were*

unaware of it. Nor can it be said that the FUGRO report was necessary to enable the claimants to advance and, ultimately plead their case, because it is clear that they have other evidence upon which they relied from the outset……… It is clear that the claimants could plead all relevant facts without the FUGRO report because they did so by the original Claim Form and Particulars of Claim both of which alleged that the December 2011 spill had caused pollution to land"

63. In the course of her arguments, Miss Oppenheimer QC asserted that there was an equivalency between the FUGRO report which featured in *Jalla* and the Moratorium Letter in this case. Both simply enhanced their respective claimants' cases. The actual fact asserted by Mr Dixon was, and always had been, that calling in loans was a breach by Santander of the terms of the moratorium and that had always been vigorously asserted in the same way that the claimants in *Jalla* had always vigorously asserted that a December 2011 oil spill had contaminated their waters. Equally, Mr Dixon had been asserting for many years that Santander had supplied a negligently inaccurate spreadsheet to Handelsbanken and that was the catalyst for it appointing an administrator.

64. The second case to which she refers me is *Roberts v RBS* [2020] EWHC 3141 (Comm). At paragraph 34 Cockerill J observes that

> *"It is not every broadly relevant fact which qualifies (as a relevant concealed fact). The only facts which count for this purpose are facts which "found the cause of action". That has been equated to the facts which a claimant would need to plead in a statement of case to plead a prima facie case."*

65. At paragraph 36 and 38 Cockerill J therefore analyses the requirements of a pleading. She has this to say:

> *"36 A critical point is what the pleading requirements are for statements of case. CPR 16.4 requires the pleading of "a concise statement of the facts on which the claimant relies". The authorities make clear that this means the facts which go to make up that cause of action – the existence of a contract, breach and damage for example"*
>
> *38 So what needs to be pleaded, and the only facts which matter for the purposes of a defence of deliberate concealment, are the bare facts which go to make up a pleading which outlines a prima facie cause of action without missing out any essential elements of the cause of action. Evidence and reply points are not necessary to this exercise and they do not attract the protection of section 32*."

What is meant by discovery?

66. *In Granville Technology Group Ltd v Infineon Technologies AG* [2020] EWHC 415 from paragraph 24 Foxton J considered this issue. His analysis led him to conclude at paragraphs 28 and 29 that:

> "28 *….the authorities establish that a claimant can be said to have discovered a fact when the claimant is aware of sufficient material to be able to properly plead that fact*".
>
> 29 *In order to be able to properly plead a claim:*
>
> *i) Any professional obligations which attach to making allegations of a particular kind must be satisfied*[15].

[15] For example, dishonesty ought not to be pleaded unless there genuinely exists the evidence to justify the allegation. There is no such injunction however against simply pleading a breach of contract.

ii) The pleaded case must be one which would not be struck out on the basis that has no sufficient evidential basis or was not sufficiently arguable; and

iii) The pleading must be one capable of being supported by a statement of truth"

Discussion

The submissions of behalf of Santander and Handelsbanken

67. The principle proposition asserted by Miss Oppenheimer QC and Miss Temple is that the claimant simply fails to meet the statement of claim test. The 3 alleged concealed facts are no more than pieces of evidence. They are not facts without which the cause of action was incomplete.

The Moratorium letter

68. As regards the moratorium letter, Miss Oppenheimer QC reminds me that it has always been Mr Dixon's case that the actions taken by Santander were in breach of an agreed moratorium. All that the moratorium letter does is provide further evidence to support that claim.

69. Indeed, Miss Oppenheimer QC prays in aid Mr Dixon's own evidence contained in his witness statement of 25 September 2020, paragraphs 21 and 22 in which he states:

    21 *……..at the beginning of November 2013 I discovered the moratorium letter amongst that (unused) material. I had no recollection of the company having received that letter but it simply confirmed to me what I had always asserted, namely that Santander had agreed a moratorium and that the company had complied with the conditions to bring it into effect.*

    22 *.....it was always my case in the civil proceedings brought by Santander (and in the criminal proceedings which followed)" that Santander had agreed a moratorium and that Santander was in breach of that moratorium and that letter is confirmation that Santander accepted that a moratorium was in place*."

70. It is argued that, in the circumstances, there was nothing to stop Mr Dixon pleading his case alleging breach of contract years before he did so. Mr Dixon did not, to quote from the observations of Cockerill J that I refer to above in paragraphs 64 and 65 *need* the actual moratorium letter to plead breach of contract. He already had all he needed to plead "*the existence of a contract, breach and damage"*. At best what he lacked was the evidence to support that pleaded case.

71. Miss Oppenheimer QC goes further. She draws attention to evidence produced in the civil proceedings instituted by Santander against Mr Dixon in March 2009 for payment of monies due under the guarantees which had been given by Mr Dixon in support of the finance agreements between Santander and Just Vans. At paragraph 10 of a witness statement dated 15 September 2011 (which appears to have been made in support of an application for an order under the Data Protection Act) Mr Dixon states:

    "*The moratorium began on 1 August 2008 and was to remain in place for the months of August, September and October 2008. Monthly finance payments were to resume on 1 November 2008 and would have, had it not been for (Santander) crystallising their position when serving the demand on (Just Vans) for (according to their particulars of claim) £3,052,751.09 on 18 September 2008. By doing so they were in breach of their 9 July 2008 agreement with (Just Vans) which took effect on 31 July 2008 following (Just Vans) paying (Santander) £116,324.48 being the arrears to the end of July 2008".*

    This leads me back to the observations of Miss Oppenheimer QC that I record in paragraph 63 above which borrowed from the observations of Stuart Smith J in *Jalla* to which I refer in

paragraph 62 viz that the moratorium was *"a fact which (Mr Dixon) had always asserted vigorously so that it cannot be said that (he was) unaware of it"*.

72. There is yet further evidence upon which Miss Oppenheimer QC relies in support of her contention that Mr Dixon for years had everything he needed in order to plead a claim based on breach of contract arising out of the moratorium. I have already referred to the 2014 claim form. It seems that in 2013 Mr Dixon had consulted solicitors who, by a letter before action dated 13 August 2013, had put Santander on notice of a potential claim arising out of what Mr Dixon characterised as "*investigations made by Santander which were negligently incorrect*".

73. In an email to his solicitors dated 14 October 2013 voluntarily disclosed by Mr Dixon in these proceedings Mr Dixon talks about a counterclaim against Santander which, it is suggested, can only relate to the consequences suffered by Mr Dixon from the wrongful conduct of Santander in calling in their loans.

74. In fact, Mr Dixon's claim against Santander was ultimately issued on 17 September 2014. Handelsbanken was also a named defendant. The claim form sets out details of the claim as:

> "*A claim for damages and other losses arising out of the termination by the defendants of various agreements between the claimant and the defendants under which the defendants contracted with the claimants to provide finance, loans and banking facilities full particulars of which will be served in due course*."

75. The value of the claim in the certificate of value is put as exceeding £300,000. Miss Oppenheimer QC draws attention to the fact that the claim form by which this current action was launched is not just in similar terms, but in identical terms – and the certificate of value is precisely the same.

76. This in itself, she argues, makes clear that Mr Dixon had by 2014 all the facts that he needed to plead his claim. There is another point that Miss Oppenheimer QC makes from these 2014 proceedings. This relates to the date on which they were issued. As I have already said in paragraph 30 above , the primary limitation period in respect of claims for breach of contract and negligent misstatement expired no later than 25 September 2014. The 2014 claim was issued a week before. Miss Oppenheimer QC suggests that it is not difficult to infer that Mr Dixon was aware of limitation issues with regard to his claim and issued his claim then in order to preserve the primary limitation period.

The Negligent Misstatement

77. Miss Oppenheimer QC argues that the suggestion relating to Mr Dixon's discovery of relevant facts in respect of the negligent misstatement claim fares no better.

78. As I have said, Mr Dixon confirms at paragraph 46 of his witness statement of 25 September 2020 that the "exist*ence and significance of (the Altered Spreadsheet) only emerged during the course of the criminal proceedings and thereafter when I received the unused material and had a chance to properly assimilate all of the documentary evidence*." He makes the point at paragraph 47 that "*before then I was not aware of the facts which would enable me to plead my case against Santander properly*." At paragraph 51 he asserts that "*the facts and matters pleaded in the Amended Particulars of Claim were only available to me as a result of the criminal trial and the provision of the unused material."* In fact it was in July 2013 that he received this unused material, more than 6 years before he brought his proceedings in October 2019.

79. In any event, Miss Oppenheimer QC argues that all this betrays a misunderstanding by Mr Dixon of what is required in order for the limitation period to be postponed. What is required

is a lack of awareness (because it has been concealed) of a fact without which the cause of action is incomplete. But in fact, Mr Dixon had been aware of the issue of the Altered Spreadsheet for about 10 years when he issued these current proceedings.

80. Miss Oppenheimer QC contends that the evidence for this comes out of his own mouth. In his original Particulars of Claim in these proceedings endorsed with a statement of truth he states (at paragraph 64) that he became aware of the existence of this Altered Spreadsheet sometime in around late 2009.

81. I was referred to a skeleton argument submitted by counsel to the Court of Appeal in July 2017 in support of the appeal against the civil liability judgment obtained by Santander in October 2011. Counsel contends at paragraph 43 of his skeleton:

- *"Mr Dixon has consistently maintained from the outset of these proceedings (i.e. from 10 March 2009) that Santander had corrupted a spreadsheet (paragraph 43.1)*

- *Mr Dixon addressed the issue of the corrupt spreadsheet in his witness statement of 4 November 2010 for the trial before HHJ Behrens explaining how it was originally created on 12 September 2008 with accurate information but that through errors made by (Santander's) staff over 200 vehicles came to be shown with the wrong customer, and inaccurate vehicle registrations and details were recorded. Various versions of the corrupted spreadsheet were exhibited to his witness statement. (Paragraph 43.4).*

- *Also in evidence before HHJ Behrens was a further copy of the spreadsheet found in a box of documents in the administrator's premises which Mr Dixon was permitted to inspect in the presence of the police in connection with the criminal proceedings in July 2011. A copy of this version of the corrupt spreadsheet is at (5/49) (paragraph 43.5)*

- *This revelation confirmed Mr Dixon's belief that Handelsbanken have been prompted to appoint administrators upon being informed by Santander that a spreadsheet was in existence with false details of hirers and/or upon being provided with a copy of the spreadsheet by Santander. (Paragraph 43.6)*

- *The corruption (of the spreadsheet) was further confirmed during Ms Woods cross examination in the first criminal trial[16] where she described the spreadsheet as containing Santander's agreement number, description of the vehicle, the registration number, the valuation that we had got from a company we used to value the vehicles. The column where we thought the vehicle was, this is the column which is incorrect and we have admitted that this was an incorrect column. Where Just Vans records showed where the vehicles were and address of where vehicles were .... - see also.... where Mrs Woods accepts that the end user column was largely erroneous (Paragraph 43.10)*

- *Mr Dixon's counsel (at his first criminal trial) submitted that Santander have managed to create the impression that there were 2 spreadsheets in existence, one of which was fraudulent and it was this that led Handelsbanken to place Just Vans into administration (paragraph 46.13)*

- *Disclosure of an internal memo as a result of a subject access request made in August 2011 demonstrates that this (what is referred to in paragraph 46.13 above) was exactly what had transpired ". (Paragraph 43.14)*

[16] In early 2012

82. Miss Oppenheimer QC argues that the reference to paragraph 43.14 is particularly apposite because Mr Dixon specifically pleads at paragraph 79 of his proposed Amended Particulars of Claim that in March 2010 an employee at Handelsbanken wrote a note in answer to a query initiated by Mr Dixon about why the bank had appointed administrators. As suggested by counsel in his skeleton argument to the Court of Appeal that note raised the prospect that Handelsbanken became suspicious that Just Vans were not acting honestly and in good faith because essentially they were operating on 2 sets of books. The point made by Miss Oppenheimer QC is that this note had been in Mr Dixon's possession since August 2011 following a subject access request made to Handelsbanken.

83. Miss Oppenheimer QC therefore offers precisely the same arguments as she marshalled in relation to the breach of contract claim to support her assertion that there is no real prospect of Mr Dixon establishing that a fact relevant to his right of action was deliberately concealed and only discovered or reasonably discoverable within the 6 years prior to the initiation of his proceedings in October 2019. Essentially, she argues that he had all the relevant facts to plead his claim in negligent misstatement. Even if he lacked the actual Altered Spreadsheet until he discovered it in the unused material his cause of action was clear. The Altered Spreadsheet was merely evidence in support of that cause of action.

The claim for concealment of fact by Handelsbanken.

84. I have already described the alleged concealed fact from paragraph 48 above. I have to admit that I have difficulty in attaching the same importance as Mr Dixon does to the fact (if it is a fact) that Handelsbanken took steps on the 19 September 2008 that were not open to it until 22 September. However, even if it does form the basis of a claim against Handelsbanken, Miss Temple argues that this fact too was known to Mr Dixon well before 1 October 2013 being 6 years before the issue of these proceedings.

85. The second criminal trial at which this circumstance was apparently revealed took place between May and 11 July 2013. The evidence of Mr Smith and Mr Fell that Mr Dixon refers to in paragraph 22 of his witness statement of 25 September 2020, was given in the period between 21 and 27 June. It was thus in his possession for some months before 1 October 2013.

86. In fact, argues Miss Temple, there is clear evidence that Mr Dixon thought he had a cause of action against Handelsbanken much earlier than 1 October 2013. As I have said, the proceedings launched by him in 2014 claimed damages not only against Santander but also Handelsbanken for "*damages and other losses arising from the termination of various agreements.*". Miss Temple suggests, in paragraph 62d of her skeleton argument, that "*it is clear that Mr Dixon had formulated a cause of action, including a breach of contract claim against Handelsbanken following the evidence given at his criminal trial*."

87. Furthermore, Miss Temple argues that, in any event, there is no real prospect of Mr Dixon establishing that the fact that he alleges was concealed is a fact relevant to his cause of action taking account of the narrow interpretation that the courts have placed on the meaning of s32(1)(b).

88. She argues that the date upon which Mr Garvey reported to the bank is not a fact without which Mr Dixon's cause of action against the bank is incomplete. His action against Handelsbanken is that it was not open to it to call in its loans and appoint an administrator when it did so. If that is so, it is suggested that that is a complete cause of action about which he had known for years prior to 1 October 2013. Moreover, it was actually translated into a claim by the proceedings issued in 2014 which Mr Dixon has simply failed to pursue.

89. There is a further point made by Miss Temple to the effect that the reliance on s32(1)(b) is procedurally flawed because, on the authority of *Various Claimants v News Group Newspapers* [2020] EWHC 1593 (Ch) at 29 and 30, reliance on s32 and the basis for that reliance ought to be pleaded. In this case the concealed fact upon which Mr Dixon relies is not particularised in his pleadings. It only appears in paragraph 22 of his witness statement of 25 September 2020.

Reasonable Diligence

90. Even if all or any of the alleged concealed facts are relevant concealed facts then the limitation period commences on the date that, with reasonable diligence, the relevant fact could have been discovered if that date is earlier than the actual date of discovery. Thus a claimant is fixed with constructive knowledge of a relevant fact from the date that that fact could, with reasonable diligence, have been discovered, whether or not it was actually discovered by that date.

91. Both Miss Temple and Miss Oppenheimer QC argue that, if Mr Dixon is able to establish a real prospect of establishing at a substantive hearing (whether that is a separate hearing of a preliminary issue or at trial) that relevant facts were concealed and he did not know about them until after 1 October 2013 then he is still out of time because, with reasonable diligence, they were discoverable before that date.

92. Miss Oppenheimer QC argues that Mr Dixon was on notice of the need to investigate whether the Altered Spreadsheet and correspondence concerning the moratorium might be found within the unused material and she suggests that, having been on notice, the burden is on him to establish that he could not, with reasonable diligence, have discovered the letter or spreadsheet prior to 1 October 2013. She argues that, on the authority of *Paragon Finance plc v DB Thackerar & Co* [1999] 1 All ER 400;

> *"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*."

The issue about the notice that a claimant has of something meriting investigation was considered by Foxton J in *Granville Technology* in paragraphs 45 and 46 which I shall come to later in the consideration of reasonable diligence.

93. Miss Oppenheimer QC also points out that, even if the concealed facts only fell to be revealed by a close analysis of the unused material following Mr Dixon's acquittal, Mr Dixon was in possession of this material from 26 July 2013 thereby still rendering proceedings issued on 1 October 2019 out of time by up to 66 days. She argues that it cannot be said that going through the unused material very promptly is an "*exceptional measure*", in those circumstances.

94. Miss Temple makes the same point concerning the third alleged concealed fact. It was always Mr Dixon's case that Handelsbanken took steps prematurely. It is Mr Dixon's evidence that in his criminal trial Mr Fell, Mr Smith and Mr Garvey essentially confirmed that suspicion. It is wholly reasonable to imagine that there may also be documents in the unused material which also corroborated that. Somebody exercising reasonable diligence would have looked for them in a more urgent timescale than that adopted by Mr Dixon.

95. I have already made reference more than once to the appeal against the judgment of His Honour Judge Behrens of October 2011. I have also mentioned that the appeal was based upon the basis that the moratorium letter (and a letter releasing Mr Dixon from some of his guarantees in favour of Santander) constituted new evidence which was not available before His Honour Judge Behrens. The Court of Appeal did indeed order a retrial. In the course of his

judgment Gross LJ clearly had regard to questions of reasonable diligence. Mr Dixon relies on the finding of Gross LJ that essentially the moratorium letter could not, even with reasonable diligence, have been discovered by Mr Dixon for use at trial before His Honour Judge Behrens.

96. Miss Oppenheimer QC contends that Mr Myerson QC's argument, that this is sufficiently good evidence to enable this court to hold that there is a real prospect that the limitation period has been postponed so that a limitation defence is frustrated, is a bad one.

97. She deals with this in paragraph 58 of his skeleton argument. She contends that the Court of Appeal was simply applying the test under *Ladd v Marshall* to permit the admission of fresh evidence. She points out that *Ladd v Marshall* is simply concerned (amongst other things) with the question of whether evidence could have been obtained for use at trial with reasonable diligence. S32 is not concerned with evidence it is concerned with relevant facts.

98. Furthermore, the timescales with which the Court of Appeal were concerned were wholly different to the timescales relevant to this application. The Court of Appeal had to consider whether the moratorium letter could have been found with reasonable diligence before trial (September/October 2011). The issue for this court, on the assumption that the moratorium letter is a relevant fact (which is of course very much disputed) is whether it could have been discovered with reasonable diligence before 1 October 2013. It is also pointed out that, other than I think a passing reference to the Altered Spreadsheet, the Court of Appeal judgment does not mention that spreadsheet or the third concealed fact.

99. Finally, it bears repeating that both Miss Oppenheimer QC and Miss Temple remind me that it is important to have in mind what it is that has to be discovered. It is a fact that has been concealed and without which the cause of action is incomplete. For the reasons I have already recounted, their assertion is that there was nothing to preclude Mr Dixon from pleading his claim alleging breach of contract by both Handelsbanken and Santander and negligent misstatement against Santander well before 1 October 2013.

Submissions on behalf of Mr Dixon

Preliminary Points

The First Preliminary Point

100. Mr Myerson QC makes a preliminary point to the effect that these summary judgment applications are not appropriate for the determination of the limitation point in the particular circumstances of this case. He argues that limitation should be determined after hearing evidence from all parties. As he puts it at paragraphs 4, 17, 18, 19 and 23 of his skeleton argument:

> "*4 (Handelsbanken and Santander's) attempt to distinguish issues that admittedly require evidence from those that the defendants assert do not does not disguise the fact that the court would be assisted by evidence."*
>
> *17 (The defendants) accept that determining limitation requires evidence that seek to preserve these applications by drawing a distinction limitation issues that need evidence and those that do not.*
>
> *18 (The claimant's) position is that the distinction the defendants draw between whether the matters relied on by the claimant are a relevant concealment and whether, if so, they could have been discovered earlier, and every other issue is uncertain and disproportionate. The real challenge to these proceedings is that they are time-barred: a preliminary issue is the obvious way forward.*

19 The question of the time of discovery is a straightforward demonstration of why that is the case……..

23 (The question of whether Mr Dixon could have discovered earlier with reasonable diligence the matters upon which he now relies which emanated from the unused material) illustrates the need for evidence at a preliminary issue……… Santander deals with the evidence……. by asserting that the claimant could have discovered the documentation. If that is seriously pursued it must involve cross-examining the claimant and undermining his witness statement."

101. Mr Myerson QC cites *Jalla* in support on the basis that Stuart Smith J (who drew support from the observations of Jackson LJ in *Chandra v Brooke North* [2013] EWCA Civ 1559) recognised that a preliminary issues is an approach that the court can, and often does, take.

The Second Preliminary Point

102. A further preliminary point which appears to be limited to the claim brought against Santander is that Santander is the author of the circumstances that in fact permit it to argue limitation and that militates against a finding that the claim, at least against it, is time-barred.

103. This argument revolved around the fact that about 15 months after the Court of Appeal judgment ordering a retrial Santander discontinued its civil proceedings against Mr Dixon under its guarantees. Since there was no counterclaim the effect of discontinuance was essentially to put paid to Mr Dixon raising the issues of breach/negligent misstatement about which he now complains. As Mr Myerson QC puts it at paragraph 12 of his skeleton argument:

"*Thus, the availability of any limitation argument arises because Santander abandoned its attempt to fix the claimant with liability on the guarantees by simply ending the proceedings rather than, for example, the conventional route of agreeing that the matter was settled on the basis that it resolved all claims arising between the parties. The inference is that it knew the claimant would not agree to any such terms."*

The Statement of Claim Test

104. The fundamental point made by Mr Myerson QC is that Mr Dixon does indeed satisfy the statement of claim test because these claims could not properly be pleaded before the revelation of the concealed facts.

105. He argues that Mr Dixon's claim in respect of breach of contract is premised on the basis that the moratorium was granted subject to a condition precedent as to the payment by Just Vans of £116,000 odd and that that condition was met. The fact of a contract subject to a condition precedent could not be pleaded in the absence of the moratorium letter. The moratorium letter did not "*improve*" the claim, it actually "*enabled*" it.

106. Mr Myerson QC argues that it is vital to have regard to the situation created by the judgment of His Honour Judge Behrens. The judge's findings essentially meant that Mr Dixon could not plead a contract subject to a condition precedent which had been satisfied because to do so would have been contrary to the findings made by the judge. As Mr Myerson QC pointed out in his oral submissions "*if Mr Dixon does not have this letter he does not have the information to plead and prove his case*". He put it another way in paragraph 27 of his skeleton argument to the effect that what completes the cause of action is the concealed fact that the letter (and in fact the Altered Spreadsheet) *exists*.

107. Furthermore, he reminds me that it is not enough that a claimant simply has sufficient details to plead the claim. As was recognised by Foxton J in *Granville Technology* to which I refer in paragraph 66 above and which itself draws from Simons J's seventh principle in

Arcadia, the pleaded case must be one which would not be struck out on the basis that it has no sufficient evidential basis or was not sufficiently arguable.

108. Mr Myerson QC makes the same point in respect of the Altered Spreadsheet. The revelation of it did not improve a claim based on negligent misstatement, it enabled it. Until the existence of that document came to light any claim based on it was disabled. Mr Dixon, it is asserted, could not plead negligent misstatement based on the provision of inaccurate information by Santander to Handelsbanken until the Altered Spreadsheet was revealed. The pleading would have to specify that there had been a statement which was inaccurate and negligently so and what the inaccuracy was. How, Mr Myerson QC asks rhetorically, could that be pleaded until the Altered Spreadsheet was discovered?

109. Furthermore, difficulties in pleading a cause of action arising out of the Altered Spreadsheet face the same difficulties as a pleading for breach of contract based on the moratorium letter because of the position adopted by His Honour Judge Behrens in the civil trial. Mr Myerson QC took me to paragraph 5.9.1 and 5.9.2 of counsel's skeleton argument filed in connection with the appeal to the Court of Appeal to have that judgment set aside.

> *"5.9.1 As regards Santander's contention that the agreements had in any event been terminated as a result of the appointment of administrators on 25 September 2008, Mr Dixon placed reliance on Santander's corruption of a spreadsheet which resulted in the location of various of the vehicles subject to the agreements being misidentified.*
>
> *5.9.2 This corrupted spreadsheet, or information about it, was provided to Handelsbanken and, in Mr Dixon's submission, served as the catalyst for Handelsbanken placing Just Vans into administration. In light of this, Mr Dixon argued that Santander was precluded from relying upon its own wrong and using Just Van's entry into administration as a ground for termination. HHJ Behrens improperly failed to entertain Mr Dixon's submissions on this point and at a number of points during the trial prevented him from advancing his arguments in this regard*".

110. Thus, argues Mr Myerson QC, any pleading of negligent misstatement before the Altered Spreadsheet was revealed was not capable of being pleaded because His Honour Judge Behrens had said it could not be argued. If it was pleaded then it would be susceptible to strike out as an abuse - as would the claim against Santander for breach of contract and for the same reasons.

111. He argues that it does not matter that the Court of Appeal did not focus on the Altered Spreadsheet. It did not need to do so. It was a matter which may have been covered by ground 3 of the grounds of appeal but the Court of Appeal did not feel it necessary to consider ground 3 when in any event Mr Dixon had been successful on grounds 1 and 2. In any event if one considers the issues which the Court of Appeal considered must be retried by reference to the order of the Court of Appeal dated 10 July 2017, it will be seen that paragraph 4g entitles the parties to raise at trial the question of *"whether Santander was responsible for Just Vans being placed into administration by virtue of its actions concerning the corrupted spreadsheet and/or otherwise made statements about the existence of two spreadsheets and wrongful practices on the part of Just Vans*".

112. In short, until the judgment of His Honour Judge Behrens had been set aside by the Court of Appeal there was, in any event, no basis upon which the current claims could be pleaded without bringing into question, and thereby impermissibly collaterally attacking, the judgment of His Honour Judge Behrens.

113. As regards the third alleged concealed fact (which relates to the claim against Handelsbanken), Mr Myerson QC's point is that the link between the timing of receipt of Mr

Garvey's report and wrongful action by the bank is wholly lacking in the absence of the evidence revealed at the criminal trial and in the unused material. Once again, he argues that the concealed facts do more than improve the claim against Handelsbanken, they enable a claim. In fact, he asserts, the concealed fact causes the cause of action to exist. This concealed fact, as is the case with the other 2 concealed facts, provides the basis for pleading the cause of action and, furthermore, is the silver bullet that would frustrate an application made by the defendants for strike out on a summary basis.

Reasonable Diligence

114. Mr Myerson QC's primary point is that it is clear that the concealed facts were revealed in the unused material which was only received by Mr Dixon on 26 July 2013. He argues that it is wholly unrealistic to expect the claimant to assimilate hundreds of thousands of pages of unused material (much less a million pages), discover the concealed facts and bring proceedings earlier than the 66 days that all that took between receipt of the unused material and the issue of proceedings. He argues that, not only is it arguable, but it is probable that Mr Dixon will establish that he did exercise reasonable diligence and these facts were discovered at the first opportunity.

115. Of course, Mr Myerson QC also prays in aid the finding of the Court of Appeal to the effect that reasonable diligence would not have discovered the moratorium letter (or indeed the Altered Spreadsheet) for use at trial.

116. As to the law, Mr Myerson QC also takes succour from the observations of Foxton J in paragraph 24 in *Granville Technology*. In that paragraph the judge was considering the question of what level of knowledge constitutes "discovery" for the purpose of s32. With regard to the facts necessary to plead a case he drew a distinction between those which are in the claimant's direct experience and those where the essential facts are matters of which the claimant has no direct and immediate knowledge and which he will seek to establish at trial by relying on disclosure or admissions by the defendant, evidence derived from third party sources and inference from other facts. Mr Myerson QC argues that the concealed facts in this case fall into the second category. This is because, as regards the moratorium letter, he had no recollection of it and did not appreciate the importance of the distinction between an obligation to pay the arrears and an obligation to pay only £116,000 odd in the context of formulating a contract upon which he could rely. As regards the Altered Spreadsheet, he did not have this prior to disclosure and as regards the third concealed fact, he was simply not aware of it until the criminal trial at the earliest.

117. However, it is important not to overlook paragraph 34 of *Granville Technology* which recognises *"the more generous ambit for pleadings where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of the defendants*".

118. In paragraph 92 above I have made reference to the observations of Foxton J in the *Granville Technology* case in paragraphs 45 and 46 of that judgment concerning reasonable diligence. It is as well to reproduce them:

> *45 If s32 (1) did involve a statutory assumption that the claimant was on notice of something meriting investigation, it would make it very difficult for many claimants to satisfy the s32 (1). Further, the application of s32(1) in a number of the authorities has involved an enquiry into whether the claimant was on notice of something which merited investigation with the court holding that, in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations. Thus in Allison v Horner [2014] EWCA Civ 117 Aikens LJ at (35) held that "on the assumption that it was not self evident that the statements ..... were false……, it would only have been reasonable for Mr Horner to take action to investigate the truth (or otherwise) of those statements if he needed to do so". Aikens*

LJ framed the issue for the court at (42) as to whether Mr Horner was "put on enquiry that Ms Allison might have made such fraudulent representations so that he ought to have followed the matter up". Similarly, Henderson LJ in Gresport Finance Ltd at (52) rejected the contention that reasonable diligence had not been made out in that case because the matters relied upon would not have triggered an obligation to investigate "order to put the claimant on enquiry as to Mr Battaglia's honesty". In the circumstances, I believe that Henderson LJ in Gresport Finance at (46) was stating that the drafters of s32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was ought to have been put on enquiry).

46 I note this is consistent with the view of Lewison J in JD Wetherspoon plc v Van De Berg & Co Ltd [2007] EWHC (Ch) at 42. He was referred to the passage from Millet LJ's judgment in Paragon set out above, and stated that "if there is no relevant trigger for investigation, then it seems to me that a period of reasonable diligence does not begin". It is also consistent with the interpretation of s32(1) which Bryan J adopted in Libyan Investment Authority v JP Morgan [2019] EWHC 152 (Comm) (30) when he stated: "it was held by Henderson LJ that the concept of "reasonable diligence" only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud concealment or mistake."

119. The point made by Mr Myerson QC is that the trigger to put Mr Dixon on notice can only be the acquittal and the delivery up of the unused material and the proceedings were instituted within 66 days of the latter.

Conclusions

120. It is worth reminding myself that the issue is not whether Mr Myerson QC has established that Mr Dixon can overcome a limitation defence by virtue of s32, the issue is whether Mr Myerson QC has discharged the evidential burden of establishing that that assertion has a real prospect of success.

121. Despite the relatively low hurdle that must be negotiated by Mr Dixon in the context of applications such as this and despite Mr Myerson QC's impressive articulation of Mr Dixon's case on this issue, I am satisfied that there is no real prospect of Mr Dixon establishing concealment of a relevant fact and accordingly these claims are time barred and ought to be struck out.

122. I do not accept that Mr Dixon satisfies the statement of claim test. It is not realistically arguable that he could not have pleaded his case any earlier. As regards the claim for breach of contract against Santander, he had the relevant knowledge to plead this even if he lacked some critical evidence in relation to it in the form of the moratorium letter.

123. As he made clear in his witness statement of 25 September 2020, he has consistently asserted that Santander had agreed a moratorium and that the company had complied with the conditions to bring it into effect. In other words, he had always asserted that there was a contract subject to conditions precedent that had been met.

124. As I recount in paragraph 71 above his cause of action against Santander in respect of breach of contract was known and "pleadable" from before September 2011. It was, to quote from the observations of Stuart Smith J in *Jalla,* a fact which Mr Dixon had always asserted vigorously.

125. Then of course there is the fact that in 2014 he issued proceedings by a claim form which summarises his claim in terms identical to the terms adopted in the claim form giving rise to these proceedings. As I recount in paragraph 76 above Miss Oppenheimer QC suggests that this suggests that, by 2014, Mr Dixon believed he had a claim for breach of contract and the facts necessary to plead it. I agree, as I do with her suggestion that the timing of the issue of the 2014 proceedings, within a week of the expiry of the primary limitation period, is itself telling.

126. I do not accept that the complications caused by the findings of His Honour Judge Behrens have any real prospect of assisting Mr Dixon in establishing a postponement of the limitation period sufficient to bring this claim within time. The Court of Appeal judgment and issues of res judicata/collateral attack on a judgment do not, in my view impact upon the statement of claim test, and whether a cause of action is complete or incomplete. In any event, the Court of Appeal judgment was handed down in July 2017, some 27 months before proceedings were instituted.

127. Nor do I accept that any pleaded case was susceptible to be struck out simply because the moratorium letter was not available. To quote from principle 7 of the Simon J principles enumerated in *Arcadia,* there was no absence of an "essential allegation". In any event, whether there was a moratorium was a question of fact arising out of what had actually been agreed by the parties as the preconditions for a moratorium and whether those preconditions had been met. It is difficult to imagine that where there is an issue of fact such as this which is dependent upon evidence that a claim would be struck out at a summary stage.

128. As regards the Altered Spreadsheet and the claim for negligent misstatement, much the same arguments apply and, for those reasons I cannot be satisfied that there is any real prospect of establishing a defence to the limitation defence in respect of this claim. Mr Dixon's own evidence, recited at paragraph 81 above is that he was aware of the existence of this Altered Spreadsheet in 2009 and, as is made clear in paragraph 82 above, the existence of that Altered Spreadsheet and the effect it had on the thinking of Handelsbanken has been a consistent assertion by Mr Dixon.

129. Once again therefore there was nothing that precluded Mr Dixon from pleading his claim for negligent misstatement. I agree with Miss Oppenheimer QC that the Altered Spreadsheet was merely evidence in support of a cause of action about which he had been aware and had been pleadable for years.

130. As for the claim for concealment of fact by Handelsbanken, once again it seems that Mr Dixon was aware of his cause of action sometime before he issued his proceedings in 2014 because the claim forms in those proceedings and these proceedings are identical. The claim was clearly pleadable and it was pleadable even absent the knowledge that Mr Garvey had not reported to the bank until 22 September.

131. In fact it is interesting to note that the proposed Amended Particulars of Claim do not appear to raise this issue about steps being taken by Handelsbanken before Mr Garvey reported. The importance of that issue so far as Mr Dixon is concerned only appears to see the light of day in his witness statement. Miss Temple has made the point that that is a procedural error (see paragraph 89 above) but perhaps more importantly it seems that even now Mr Dixon has felt able to plead his claim without any specific reference to the concealed fact upon which he now relies. Paragraph 122 of his proposed Amended Particulars of Claim intimates the claimant's case as being "*that when (Handelsbanken) purported to withdraw the facility and make formal demand on the company, the company was not in breach of the debenture formula".* This has of course been a constant refrain of Mr Dixon essentially from 2008.

132. Furthermore, there is no question of the claims against Handelsbanken being subject to issues relating to res judicata/collateral attack et cetera. Handelsbanken was not a party to the proceedings which resulted in the order of the Court of Appeal.

133. A point which may be more relevant to reasonable diligence issues but which I think it right to mention at this stage is the fact that I do not overlook that the unused material ran to tens of thousands of pages or perhaps even a million pages. Inevitably therefore Mr Dixon was faced with an enormous task in identifying particular documents. But the fact is that what he was looking for were documents whose existence appears to have been pointed up by the oral evidence in the criminal trial and in any event, I repeat, they were not necessary for him to plead his case. They were only evidence in support of his case.

134. If I am wrong in my view that there has not been concealment of the relevant facts then, in any event, it seems to me that the relevant facts were discovered or were discoverable with reasonable diligence more than 6 years prior to the bringing of these proceedings.

135. Mr Dixon appears to be inconsistent about the date when these concealed facts were discovered. Miss Temple highlights this at paragraph 51 of her skeleton argument. Mr Dixon suggests that he became aware of the concealed facts during the course of the giving of evidence by witnesses in his second criminal trial but he also suggests that it was when he received the unused material. If it was the former, he was aware of these concealed facts by the end of June 2013. If it was the latter then, at the very least, he was on notice that these facts may be discoverable in the unused material. I find the arguments put on behalf the defendants which I set out in paragraphs 92 to 94 compelling. Either way, the trigger that Mr Myerson QC refers to was pulled well before 1 October 2013.

136. I also agree with counsel for Santander and Handelsbanken that the succour that Mr Myerson QC derives from findings of reasonable diligence by the Court of Appeal when applying the test in *Ladd v Marshall* is misplaced. It is clear that the Court of Appeal were applying a different test viz reasonable diligence in the context of admitting further evidence such as to justify a retrial. That is a completely different test to the reasonable diligence test applicable to s32.

137. As for Mr Myerson QC's preliminary points, in my judgment this is not a matter which must be decided as a preliminary issue. There are no disputed factual issues which must be resolved one way or another. This case in my view falls firmly within principle vii of the principles in *EasyAir*. The application gives rise to a point which I have the necessary evidence to determine. I have heard full argument and it is appropriate therefore to "grasp the nettle". In so far as evidence arises for consideration I have been able to do so on the basis of the evidence emanating from Mr Dixon himself.

138. As regards the second preliminary point, first, it is appropriate to point out that this point, developed by Mr Myerson QC in paragraphs 102 and 103 above has no application at all to Handelsbanken but even with regard Santander, in my view, it holds no water. It is always open to a claimant to discontinue proceedings. As a general rule a claimant doing so suffers a costs penalty. There are many reasons to discontinue other than the fear on the part of the claimant that if he pursues his claim it may be met with the counterclaim. An obvious one is the belief that pursuing proceedings is simply throwing good money after bad. It cannot be inferred in my view that Santander decided to discontinue because they envisaged a counterclaim but even if it did, it is entitled to do so. In any event if the inference is that discontinuance was the only feasible option because Santander believed that Mr Dixon would not agree to any terms which had the result of resolving all claims arising between the parties, as suggested by Mr Myerson QC in paragraph 12 of his skeleton argument, then this is itself

supportive of the idea that Mr Dixon believed that he had pleadable claims just short of one year before he started proceedings.

139. Furthermore, it is no defence to a limitation defence for the claimant to argue that his claim has merit. Meritorious claims will be frustrated if brought outside the limitation period. The principle that vulnerability to a claim should not be open ended and that a defendant should not have to deal with particular matters outside a set period is a fundamental one. S32 is one of a number of provisions in the Limitation Act which permits an extension of the limitation period but only on terms which are not met, in my view, in this case. Certainly it does not necessarily matter that the defendant himself may be the cause of the claimant's delay in bringing proceedings. It is telling to note for example that s32 does not preclude a limitation period even for fraud by the defendant. All it does provide is a basis for establishing the date from which that limitation period shall run.

Other compelling reasons

140. I am not satisfied that there are any other compelling reasons for a trial. On the contrary, where, as here, there is no real prospect of the claim surviving the limitation defence there is a positively good reason for shutting it down earlier rather than later. I remind myself of the guidance given in vii of *EasyAir* to that effect and which I have reproduced in paragraph 26 above. This is not a case where there is some conduct which requires exposure to the public forum of a trial even of a case that is unwinnable.

Waiver

141. Mr Myerson QC argues that there is a real prospect of establishing that Santander have waived reliance on a limitation defence by failing to raise it before the Court of Appeal. Miss Oppenheimer QC in her skeleton argument paragraph 62 calls this "*a very ambitious legal argument"*. I agree.

142. She refers to *McGee Limitation Periods* (8th Edition) paragraph 21.025. That makes it clear that, as a matter of principle, waiver of reliance on limitation (or estoppel from pleading such a defence) is a recognised possible response to a limitation defence. The issue boils down to whether there has been agreement, or conduct, sufficient to amount to estoppel or waiver. The editors of *McGee* suggest that establishing estoppel (or waiver) in relation to the Limitation Act is likely to be "*a formidable task and one which can be accomplished only in the most exceptional cases*".

143. Miss Oppenheimer QC asserts at paragraph 63 of her skeleton argument that *Ace Insurance SA-NV v Seechurn* [2002] EWCA Civ 67 notes the elements that would need to be established to find that there has been a waiver of a limitation defence. The case does not appear to have made its way into the authorities bundle but Mr Myerson QC did not suggest that Miss Oppenheimer QC was wrong when she suggests, as she does at paragraph 63 of her skeleton, that there must be a clear, unequivocal, unambiguous and unconditional promise or representation that the defendants will not raise the defence that the action is statute barred. Furthermore, the promise or representation must be construed objectively i.e. whether the conduct can reasonably be understood to amount to such a promise or representation. Third, it must be established that the claimant relied on the promise/representation and altered his position to his detriment or that it would be inequitable or unconscionable not to hold the defendant to its promise/representation.

144. I do not think that Mr Myerson QC is able to point to any clear unequivocal or unambiguous promise by Santander that it would not rely on a limitation defence. It is not realistically arguable that Santander's failure to raise limitation before the Court of Appeal provides a representation upon which Mr Dixon can rely. This is because in the case before the Court of Appeal there was no claim being advanced by Mr Dixon again Santander and

therefore no limitation defence to which any purported waiver could attach. Mr Myerson QC argues that Mr Dixon thought he had such a claim and indeed thought that he could advance it but it seems to me that what Mr Dixon thought in this context is neither here nor there. It is really impossible to establish that in failing to raise a limitation defence to a non-existent claim that in some way Santander were making a clear, unequivocal, unambiguous and unconditional promise not to rely on a limitation defence.

145. In my view, the waiver argument not only lacks any real prospect of success, it lacks any prospect of success, real or otherwise. Of course, as I have said, in any event it has no application to the claim against Handelsbanken.

Abuse of process

146. Both Santander and Handelsbanken argue that this claim is an abuse of process because it is an impermissible attempt to resurrect the 2014 claim which has been wholly neglected since the claim form was served on Handelsbanken and Santander in January 2015. Nothing has happened since then. No particulars of claim have been served and no other steps have been taken to advance that litigation.

147. In the light of my findings that these claims are time-barred I do not think that I need to deal with this particular issue save to say that I can think of no basis, and no real basis was suggested to me by Mr Myerson QC, for taking the view other than that it is an abuse to issue proceedings which are identical to earlier proceedings which have been subject to inordinate and inexcusable delay but which presumably are still technically extant. As I understand it, those 2014 proceedings are indeed still on foot despite the fact that nothing has been done to advance them since 2015. If that is indeed the case the answer is not to issue new proceedings but to seek to serve particulars of claim consequent upon the claim form issued in May 2014. It is unclear to me why Mr Dixon did not take that step. It may very well be that, had he done so, he would have been met with an application for that claim to be struck out because of the delay in advancing it but, as it turns out, he is in no better position with regard to these claims issued in 2019 in which it must have been foreseeable that the defendants would raise a limitation defence and seek strike out on that basis.

Handelsbanken's claim for summary judgment on the merits.

148. I refer with gratitude once again to Miss Temple's indication both in her oral submissions and written submissions that issues as to the merits of Mr Dixon's claims against Handelsbanken and whether they are realistically arguable need not be considered if I make a finding in Handelsbanken's favour in relation to limitation.

149. I trust that it will not come as a surprise, and may indeed come as something as a relief to those who have to read this judgment, that I propose to take her up on that approach.

The application to re-amend the amended particulars of claim.

150. It is accepted by all parties that this application becomes otiose if there is a finding, as there has been, that the claims are time-barred.

Final remarks

151. I have no doubt that my conclusions will come as a great disappointment to Mr Dixon who obviously firmly believes that he has been seriously wronged. I hope that, on reflection, he will come to take the view that it is preferable to suffer that disappointment at this stage rather than at a much later stage when many more thousands of pounds will have been expended in costs.

Once again, I express my gratitude to all three counsel for their very able assistance in this matter.

HH Judge Saffman