Neutral Citation Number: [2021] EWHC 2465 (Ch)

Case No: HC-2016-001314

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

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Before :

MASTER KAYE

- -

Between :

ANTHONY ROBERT COLLIVER	**Claimant**
- and -	
(1) JONATHAN PAPWORTH	**Defendants**
(2) SIMON CHARLES PAPWORTH	

- -
- -

Thomas Graham (instructed by **SBP Law Solicitors**) for the **Claimant**
Peter Shaw QC (instructed by **Strain Keville LLP**) for the **Defendants**

Hearing dates: 28 May 2021

- -

Approved Judgment

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

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MASTER KAYE

Master Kaye :

1. This judgment concerns the Claimant's application to amend his particulars of claim dated 15 October 2020.

2. I set out the background to this dispute and the procedural chronology in [2021] EWHC 1450 (Ch) which addressed the Defendants' application to amend their defence. I use the same abbreviations and definitions in this judgment. I allowed the Defendants' application to amend. So far as is relevant to this application the Defendants were given permission to plead reliance on the Deed of Agreement and Release, which they say releases all claims including the claims made in these proceedings.

3. The only additional evidence served in advance of this hearing was a short witness statement from the Claimant dated 27 May 2021 confirming that he believed the proposed amended particulars of claim were true and that the contents of his solicitor's witness statement relied on in relation to the application were true. He exhibited his email exchanges with the First Defendant of 10 September 2010.

4. The Claimant's application was said to be responsive to the Defendants amendments. The Claimant seeks to raise by way of an amendment additional claims in fraudulent misrepresentation in respect of the Deed of Agreement and the Release and to rescind it and/or damages. He also seeks to amend paragraph 28 of the particulars of claim to plead that the Defendants' alleged breach of fiduciary duty includes dishonest breach of fiduciary duty.

5. The Claimant's primary contention is that there is strong authority for the proposition that a claim in fraud or an unknown claim cannot be excluded by the Release. Having determined, on the Defendants' application, that there is no absolute bar to such an exclusion and the context needed to be considered, the trial judge will now need to consider those authorities and the context in which the Deed of Agreement and Release was entered into. If the trial judge agrees with the Claimant, then the majority of the amendments are unnecessary.

6. The events giving rise to this claim took place between February and September 2010, letters of claim and responses were exchanged in 2012 and the claim itself was issued in April 2016 and served in June 2016. The Claimant's application to amend was issued in October 2020, over 10 years after the events in issue.

7. Whether to allow an amendment is ultimately a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Save where a limitation issue arises the test to be applied is similar to that applied on summary judgment. An amendment should be refused if it is clear that it has no real prospect of success. The Claimant must therefore demonstrate that the amendment has a more than merely fanciful prospect of success and carries some degree of conviction.

8. The Defendants oppose the amendments arguing that in relation to those arising from the Deed of Agreement and Release the Claimant is seeking to bring a new claim after the expiry of the relevant limitation period and is therefore barred by limitation, as the

amendments do not fall within CPR 17.4 (2). I address the position in relation to Paragraph 28 later in this judgment; no CPR 17.4 (2) issue arises in relation to it.

9. If the Claimant's amendments are barred by limitation, CPR 17.4(2) provides that the court may still allow the amendments even if their effect would be to add a new claim, but only if that new claim arises out of the same facts or substantially the same facts as a claim in respect of which the Claimant has already claimed a remedy in the proceedings.

10. The Claimant says that it is not reasonably arguable that any of the opposed amendments are outside the relevant limitation period. The Claimant submits that the claim in respect of the Release was only a contingent liability and there was either no operative misrepresentation or no loss until the Defendants sought to rely on the Release. It was only when the Defendants sought to rely on the Release that the new claim crystallised. Time therefore did not start to run for the purposes of limitation until the date on which the Defendants were given permission to amend.

11. Alternatively, the Claimant relies on section 32 (1) (a) and/or (b) of the Limitation Act 1980. Section 32 postpones the commencement of the limitation period in claims involving fraud until the Claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have done so. The Claimant submits that the relevant date for section 32 was at earliest when the Defendants issued their application seeking to rely on the Release, as the relevant fraud could not reasonably have been discovered earlier or, as with the contingent liability argument, when permission to amend was given. Again, therefore, no limitation issue arises and permission to amend should be considered on the same basis as the Defendants' application.

12. Further or alternatively the Claimant submits that even if the new claim were time barred, the amendments arise out of facts already in issue and he should be given permission to amend pursuant to CPR 17.4(2).

The Proposed Amendments:

The Deed of Agreement (Amended Particulars of Claim [36]-[46]):

13. The Amended Defence relies on the Deed of Agreement and Release as precluding the Claimant's claim.[1] The Claimant now seeks to amend the particulars of claim to plead that the Deed of Agreement and Release was procured by misrepresentation and is liable to be rescinded. The Claimant also makes a claim for damages [36].

14. The separation of the Claimant and Defendants' interests in ISS and the separation of their joint pension scheme were agreed in 2010. The precise terms and timing of the agreement will be a matter of evidence at trial, which will now include the context in which the Deed of Agreement and Release were entered in to. The Claimant sold his shares in ISS to the Defendants' company Caresys in July 2010 with a deferred/instalment payment arrangement. Caresys then held all the shares in ISS. The Deed of Agreement was entered into on 22 September 2010.

[1] Details of the terms of the Release and the Deed of Agreement can be found in [2021] EWHC 1450 (Ch)

15. The Claimant's amendments concern the next stage in the overall separation of their interests following the SSA, namely the separation of the parties' interests in the joint pension scheme. He says that on 1 September 2010 he emailed the First Defendant three draft contracts he had drafted himself which were intended to have the legal effect that the Claimant would acquire the First and Second Defendant's interests in the joint pension scheme. The First Defendant instructed a solicitor who prepared the Deed of Agreement and Release. This reduced the three drafts to a single document and included additional provisions including the Release. A draft was emailed to the Claimant on 10 September 2010 by the First Defendant who offered to discuss any concerns and said:

> "… this is a document that I believe encapsulates everything we need it to….as well as proper protection for all three of us. It is effectively committing that the separation between us is final, and that we both relinquish any rights over the other…."

16. The Claimant seeks to rely on misrepresentations that he says were made by the First Defendant on 10 September 2010 when his concerns were discussed. The representations are set out in new paragraph 40 as follows:

> "40. The following events occurred on 10 September 2010:
>
> (1) The Claimant asked the First Defendant by email what the timescale was for any future sale of the company, adding that the answer would have a bearing on how he interpreted the draft Deed of Agreement.
>
> (2) The First Defendant responded by email, but deliberately evaded the Claimant's simple question, instead asking, "what's the issue?"
>
> (3) The Claimant replied by email, stating that the issue was to do with reciprocity.
>
> (4) The Claimant then spoke to the First Defendant by telephone.
>
> (a) The Claimant asked again when any sale of ISS might take place. The First Defendant replied to the effect that there were no current plans to sell ISS.
>
> (b) The Claimant asked the First Defendant what the purpose and effect of the [Release] was. In response the First Defendant assured him that it was simply a technicality, inserted by his solicitor, not because of any specific factual matter which had arisen but because "that is what lawyers do" (or words to that effect), and assured the Claimant that he should not worry about it."

17. Paragraph 40 (4) (a) is similar in form to the misrepresentations relied on in respect of the SSA although obviously after the SSA had been concluded. Paragraph 40 (4) (b)

is new and specific to the Release. Both of the operative representations were said to have been made after the initial exchange of emails in the course of a telephone conversation on 10 September 2010.

18. The Claimant says those representations were false (alternatively they were negligent), deliberately untrue and intended to mislead and induce him into entering into the Deed of Agreement and Release which he did on 22 September 2010 ([43] and [44]). ACS acquired the shares in Caresys on 30 September 2010 and thus acquired ISS. The Claimant says that the Defendants always intended to and now seek to rely on the Deed of Agreement and Release to exclude his claim. The Claimant therefore seeks rescission or damages in lieu ([46]).

Fiduciary Duty (Amended particulars of claim [28]):

19. The Claimant seeks to clarify that his claim includes an allegation that the alleged breach of fiduciary duty by the Defendants in not disclosing negotiations with ACS was dishonest not just negligent as follows:

"In the premises, the Defendants' failure to disclose the said dealings with ACS to the Claimant, further or alternatively to forward the said correspondence to the Claimant, was a breach of such fiduciary duties (and, for the avoidance of doubt, dishonest)."

20. The importance of this amendment is that the Release might still be effective to exclude non-fraudulent claims even if it is not found to exclude fraudulent claims. On the Defendants' amendment application the Defendants' argued that as currently pleaded paragraph 28 did not include dishonest breach of fiduciary.

21. This amendment is opposed by the Defendants not on the grounds of limitation but on the basis that it does not clearly set out and particularise the claim in dishonest breach of fiduciary duty that the Claimant now intends to pursue.

Contingent Liability

22. The starting point is that a misrepresentation claim is a claim in tort for which the applicable limitation period is 6 years from when the cause of action accrued. The cause of action is complete when the Claimant suffers loss in reliance on the misrepresentation, which is quantifiable or ascertainable.

23. In this case, for the misrepresentation to be fraudulent the Defendants must have made knowingly untrue statements (or without any belief in their truth or reckless as to their truth) of facts or law which induced the Claimant to enter into the Deed of Agreement and Release. The Claimant must have suffered loss as a consequence.

24. Usually, the loss is suffered at the point the transaction is entered into as a consequence of the tort, at which point the claimant says they have acquired rights that are of less value than contemplated as a result of the tort.

25. The exception is where there is only a contingent liability. In such a case the loss is said to be suffered (crystallises) when the liability materialises, *Law Society v Sephton* [2006] AC 45 ("*Sephton*"). "The risk of exposure to a mere contingency of a future

claim does not constitute actionable damage. There has to be some additional loss." [Jackson & Powell Professional Negligence: 5 – 050]

26. When the Claimant entered into the Deed of Agreement and Release on 22 September 2010 in reliance on the misrepresentations did he acquire a "package of rights" less valuable than he was entitled to expect, or acquire an asset diminished in value or was his legal position changed?

27. In order to understand the Claimant's argument that the fraudulent misrepresentation claim was a contingent liability it is necessary to revisit the chronology briefly.

28. The Defendants' pre-action protocol letter of response, dated 28 September 2012, relied on the Deed of Agreement and Release as excluding the Claimant's claims. There was a further round of correspondence with the Claimant asserting that claims for fraud could not be excluded and relying on *Satyam* as he did in response to the Defendants' amendment application. The Defendants responded on 18 December 2012, denying fraud, arguing that *Satyam* was not applicable. There was no further correspondence on this issue. At the end of 2012, the parties had joined issue on the effect of the Deed of Agreement and Release and the effect of the authorities on which Mr Graham relies.

29. The claim issued in April 2016 did not seek any relief in respect of the Deed of Agreement and Release. The subsequent Defence dated 16 September 2016 did not rely on the Deed of Agreement and Release as excluding the Claimant's claim. The Claimant says that since he did not consider the Release to be effective to exclude a claim in fraud, he considered that the Defendants had properly decided not to pursue reliance on the Deed of Agreement and Release in their defence.

30. The Claimant argues that the Defendants made an election, which they have now been permitted to resile from by being given permission to amend. It would be an injustice if the Claimant were not now permitted to amend to plead the claim in fraudulent misrepresentation and rescission. Although not accepting the limitation argument the Claimant says that if the Defendants had relied on the Release in the defence the Claimant could either have issued a new claim or made an application to amend before the limitation period contended for expired a week later.

31. Not much progress was made in relation to the claim between 2016 and 2021. It was not until a change of counsel in January 2019 that the Defendants' indicated an intention to seek to amend. They provided a draft in May 2019.

32. Mr Graham argues that the Claimant should be permitted to amend the claim, as they would have done if the Deed of Agreement and Release had been relied on in the original defence in 2016.

No operative misrepresentation

33. The Claimant argues that until the Defendants chose to advance a defence that the Release precluded his claim there was no basis for Claimant to assert that the Deed of Agreement and Release had been procured by fraudulent misrepresentation. Many potential defences are relied on in pre-action correspondence but not pursued. Mr Graham argued that having rebuffed the Defendants in the pre-action correspondence

there was nothing to engage with, the Release could not operate in the abstract. The representations at paragraph 40 (4) (b) were wholly immaterial and inoperative until they were relied on. Until then any claim that relied on those representations was inchoate. There was therefore no proper basis on which the Claimant could pursue a claim that the Deed of Agreement had been procured by misrepresentation. Any claim would have been a claim in the abstract on a non-issue.

34. Only when the Defendants relied on the Release to exclude the Claimant's claims in a fraudulent manner by way of an actual amendment did time begin to run for the purposes of limitation. Instead, the Defendants could have acted honestly and consistently with their representations at paragraph 40 (4) (b) that the Release was a mere technicality that the Claimant did not need to worry about it. They could have relied on the Deed of Agreement in a non-fraudulent manner, by not relying on the Release.

35. Mr Shaw argues that the Defendants' reliance on the Release is the wrong place to start when considering whether there was an operative misrepresentation. What the Defendants said in their original Defence or Amended Defence did not affect when the cause of action accrued. They are irrelevant to when the cause of action accrued or when the liability arose, or the loss occurred. The misrepresentation becomes 'operative' when it is relied upon and damage is suffered.

36. He argues that the Claimant's own evidence and pleading is that the misrepresentations were operative at the time the Deed of Agreement and Release were entered into. The Claimant's proposed amendment is that the Claimant entered into the Deed of Agreement and Release in reliance on the representations in September 2010. The cause of action therefore accrued in September 2010. The claim for rescission or damages accrued at that point. The Claimant's proposed amendments do not plead that the representations only became untrue when the Defendants advanced the Amended Defence despite Mr Graham's submissions.

37. The issue of the Release and the Defendants' intention to rely on it to resist the Claimant's claim was raised in pre-action correspondence in 2012, 3 ½ years before the Claimant issued his claim. Mr Shaw argues that the Claimant was on notice that the Defendants considered that the Release was a complete defence to the claim from then at the latest.

38. By that stage the Claimant knew that to succeed he would need to establish, not only that the alleged misrepresentations leading up to the SSA had been made and/or that the Defendants were in breach of fiduciary duty to him and that he had relied on them and suffered damage, but also that the Deed of Agreement and Release was liable to be rescinded as a result of the misrepresentations made in September 2010 – both 40.4 (a) and (b).

39. Mr Shaw submits that the Claimant could properly have sought to rescind the Release or alternatively have sought a declaration that the Defendants could not rely on it to preclude liability for Claimant's claims in respect of the September 2010 share sale to ACS.

40. I agree with Mr Shaw, it seems to me the claim now advanced could have been pleaded, not in the abstract, but at a minimum as a claim for a negative declaration.

Mr Graham submissions appeared to suggest a conscious choice not to plead to a claim in respect of the Release on the basis that the Claimant considered that the Defendants could not rely on it and they had seen off the argument in the pre-action correspondence. In light of the terms of the Release and the 2012 pre-action correspondence in which the Defendants had sought to rely on the Release to exclude the Claimant's claims, it seems to me that it would have been prudent to have at least sought a negative declaration in the absence of any clear concession by the Defendants. The fact that the Defendants, as it turned out, did not, in their original defence rely on the Release does not assist and to my mind does not affect when the cause of action accrued. Again, I agree with Mr Shaw that the focus on the Defence and Amended Defence is to start in the wrong place.

41. To my mind, the need to plead to the Release at the outset was heightened by the time at which the claim was issued. Mr Graham did not accept that the claim had been issued close to the end of limitation and consequently did not accept that the Claimant took a risk by not pleading the additional claim in fraudulent misrepresentation or seeking rescission of the Deed of Agreement and Release at the outset. However, it seems to me that the chronology demonstrates both that the claim was issued close to the end of limitation and that even if the Defendants had pleaded reliance on the Release in the original defence the Claimant had left himself almost no time to react at all. Given the Claimant's knowledge that the Defendants had indicated an intention to rely on the Release, whatever view the Claimant took of the merits of such a defence, it is surprising that the Claimant did not plead its alternative case from the outset. Whenever a Claimant issues close to the expiry of a limitation period, he needs to take into account the risk he takes if he does not plead out a claim that may be available to him and allows limitation to expire.

No loss

42. Mr Graham further argues that until permission to amend the defence was given the cause of action in deceit was not complete because no damage was suffered.

43. Mr Shaw argues that the damage was suffered in September 2010 when the Claimant acted in reliance on the alleged misrepresentation to his detriment and entered into the Deed of Agreement and Release giving up such causes of action that he might otherwise have had. Where a party acquires rights and obligations in a transaction that may contain within it the contingent possibility of a loss, the loss is suffered (for the purposes of a cause of action in tort) at the point of time that the transaction is entered into (not a later point of time when the contingency materialises).

44. Mr Shaw points to the terms of the Deed of Agreement and Release itself which he reminds me consisted of a bundle of rights and obligations and included a mutual settlement and release of claims. Both the Claimant and the Defendants had potential causes of action, the rights of which they each gave up by signing the Deed of Agreement. In September 2010, the Claimant gave up something of value, his rights of action against the Defendants. I note that this reciprocal relinquishing of rights was not hidden and was, in fact, specifically referred to in the First Defendant's email of 10 September 2010.

45. Mr Shaw argues that the Claimant's loss was suffered at the point that he entered into the Deed of Agreement and Release in which he gave up those rights. It did not

crystallise at a later date when the Defendants pleaded reliance on the Release as the Claimant asserts. He compromised his own cause of action as part of the agreement reached in the Deed of Agreement and Release, which he now wishes to assert. The cause of action was therefore complete and loss occurred on 22 September 2010 not when the Defendants told the Claimant that they considered he had given up his rights in 2012 or when they amended their defence to plead that in 2021.

46. The Deed of Agreement and Release, which included a mutual release, was, as commented on in the authorities, a thing of value so the Claimant must have suffered some loss capable of quantification in 2010. Indeed, it seems to me that the fact that he could have pursued negative declaratory relief highlights that the Release was a thing of value.

47. Mr Graham relied on *Sephton* referring to the speech of Lord Hoffman at [9] [11] [17] and [21] as support for the proposition that the claim arose only when the contingency came to fruition. In this case he argues that the claim in respect of the Release was prospective and for the reasons set out above might never have occurred (relying on the analysis of *Forster v Outred & Co* in the Court of Appeal cited in [17] of Lord Hoffman's speech). He argued that at the time at which the Deed of Agreement was entered into in 2010 there was, at best, the possibility that there might be a claim against the Defendants in the future that might fall within the terms of the Release and that the Defendants might rely on the Release rather than accepting it was, as they had represented, a mere technicality. This represented several different layers of contingency all of which had to come to fruition before the Claimant suffered a loss; it was thus a contingent liability.

48. Referring to Lord Hoffman's speech in *Sephton* at [30] that "A contingent liability is not as such damage until the contingency occurs." and at [31] "But I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage." he argued that until the Defendants relied on the Release the misrepresentations had no effect and there nothing on which the rescission claim could bite.

49. Mr Shaw pointed to Lord Walker's speech at paragraphs [46]-[48] and Lord Mance at [68] and [69] of *Sephton*. I note in particular the passages cited from *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172 including Hobhouse LJ's approval of Saville LJ's explanation of the authorities in *First National Commercial Bank plc v Humberts* [1995] 2 ALL ER 673,679 and further the discussion of *Hatton v Chafes* [2003] PNLR 489 relating to choses in action.

50. Generally, where a contract is entered into and/or there is some change in the rights of a party to an agreement, even if the consequences of that agreement may not occur until some future date, the loss has arisen at the point in time at which the agreement is entered into which diminishes the rights and/or by which the rights are given up. I do not accept Mr Graham's argument that the liability remains contingent unless or until the Defendants relied on the Deed of Agreement and Release in a way in which the Claimant says is inconsistent with the representations made to him.

51. To my mind this is not a contingent liability case but one where the Claimant's cause of action was perfected when he entered into the Deed of Agreement and Release in reliance on the representations on 22 September 2010 by which he gave up his rights

against the Defendants as part of a package of rights and obligations which both parties entered into.

52. The Claimant's case is that he has acquired rights that are of less value than contemplated or has changed his legal position to his detriment. The rights he has given up are a chose in action and the authorities recognise a chose in action as being a thing of value which is lost when the right is lost and so it seems to me the loss arises when the Claimant enters into the Deed of Agreement and Release which he says he was induced to enter into by the representations.

53. On the Claimant's case had the Defendants not induced him to enter into the Release in reliance on their representations, he would have had the right to pursue this claim. However, it seems to me that the difference between the Claimant's rights with and without the Release can be quantified from 22 September 2010 when he gave up those rights even if that may be more difficult to assess the loss at that early stage. It does not mean that a loss has not arisen.

54. For the reasons set out, I am not persuaded that the Claimant is able to argue that this is a contingent liability case. The cause of action accrued on 22 September 2010. The misrepresentations were operative and there was loss from that date. On that basis, primary limitation has expired.

Section 32 (1) (a) and (b) Limitation Act 1980

55. Mr Graham submits that in any event the limitation period did not begin to run until the Claimant had or could reasonably have discovered the fraud. The fraudulent misrepresentation claim based on paragraph 40 (4) (b) could not have been discovered nor was it discoverable until the Defendants wrongly relied on the Release in the Amended Defence. As with the contingent liability submissions he does not accept that, the 2012 pre-action protocol correspondence was sufficient for the fraud to be discovered or discoverable. As set out above he submits that it was it was open to the Defendants to continue to act honestly and not rely on the Release. He says that the earliest date on which the relevant fraud could have been discovered was the issuing of the application to amend the defence and reliance on the Release. Alternatively, it was when permission to amend was given. In either case, time did not start to run for limitation purposes until that point and thus the amendments are not time barred.

56. Alternatively, Mr Graham submits that in not seeking to rely on the Release as excluding the Claimant's claims in their original defence in 2016 the Defendants deliberately concealed a fact relevant to Claimant's right of action. Therefore, he argues that section 32(1) (b) of the Limitation Action 1980 applies and the limitation period does not begin to run until the Claimant has either discovered the concealment or could with reasonable diligence have done so. Again, he does not accept that the pre-action protocol correspondence assists. He points to the nature of the representations in paragraph 40 (4) (b) that the Release was nothing to worry about and a mere technicality. As with section 32 (1)(a) he argues that that the Claimant did not have all the relevant facts available to him to enable him to pursue the amendment until either the issuing of the application to amend or permission being given. In either case, the limitation period would not have expired in respect of the Claimant's proposed amendments.

57. The Claimant therefore says that he did not have sufficient knowledge until the Defendants made their election to rely on the Release as excluding his claim.

58. Mr Shaw again points to the 2012 pre-action correspondence. By 12 August 2012, the Claimant knew of sufficient facts to set out his claim in respect of the share sale to ACS. Mr Shaw argues that he also knew all of the relevant facts to enable him to plead the cause of action he now seeks to advance by amendment.

59. By August 2012 or (at the latest) when the Particulars of Claim were settled in April 2016 the Claimant knew of the representations on 10 September 2010 since they were made to him and he says he relied on them. He knew the terms of Deed of Agreement and Release, as he was a party to it. He knew that by 30 September 2010 a sale agreement had been concluded with ACS. He knew of the terms of the sale of ACS as they were expressly pleaded. I note that all of these facts and matters were known to the Claimant even without the additional knowledge he gained about the Defendants' intentions in 2012.

60. Mr Shaw says that the Claimant had sufficient knowledge to plead a case based on the alleged misrepresentations in September 2010 by April 2016 but appears to have chosen not to and there is therefore no basis to postpone the commencement of the limitation period pursuant to section 32(1)(a).

61. So far as section 32 (1) (b) is concerned he says that the fact that Defendants are now relying on the Release does not constitute concealment of any facts relevant to the Claimant's cause of action. There are no facts that were previously unknown to the Claimant that have now emerged. The Claimant knew of the terms of the Release. Even if he had forgotten about it, it was expressly referred to (and enclosed) with the letter of response on 28 September 2012. Having been brought to the attention of the Claimant's solicitors it was thereafter incapable of being concealed.

62. Males LJ in *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501 explained the test to be applied when considering whether a claimant had discovered a fraud or could with reasonable diligence have discovered it for the purposes of section 32(1) as follows:

> "26. The state of knowledge which a claimant must have in order for it to have "discovered" the concealment (or as the case may be, the fraud or the mistake) has been considered in the cases. For the most part the "statement of claim" test has been applied: that is to say, a claimant must have sufficient knowledge to enable it to plead a claim…"
>
> "28. Time will begin to run, not only if the claimant does in fact discover the concealment (or as the case may be, the fraud or the mistake), but also if "the plaintiff … could with reasonable diligence have discovered it". These are the critical words in the present case. They make it clear that the question is what "the plaintiff" (in the present case, OTC) could have discovered, but that the test is objective, to some extent at least, applying a standard of reasonable diligence."

63. I emphasise that the test is could not should and it is an objective test. It seems to me plain that objectively the Claimant had in fact discovered the fraud he alleges not merely could have. He knew about the share sale to ACS from 30 September 2010. At the latest, he knew all the facts referred to above and he knew that the Defendants considered that the Release enabled them to resist his claims by 28 September 2012. He was therefore objectively on notice of the alleged fraud in respect of the representations he relies on. The Deed of Agreement and Release were not hidden but relied on to resist his claim and a copy provided even if, as Mr Shaw says, he had forgotten about it. There was nothing unknown or concealed, at least, from 2012 in relation to paragraph 40 (4).

64. For the same reasons nothing was concealed that prevented the Claimant from pursuing the claims that he now wants to pursue when he issued the claim in 2016. All the relevant facts were available to him – the fact that he considered that the Defendants' assertion that the Release precluded his claims was without merit does not mean he did not know about it and/or that it had been concealed. This is not even a case where the Claimant needed to investigate and to which the statutory reasonable diligence requirement would attach. He knew all he needed to know. So far as the amendment is concerned, he knew the terms of the Release, he knew the representations he said had been made and he knew that the Defendants considered the terms of the Release to exclude his rights to pursue the claim. The fact that the Defendants did not initially advance that defence in 2016 does not assist the Claimant at all. It starts from the wrong place for the purposes of section 32.

65. I therefore agree with Mr Shaw that neither section 32 (1) (a) or (b) assists the Claimant and the proposed amendments raising a new cause of action pursued for the first time in this application issued in 2020 are on any basis barred by reason of limitation.

Same Facts and Matters

66. Even if the relevant limitation period has expired, there are limited circumstances in which an amendment raising a new cause of action can still be permitted.

67. Section 35 Limitation Act 1980 provides conditions that have to be met if the court is to allow a party to raise a new cause of action within existing proceedings after the expiry of limitation. Section 35 (5) (a) provides:

> "in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action;"

68. CPR17.4(2) provides

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

69. Tomlinson J set out the three stage test to be considered on such an application for permission in *Ballinger v. Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597, at [15]:

> "i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
>
> ii) If so, do they seek to add or substitute a new cause of action?
>
> iii) If so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?"

70. Even if the Claimant can satisfy the threshold conditions of CPR17.4 (2) the court must still be satisfied that the amendment has a more than merely fanciful prospect of success. I must still consider whether to exercise my discretion to allow the amendments taking into account all the circumstances including the prejudice to each party and the overriding objective to deal with cases justly, efficiently and proportionately. Thus, overcoming the threshold conditions of CPR17.4 (2) is only the first stage to obtaining permission to amend.

71. For the reasons set out above the opposed amendments are outside the relevant limitation period. It appears to be common ground that the amendments seek to add a new cause of action of rescission and damages focussed on what happened in September 2010. However, the separation of the Claimant and Defendants' interests in ISS and the joint pension scheme were part of an overall separation of their interests, which formed the factual background to the existing claim even prior to the amendment of the Defence. In light of the Amended Defence, the factual enquiry now needs to consider the Release in its factual context.

72. The issue that needs to be considered however is whether the amendments seeking to raise a new claim for rescission of the Deed of Agreement and Release can be said to arise out of the same or substantially the same facts as are already in issue.

73. The purpose of section 35, CPR17.4(2) and the staged test set out in *Ballinger v Mercer* is to avoid putting a defendant in the position of having to investigate facts and evidence unrelated to those that they are reasonably likely to have to investigate anyway to defend the unamended claim. In considering the threshold test, the current Amended Defence is also of relevance to the issue of the facts that are now reasonably likely to have to be investigated.

74. Mr Graham argues firstly that the Deed of Agreement and Release amendments arise from the same or substantially the same facts as already in issue namely the Defendants' fraudulent concealment of their dealings with ACS. Secondly, that they arise from the same or substantially the same facts as are already put in issue by the Defendants' Amended Defence namely reliance on and assertion of the efficacy of the Release. He says that the Release has been put in issue in an existing claim, because the need to amend only arises directly from the Amended Defence.

75. He relies on *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828. In *Goode v Martin* Mrs Goode was injured in an accident on a yacht. She sought permission to amend her claim after primary limitation had expired to adopt the Defendant's factual account of the accident, which he put forward in his amended defence.

76. Brooke LJ in *Goode v Martin* considered that the rule in CPR 17.4 (2) should be read as if it contained the words "are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." He therefore allowed Mrs Goode to plead by way of a post limitation amendment that if the defendant succeeded in establishing his version of the facts, she would still succeed because on those facts too he was negligent and she would be entitled to damages. The facts, which the Defendant would have to investigate, were the very same facts he was always going to have to investigate. The court was therefore able to conclude that the new claim that Mrs Goode wanted to pursue did arise out of the same facts or substantially the same facts as were already in issue on a claim in respect of which she had already claimed a remedy in the proceedings.

77. In *Akers v Samba Financial Group* [2019] EWCA Civ 416 McCombe LJ, who confirmed that CPR 17.4 (2) should be read as construed by Brooke LJ in *Goode v Martin*, said:

> "52. In my judgment, in the vast majority of cases what is "in issue" in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question. In some cases, however, such as those considered above where, for example, there has been an extensive evidential battle on a summary judgment application or on a jurisdictional question, it may be possible to discern that facts are already in issue in a case prior to being crystallised in formal pleadings."

78. Mr Shaw argues that *Goode v Martin* provides no assistance because it decided only that a claimant would be entitled to amend to rely on the version of events that was set out by a defendant in his defence. He argues that here the Claimant's amendments go further than the gloss provided by *Goode v Martin.*

79. Further that when applying the third stage of the test set out in *Ballinger* and the approach identified in *Akers* the new claim cannot be said to arise out of the pleadings, the same facts or substantially the same facts, even taking into account the Amended Defence.

80. He argues that the Claimant's existing claim solely relates to alleged misrepresentations/breaches of fiduciary duty leading up to the SSA. Despite the pre-action correspondence, the existing claim is silent about anything occurring in September 2010. Even though the facts the Claimant now wants to rely on may have arisen out of a related transaction they are not the same facts nor substantially the same facts.

81. Whilst he accepts that there is some factual overlap, he argues that the amendments would require the Defendants to investigate facts and obtain evidence that are outside

the ambit of those facts he could reasonably have assumed he would have to investigate.

82. In *MasterCard Inc. v. Deutsche Bahn AG* [2017] EWCA Civ 272, Sales LJ, as he then was, explained the reasoning in *Goode v. Martin* at [42]:

> "The important feature of Goode v. Martin is that in order to make out her newly formulated claim, the claimant did not need or propose to introduce any additional facts or matters beyond those which the defendant himself had raised in his pleaded defence. In effect, the claimant was allowed to say, 'Well, if you are going to defend yourself against my existing claim by reference to those facts you have now pleaded in your defence, I rely on those very facts (if established at trial) to say that you are liable to me.' In such a case, the defendant has chosen to put those facts in issue in relation to the claimant's existing claim and there is no unfairness and no subversion of the intended effect of the limitation defence introduced by Parliament to allow the claimant to rely on the defendant's own case as part of her claim against him."

83. It seems to me that Mr Shaw goes too far. As Sales LJ explained in *MasterCard* the provisions of CPR17.4 (2) as construed by Brook LJ in *Goode v Martin* are not as restrictive as Mr Shaw submits. The Claimant is not barred from relying on any fact not already put in issue by the claim or indeed the Amended Defence. The phrase "substantially the same" does not mean exactly the same. Were it intended to mean exactly the same the additional words would be unnecessary. It is clear from the authorities that the words substantially the same have a purpose and meaning providing some, albeit limited, flexibility.

84. The Claimant's claim has always put in issue the allegation of fraudulent misrepresentation in relation to the sale of the shares in ISS. The amendments now seek to add to that allegation raising an additional alleged misrepresentation about the sale of the shares made on 10 September 2010. Although this was after the SSA itself, the factual matters set out in paragraph 40 make it clear that the Claimant was linking the representation in relation to the separation of the parties' interests in both ISS and the joint pension scheme.

85. The further allegation is that the Claimant was induced into entering into the Deed of Agreement and Release, which on the Defendants' case resulted in him giving up his right to pursue that claim, by the further fraudulent misrepresentations pleaded at paragraph 40 (4) (b).

86. The Amended Defence positively seeks to rely on the Deed of Agreement and Release to exclude the Claimant's claims not only arising in respect of the pension scheme but also in relation to all claims arising out of the relationship between the Claimant and Defendants including in relation to the sale of the shares. The Defendants therefore seek to rely on the Deed of Agreement and Release as part of the overall separation of the Claimants and Defendants interests.

87. The Release refers back to the SSA and the broader separation of the parties' interests, which appears on the Defendants case to have been deliberate and intended. It appears to me that the Deed of Agreement and Release and the SSA are all part of the same factual continuum and cannot be viewed in isolation. I do not therefore accept Mr Shaw's submission that one should view the Deed of Agreement and Release as a separate transaction in this case. It is in any event inconsistent with the Defendants intention to rely on that same Deed of Agreement and Release to exclude claims relating to the sale of the shares rather than just in relation to the joint pension scheme.

88. The claim for rescission is not a claim for the same loss and damage claimed in the original particulars of claim nor does it arise out of precisely the same facts and matters as the existing unamended claim. However, the Amended Defence puts in issue the facts and matters surrounding the entry into the Deed of Agreement and Release.

89. The Amended Defence will cause the trial judge to consider whether the Deed of Agreement and Release could exclude fraud or unknown claims. The Defendants' own submissions in seeking to persuade me that I should allow their amendment was that the context in which the Deed of Agreement and Release were entered into would have to be investigated.

90. For that there will have to be a factual enquiry of the events in September 2010. The trial judge will need to consider the evidence of the relationship and arrangements between the Claimant and the Defendants to determine whether the Release impermissibly excluded claims in fraud or unknown claims as contended by the Claimant or whether as contended by the Defendants the Deed of Agreement and Release does in fact exclude the Claimant's claims in respect of the sale of the shares (not in relation to the pension scheme).

91. It therefore appears to me that the Amended Defence puts in issue the same or substantially the same facts and matters as will be relied on by the Defendants in pursuing their Amended Defence. If they are right and the Deed of Agreement and Release can exclude all the Claimant's claims, the Claimant wants to be able to rely on substantially the same facts and matters that will have been considered by the trial judge in determining that issue to seek rescission and/or damages.

92. The Claimant was unsuccessful in persuading me that the Defendants had no prospect of success on their amendments. As set out above Mr Shaw argued that it was all about context and there was no absolute bar to excluding such claims. I agreed and the trial judge will now be considering not just the words of the Deed of Agreement and Release but its factual context including the relationship and arrangements between the Claimant and Defendants. This will include how it came to be entered into in the first place in September 2010. Inevitably that means the trial judge will be considering the evidence of what occurred on 10 September 2010.

93. It seems to me looking at it in the round that the facts that need to be investigated in relation to the Amended Claim will be same or substantially the same facts as are already in issue in light of the Amended Defence and what is necessary to determine it. The misrepresentations said to have been made in September 2010 go to the

context surrounding the entry into the Deed of Agreement and Release. They are facts that the Defendants will now have to investigate anyway.

94. CPR 17.4 (2) and the gloss identified by Brooke LJ in *Goode v Martin* do not limit the facts to those which are exactly the same. It is the Defendant who has chosen to amend to put in issue the Deed of Agreement and Release. They could have done so at an earlier stage but did not and there is no explanation for that change of position other than change of counsel. There is in my view no unfairness in this case in allowing the Claimant to also rely on the context in which the Deed of Agreement and Release were entered into when that has been put in issue by the Defendants' amendment.

95. It seems to me that it would be an odd and surprising outcome, inconsistent with public policy and fairness and the overriding objective, if the trial judge were to determine the facts in a way adverse to the Defendants and yet there was no remedy available to the trial judge to order rescission of the Deed of Agreement and Release or to award damages.

96. It seems to me that the amendment to plead the claim in rescission on the facts of this case falls within the type of scenario envisaged in *Goode v Martin, Ackers* and *MasterCard* and does not give rise to any unfairness nor undermine the finality intended by having time periods for the limitation of actions. It is simply the mirror of or response to the Defendants' Amended Defence and relies on the same or substantially the same facts. For all those reasons, on the facts of this case it seems to me that the proposed amendments can be said to meet the threshold test in CPR17.4 (2).

97. The Claimant's proposed amendments still have to have some prospect of success that is more than merely fanciful. Mr Shaw argues that there is a lack of conviction in light of the earlier failure to plead the rescission claim. Given the Defendants' own delay in pleading the Amended Defence, the delay alone did not seem to me to be a strong argument on conviction. It is clear that the Claimant strongly resists the Defendants' case on the Amended Defence. Indeed, to the contrary, the Claimant appears to have formed such a strong view about the merits of the Defendants' proposed defence that the Deed of Agreement and Release excluded his claim that he did not plead to it in 2016. It is clear to me that the Claimant firmly believes he has been defrauded and the Release is part of that fraud.

98. As to the question of the overall merits, I have to be satisfied that the amendment in relation to the Deed of Agreement and Release is more than merely fanciful. The burden on the Claimant is low. Mr Graham relies on telephone conversations on 10 September 2010 as well as emails. Although it seems to me that the email from the First Defendant may make the Claimant's position more difficult in relation to the paragraph 40 (4) (b) representations it cannot be said that the Claimant's proposed amendments are unarguable. I cannot say that the Claimant's amendments are entirely fanciful and without merit particularly given the reliance on telephone conversations and the need to consider the overall factual context and evidence.

99. Finally, I need to consider whether to exercise discretion to allow the Claimant's amendments. I have given the Defendants permission to amend to plead the Amended Defence. The Claimant's amendments in relation to the Deed of Agreement and

Release are, as they say, responsive. Mr Graham says it would be an obvious injustice not to permit the Claimant to amend and I should allow both parties to amend or neither.

100. The facts and matters to be investigated will have to be investigated anyway and I have already concluded, on the facts of this case that it is not unfair for the Defendants to have to undertake that investigation. Any delay or diminution in memory applies equally to both parties who have equal responsibility for the delay in bringing forward their amendments and progressing the claim. Both parties knew about their respective positions in relation to the Deed of Agreement and Release at latest in 2012. Neither raised it in their initial claim and defence, it only re-emerging in about 2019.

101. The procedural history of delay and lack of forward progress on the part of both parties is set out in [2021] EWHC 1450 (Ch). The claim remains at an early stage procedurally. It appears highly unlikely that the evidence for the Claimants amendment will add to the cost and time of the proceedings given the need to investigate those same facts and matters now for the Amended Defence. We are still to complete the CCMC, and the disclosure will be the same irrespective of whether the amendment is permitted. The amendments will not result in any out of sequence disclosure or witness evidence. It does not appear it will require any additional witnesses. It is not clear that there will be any additional evidence beyond that necessary for the Defendants' Amended Defence. The addition of the claim for rescission may add to the legal submissions but not substantially given the scope of those submissions now required in relation to the Deed of Agreement and Release.

102. As against that, this application is very late indeed and there does not appear to be any particularly good reason for the delay. For the reasons set out above the claim could have been made at the outset even if only as a claim for negative declaratory relief and I have not accepted Mr Graham's argument on contingent liability. It does not appear that that there was a lack of knowledge of the issue given the 2012 pre-action correspondence, it was a choice and decision to pursue the claim without reference to the Deed of Agreement and Release. That choice and decision appears to have been driven at least in part by the conviction that the Deed of Agreement and Release could not exclude the Claimant's claims.

103. I balance against that, as I say, the fact that the Defendants also failed to plead out the defence they now rely on in 2016 for which there is no explanation. Had they done so, in theory, the Claimant could have retrieved the position without a limitation issue arising.

104. The prejudice to the Defendants is the loss of a limitation defence but for the reasons I have set out that does not seem to me to be unfair. The Defendants have not identified any other unfairness.

105. The prejudice to the Claimant would be the loss of this additional claim in fraudulent misrepresentation and rescission to respond to the Amended Defence leaving them without a remedy. This takes me back to consideration of the low bar which a party has to overcome for permission to amend. It seems to me that on the information presently available the representations relied on in paragraph 40(4) are towards the lower end of the spectrum but I accept that it is no part of my role to conduct a mini

trial even if evidence were available to do so. I just have to be satisfied that the claim is not fanciful.

106. Ultimately, this is a question of balance. Taking into account all the matters set out above it seems to me that the Claimant should be allowed to rely on the new cause of action. This seems to me to be consistent with the overriding objective, just reasonable and proportionate and on balance marginally militates in favour of granting permission as a matter of discretion.

Paragraph 28

107. The Claimant, in addition, seeks permission to amend the particulars of claim to plead that the Defendants' alleged breaches of fiduciary duty in not disclosing negotiations with ACS were "for the avoidance of doubt dishonest". This part of the application falls to be determined on the usual principles as set out above and in [2021] EWHC 1450 (Ch) and is ultimately an exercise of discretion.

108. Mr Graham seeks to clarify or expand his current pleaded case to cover dishonest breach of fiduciary duty. He argues that the claim for breach of fiduciary duty as pleaded by its very nature already encompasses this claim but seeks to amend to make it clear and "for the avoidance of doubt" that it includes dishonest breach of fiduciary duty. He does not intend to restrict himself to either dishonest or non-dishonest breaches of fiduciary duty but to pursue both. Whilst he considers that it is clear that the breach of fiduciary duty is dishonest, and he says even more so in light of the Defendants' intention to rely on the Release, in the event that the trial judge is not persuaded that the breach of fiduciary duty goes as far as dishonesty he wants to retain a claim for non-dishonest breach of fiduciary duty.

109. However, he argues that the dishonest state of mind required for this arguable expansion of the particulars of claim is already set out in detail in the particulars of claim. I remind myself that the Claimant already sets out a claim in fraudulent misrepresentation to which he seeks to add an additional fraudulent misrepresentation. It is those parts of the particulars of claim, which the Claimant relies on in support of his amended claim of dishonest breach of fiduciary duty. He points to paragraphs 12 (3), 12 (5) and 12 (7) which form part of the facts on which the fraudulent misrepresentation claim is based and relies on those same facts to support the dishonest state of mind he needs to demonstrate for a dishonest breach of fiduciary duty.

110. He points to paragraph 15, which already sets out the allegations of falsity relating back to those matters set out in paragraph 12. He relies on paragraphs 18 to 20 as setting out what was in fact concealed from the Claimant relying on the Meta letter and the ACS 6 July offer both of which are already relied on in relation to the concealment and fraudulent misrepresentation claims.

111. He says that paragraph 28 relies on everything that has been pleaded earlier in the particulars of claim which is why it starts "in the premises". He relies on the same matters for the state of mind required to plead dishonest breach of fiduciary duty. The allegation is fully pleaded because he has already pleaded all the elements of the fraudulent misrepresentation claim. The Defendants know the case they have to meet.

He does not accept that there is any requirement as a matter of pleading for him to further particularise the allegations.

112. Mr Shaw says he has no objection to the amendment to paragraph 28 provided it is set out clearly. He accepts that the Claimant can seek to plead a case both in dishonest and non-dishonest breach of fiduciary duty. However, he says that the proposed amendment is objectionable because as a matter of pleading the particulars of claim do not make it clear that the Claimant is proposing to pursue the existing allegations of non-fraudulent breach of duty and fraudulent/dishonest breach of duty. He argues that the fraudulent and non-fraudulent breach of fiduciary duty are not pleaded in the alternative and should be so there can be no doubt about what is intended.

113. Mr Graham believes the particulars of claim are clear but accepts that if it is considered there is a lack of clarity, he should amend to make it clear that the claim is made in the alternative.

114. Mr Shaw's second point was that dishonesty needed to be distinctly alleged and distinctly pleaded with properly particularised facts to support an allegation of fraudulent/dishonest breach of duty. He argues that there are no such particulars set out. He says that the linkage between the alleged dishonesty and which defendant is said to have been dishonest is missing as the claim as pleaded is generic. He argues that there would need to be a clear particularisation as to whether it was said the First or Second Defendant were in dishonest breach of fiduciary duty.

115. Mr Graham says that the linkage between the allegations is made in the existing particulars of claim, which he relies on compendiously. The Defendants kept their negotiations with ACS secret from the Claimant. He says the allegations as pleaded make it clear that there was improper conduct, which was morally wrong and dishonest by both Defendants. In this regard, I note that at paragraph 15, which sets out the falsity, the plea is that both the First and Second Defendant failed to tell the Claimant the truth even though at paragraph 12 it is alleged that the First Defendant made the representations on which the Claimant relied. Mr Graham is relying on a state of mind of both the Defendants as already pleaded.

116. He says that the amendment is only to make it clear that particularly in light of the amended Defence and the delayed reliance on the Release that the claim is also one for dishonest breach of fiduciary duty. The Release on the Claimant's case being a further fraudulent or dishonest act.

117. Mr Shaw argues that in deciding whether to permit an amendment the court is required to assess whether the proposed amendment carries conviction. He submits that the amendment must be wholly lacking in conviction – it was not raised at all in the last 10 years. It is being introduced for the first time in draft 10 years after the relevant events, 9 years after the Release and its consequences were drawn to the attention of the Claimant and 4 years after the claim was first issued. He points to the delay and the fading of memories. He says it is just tactical manoeuvring by the Claimant to seek to avoid the consequence of the Release.

118. Mr Graham does not accept this. He points to the lack of need to plead the dishonest breach of fiduciary duty before the Release was relied on. He points to the existing claim in fraudulent misrepresentation and that the same facts and matters are relied on

and are just as capable of amounting to dishonest breach of fiduciary duty. Objectively assessed the amendment to plead dishonest breach of fiduciary duty is viable and that the Defendants' conduct and behaviour was inherently dishonest.

119. The bar for amendment is low and where there is no other issue to consider such as limitation the question is whether the amendment is more than merely fanciful.

120. Here despite Mr Shaw's submissions, it seems to me that it is possible to discern from the particulars of claim the plea in dishonest breach of fiduciary duty by reference to the facts and matters that have been pleaded in the fraudulent misrepresentation claim. None of those facts or matters are new nor do they take the Defendants by surprise. The Defendants were always going to have to give evidence in respect of both the existing fraudulent misrepresentation claim and the breach of fiduciary duty claim. Adding in a dishonest breach of fiduciary duty claim does not appear to me to change the facts and matters which the Defendants will have to consider in response to the claim.

121. For the same reasons it appears to me that a plea of dishonest breach of fiduciary duty, relying as it does on the same facts and matters as the fraudulent misrepresentation claim, cannot be said to fail the low bar required to say that the claim is more than merely fanciful and has some prospect of success.

122. The question of delay and dilatoriness is one which the Defendants themselves are guilty of having only sought to amend to plead the Release 10 years after the events in question and 9 years after it was raised in correspondence. It would not be consistent with the overriding objective or good case management to refuse this amendment, which arises out of the same facts, and matters as the existing claims and which does not appear to me to prejudice the Defendants. Whether the Claimant is right or wrong in his argument about the reasons for not pleading to the Release earlier does not affect this amendment.

123. However, I do agree with Mr Shaw that for clarity Mr Graham needs to make a minor amendment to make it clear that he relies on both dishonest and non-dishonest breach of fiduciary duty. At the previous hearing, there was some debate about this even before the amendment was considered and it seems to me necessary to resolve that matter once and for all for the assistance of the trial judge.

124. I invite the Claimant to seek to agree the additional amendment with the Defendants prior to the consequentials hearing.

125. I therefore conclude for the reasons set out above that the Claimant should have permission to amend as sought subject to the clarification identified above.