



Neutral Citation Number: [2023] EWHC 1916 (KB)

Case No: QB-2020-003721

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2023

Before:

ANDREW BURNS KC
(Sitting as a Deputy Judge of the High Court)

Between:

- (1) QATAR INVESTMENT AND PROJECTS
DEVELOPMENT HOLDING CO
(2) HIS HIGHNESS SHEIKH HAMAD BIN
ABDULLAH AL THANI

Claimants

- and -

- (1) PHOENIX ANCIENT ART S.A.
(2) ALI ABOUTAAM
(3) HICHAM ABOUTAAM
(4) ROLAND ANSERMET

Defendants

Roger Stewart KC and Marie-Claire O’Kane (instructed by Pinsent Masons LLP) for the
Claimants
Gilead Cooper KC and Francesca Mitchell (instructed by Herrington Carmichael LLP) for
the First, Second and Third Defendants

Hearing date: 18th July 2023

JUDGMENT

Andrew Burns KC (Sitting as a Deputy Judge of the High Court):

Introduction

1. This is the Claimants' partly adjourned application to make substantial amendments to their particulars of claim to add claims for deceit, fraudulent misrepresentation and unlawful means conspiracy against the Defendants.
2. The Claimants are Qatar Investment and Project Holding Co ("QIPCO") and its Chief Executive Officer, Sheikh Hamad. In 2013 QIPCO purchased through its English agents Pinsent Masons, a chalcedony statuette of the figure Nike (the "Nike"). It was purchased from the First Defendant ("Phoenix"). The Nike was sold for US\$2.2m under the terms of a Sale and Purchase Agreement dated 13 May 2013 ("the SPA"). The SPA was subject to English law and jurisdiction. It provided for completion of the purchase once QIPCO's expert had inspected the Nike in New York, with Pinsent Masons transferring the purchase money from England to its agent in New York and ownership passing to QIPCO when Pinsent Masons authorised the release of the funds and the Nike was collected by QIPCO's agent in New York.
3. The Claimants sought to add three new defendants and by these amendments bring against them the new claims of deceit, fraud and conspiracy. The new defendants joined and served by order of Master McCloud dated 30 March 2023 are:
 - a. The Second Defendant, Mr Ali Aboutaam, the co-founder and President of Phoenix, who was based in Geneva, Switzerland;
 - b. His brother the Third Defendant, Mr Hicham Aboutaam, who was the other co-founder of Phoenix, and sole owner of Electrum, Phoenix's agent in New York; and
 - c. The Fourth Defendant, Mr Roland Ansermet, a Swiss dealer of antiquities who supports the provenance of the Nike by giving evidence that he bought it in 1982 and sold it to Phoenix's agent, Tanis Antiquities Ltd.

Background to the Claim

4. The Schedule 1 of the SPA described the Nike as a “Byzantine Chalcedony Statuette of a Nike – Victory, Period: circa 400 – 500 AD” and in the attached report it was described as “Presumed origin and period Early Byzantine, 5th Century AD”. The Schedule gave the following provenance for the Work: “Phoenix Gallery Ancient Art S.A., Geneva, Switzerland, Ex Collection Ansermet - Acquired in 1982”.
5. In or around early 2018, the Claimants raised concerns with Phoenix as to the authenticity of the Nike. They had received a report stating that microscopic inspection had detected modern machine tool markings and machine polishing. Attempts to resolve the dispute were unsuccessful despite a standstill agreement dated 7 May 2019 which was terminated on 8 October 2020.
6. The Claimants issued the claim on 22 October 2020 and served Phoenix with the Claim Form and Particulars of Claim. Phoenix served its Defence on 2 February 2021 and the Claimants served their Reply on 31 March 2021. Phoenix served a Re-Amended Defence dated 24 September 2021; and the Claimants served a Re-Amended Reply dated 13 October 2021. Further steps were taken with a trial listed for 2023 including a stay for ADR in 2022.
7. On 8 March 2023 Master McCloud held a Pre-Trial Review at which the Claimants applied for permission to amend the Claim Form and Particulars of Claim to add the Second, Third and Fourth Defendants. She gave permission to join the Second, Third and Fourth Defendants respectively and serve the Amended Claim Form and Particulars of Claim, without prejudice to their rights to challenge jurisdiction and the proposed amendments.
8. Master McCloud postponed the trial to 11 days in early 2024 and listed a hearing on 23 June for the amendments to be challenged and made directions for exchange of evidence for that hearing. She adjourned that hearing to give more time for the Fourth Defendant to be served and the application comes before me today. Despite attempts to chase, the Claimants have not received confirmation that the Fourth Defendant has been served out of the jurisdiction, but the other parties invited me to proceed with the application. I agree that it is appropriate to proceed today having regard to the trial listed to commence in January 2024.

9. In the unamended case there were essentially, two key issues: first whether the Nike was authentic and if not, whether Phoenix was in breach of express or implied terms of the SPA and/or guilty of negligence. The Claimants contended that the Nike was manufactured in modern times and claim damages for breach of duty under contract and/or tort and/or under s. 2 of the Misrepresentation Act 1967. In its Re-Amended Defence Phoenix maintains that the Nike is a genuine Byzantine treasure but, in any event, Phoenix denies that it is in breach of any term of the contract or negligent. It is also denied that the Claimants relied on, or were entitled to rely on, any statement by Phoenix as a basis for believing that the Nike was authentic. Phoenix plead a term of the SPA excluding liability for negligent misrepresentation and asserts that the Claimants relied on the expertise of their own expert in buying the Nike.

The Proposed Amendments

10. The proposed Amended Particulars of Claim introduces reformulated claims for breach of contract and negligence and pleads deceit by fraudulent misrepresentation and/or unlawful means conspiracy against the Defendants.
11. As the Fourth Defendant has not yet been served and so does not appear, the conclusions I reach and the orders that I make are without prejudice to the Fourth Defendant's right to object. The First to Third Defendants are represented by Mr Cooper KC and Ms Mitchell who have helpfully provided a document indicating the proposed amendments to which their clients take objection and the ones to which they do not object. The amendments which are not challenged are largely clarifications or particularisation of the existing case of breach of contract, negligence and negligent misrepresentation. They are appropriate amendments and I grant permission for those amendments on that basis. I also permit the Claimants to amend paragraph 31 of the Amended Particulars of Claim by inserting a missing 'not' as that typographical error was identified during the course of the hearing.
12. The rest of the amendments are contested. Apart from one amendment, all the contested amendments are to add claims of deceit by fraudulent misrepresentation and/or unlawful means conspiracy against the Defendants. The outlier amendment I can deal with first.

Paragraph 28 of the Amended Particulars of Claim

13. The Claimants apply to amend paragraph 28 to add the underlined words as follows:

“QIPCO is entitled to and claims damages for Phoenix’s breach of duty (in contract and/or tort), amounting to the difference between the value of the Work had it conformed to the contract of sale and had a genuine provenance (US\$2.2m) and its actual value (zero). For the avoidance of doubt, the Claimants’ case (for the purpose of all claims against all Defendants – as to which see also paragraphs 29A to 29F below) is that the Work is valueless because it is inauthentic and/or because it has a false provenance. The sterling equivalent of US\$2.2m at 13 May 2013 was 1,433,740. The source for the exchange rate used is the daily spot rate of the Bank of England on this date.”

Discretionary factors

14. It is agreed that this amendment raises a straightforward question of discretion. Under CPR r.17.1(2) “If his statement of case has been served, a party may amend it only – (a) with the written consent of all the other parties; or (b) with the permission of the court.” I adopt and apply the principles helpfully summarised in *Quah Ling v Goldman Sachs* [2015] EWHC 759 (Comm) at [38]. In particular I note the importance of the overriding objective and the balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted. As trial is not until the end of January 2024 these are classed as late but not ‘very late’ amendments. I bear in mind that lateness is a relative concept and that costs may not always be an adequate compensation. Lateness may require the parties to revisit significant steps in the litigation. I have to look to the Claimants for a good explanation for any delay and any non-compliance with the Civil Procedure Rules or directions of the Court as the wider public interest requires the Court must ensure that other litigants can obtain justice efficiently and proportionately. A good explanation is one of the factors to be considered in the balance.

15. The overriding objective is to enable the Court to deal with cases justly and at proportionate cost. Amendments may be refused if they result in a disproportionate and

unjustified addition of costs or Court time or if allowing them would be disproportionate to the amount of money at stake or the importance of the issues in the case. I have been asked to consider the financial position of each party. I accept that the Claimants are very wealthy, but I have no evidence before me about the financial situation of the Defendants or whether there would be financial prejudice to them by permitting the amendments.

16. The particularity and/or clarity of the proposed amendment has to be considered and whether they involve duplication of cost and effort. As held in *Kawasaki Kisen Kaisha v James Kamball* [2021] 3 All ER 978 the amended claim must carry some degree of conviction. The pleading must be coherent and properly particularised. It must be supported by evidence which establishes a sufficiently arguable factual basis.
17. Taking these factors into account I accept the submissions of Mr Stewart KC and Ms O’Kane on behalf of the Claimants that this proposed amendment is no more than a clarification and particularisation of the existing case. The Claimants have already pleaded that as a result of the allegedly false provenance they were induced to buy the Nike, that they would not have suffered the loss had Phoenix not made the representation and that they are entitled to damages under s.2 Misrepresentation Act 1967. I do not accept the submissions of Mr Cooper KC and Ms Mitchell on behalf of the First to Third Defendants that this conceals an entirely new, different and contradictory claim. The Claimants already rely on the allegedly false provenance in addition to the alleged false representation as to authenticity of the Nike to find their claims for damages. It is already open to the trial judge to assess what loss flows if either or both misrepresentations are held to have been made. In my judgment this is accurately described as a ‘for the avoidance of doubt’ amendment. I accept that this could have been clarified earlier and makes it more likely that valuation evidence from an expert witness will be required as to the value of a genuine Nike with a false provenance and whether that removes or only reduces its value. There is time for both parties to seek and adduce such evidence and it will not add significantly to the issues for the trial.
18. In all the circumstances I permit the amendment to paragraph 28 in the form already served following the Order of Master McCloud dated 30 March 2023.

Jurisdiction Challenge

19. As a result of Master McCloud's order, the Second and Third Defendants are already before the Court. It was agreed by Phoenix that she could determine the application to serve them out of the jurisdiction and she did so in paragraph 4 of her Order with the balance of the application adjourned. The Second and Third Defendants (by their agent Phoenix) indicated that they would accept service through Phoenix's solicitor subject to the provisos in the Order, one of which was their right to challenge jurisdiction. Phoenix was ordered to file and serve any responsive evidence to the Claimants' application by 9 June 2023 with provision for further evidence in reply by 16 June 2023. I infer that the Second and Third Defendants were intended to have the same permission to serve evidence.

20. The Second and Third Defendants have challenged jurisdiction in the skeleton argument served on their behalf which says:

“the contract under which Phoenix sold the Nike was expressly governed by the law of England and Wales, and there was therefore no challenge to the jurisdiction of the court in respect of the Claim against Phoenix. However, the new claims against the proposed additional defendants allege conspiracy and fraud that are said to have taken place outside the jurisdiction and would not on any analysis be governed by English law. Consequently, the Claimants should not have permission to amend the APOC or the Amended Claim Form by joining the additional defendants.”

21. It appeared to be common ground in oral submissions that the applicable law of a tort is generally the law of the country in which the damage occurs irrespective of the country where the conspiracy or fraud is alleged to have occurred. Neither party suggested that habitual residence was relevant presumably because the Defendants are in Switzerland and/or New York and the Claimants are in Qatar. The Claimants suggested that English law being the applicable law of the SPA and being closely connected to the tort in question would indicate that English law was a closer connection than any other country. However, their main point was that the all or some of the damage was sustained within the jurisdiction.

22. The Claimants served evidence from Mr Pulford of Pinsent Masons in a witness statement dated 3 March 2023 in support of this application. Despite Master McCloud's directions and the considerable time since the PTR, the First to Third Defendants have not submitted evidence to challenge that evidence or to support any jurisdictional challenge.

23. Mr Pulford's evidence on this issue is at paragraph 73:

“73.1 The damage occasioned by both torts was the Claimants' loss in the value it paid for the Nike and the costs for its acquisition (the Nike being a worthless modern object). This damage was sustained within the jurisdiction, given that the Nike is located here. In the premises, PD 3.1 (9)(a) applies in respect of both torts.

73.2 The applicable law of the claims for deceit and conspiracy is determined by Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations ("Rome II") (part of EU retained law as amended by The Law Applicable to Contractual and Non-Contractual Obligations (Amendment) (EU Exit) Regulations (SI 2019/834)). English law is the governing law of both torts by Article 4(1) and/or 4(3) on the footing that the damage to the Claimants occurred in this jurisdiction. In the premises, PD 3.1 (9)(b) applies in respect of both torts.”

24. Mr Cooper KC relies on the evidence from the Second Defendant's witness statement dated 25 January 2023 that the Nike was stored in New York at the Gallery run by the Third Defendant. He relies on the witness statement of the Gallery Director (Mr Gherardi) of the same date who gives evidence that the inspection of the Nike took place in New York and then was delivered to the Claimants' shippers. He submits that on that basis, there is no connection with England and Wales as the only connection is the applicable law of the SPA but that can only influence the position of Phoenix and is irrelevant to the Second and Third Defendants.

25. Mr Cooper KC submits based on these statements that the torts took place in New York, with parties to the alleged conspiracy in New York and Switzerland and the loss was suffered by parties based in Qatar. He says that Mr Pulford's evidence that the loss was suffered in England & Wales as the Nike was located there is plainly wrong as his witnesses say that the Nike was not in the jurisdiction when the loss was suffered because

it is possible to infer from their evidence that it was in New York at the time of the alleged deceit and conspiracy.

26. Mr Stewart KC submits that the only direct evidence on this point before me is that the loss (which include the costs lost by the Claimants) took place in England and Wales which was the location of the buyer's agent, Pinsent Masons and Mr Pulford who gives the evidence is a partner of Pinsent Masons. Under the SPA the 'Buyer's Authorised Representative' was an agent instructed by Simon Jones Superfreight Limited. Mr Stewart KC points out that the Defendants have not adduced evidence to show the Nike was in New York at the time that property passed under the SPA. There is nothing to contradict Mr Pulford's evidence that at least part of the loss, namely the associated costs, were suffered in England & Wales where Pinsent Masons was based. He says that where a party relies on foreign law, it must be pleaded and proved. If foreign law is not pleaded, English law is presumed to apply.

27. The Defendants having submitted to the jurisdiction of the English Court subject to reserving their rights to challenge jurisdiction and having been joined by Master McCloud on that basis, must at least raise a *prima facie* case as to where the tort took place and where the damage was suffered and so what law applies to the claim. I am invited to draw inferences as to where the damage took place from evidence which was served in January 2023 which does not address the issue directly. The Second and Third Defendants invite me to reject the clear evidence of Mr Pulford that damage took place within the jurisdiction without serving any evidence explaining (with supporting evidence) why his evidence is not accurate. It seems to me that it is most unsatisfactory for me to be invited to determine the issue of jurisdiction in circumstances where the Defendants have declined to put forward a positive case on the proper jurisdiction or the proper law of the alleged torts. I accept that at this stage they have no obligation to plead the foreign law that they say applies instead of English law, but it does seem to me that they need to raise the foreign law by way of evidence on the application and adduce some evidence about the impact of that foreign law (if any) on the jurisdiction of this Court to hear the proposed claims which are the subject of the amendments. In these circumstances I accept the direct evidence that has been served on the application which indicates in clear (if concise) terms that the alleged torts are subject to English law.

28. The Second and Third Defendants correctly point out that the application for permission to serve out of the jurisdiction before the Master attracted a duty of full and frank disclosure. They say that the Order joining the Second and Third Defendants should be set aside because the Claimants failed to draw attention to CPR r.19.6(2), failed to mention the fact that the limitation period had expired and failed to draw attention to the requirements of section 35(3) of the Limitation Act 1980 and CPR r.17.4.
29. Having reviewed the witness statement of Mr Pulford I am satisfied that there are no credible grounds for this suggestion. Mr Pulford addresses the issue under the heading “Impact of any issues of limitation” in paragraphs 56 to 59 of his statement. He expressly refers to s. 35 of the 1980 Act and CPR r.17.4 and r.19.5. He submits that “although the facts giving rise to the new claims occurred more than six years ago, they are not time-barred under either s.2 and/or 6 LA 1980. Rather, by s.32 LA 1980 (inter alia), where (i) an action is based upon the fraud of the defendant or (ii) any fact relevant to the claimant’s right of action has been deliberately concealed by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or concealment or could with reasonable diligence have discovered it.”
30. He discloses the background to the joinder and amendment application and the fact that the Swiss Report (which I will address in detail later) had been disclosed in February 2022. He outlines the timeline since then explaining the reasons for the delay before the application was made. Mr Stewart KC’s skeleton argument for the PTR dated 7 March 2023 states immediately after the passage which is quoted and relied on by Mr Cooper KC:
- “The Court is referred to the witness statement of Mr Pulford. There seems to be little doubt but that the Defendants will each dispute that they have been dishonest and may well assert jurisdictional points. It is possible that they will assert that the Claimants could have made the present allegations earlier and/or discovered the matters in respect of which complaint is now made earlier.”
31. The suggestion of a failure to make full and frank disclosure is groundless. The matters that are said by the Second and Third Defendants to have been omitted were addressed expressly. For all these reasons I do not disturb Master McCloud’s order dated 30 March

2023 granting permission to join the Second and Third Defendants, but I must of course now examine the contents of the amendments and decide whether the challenge to those amendments is well founded.

Deceit, Fraudulent Misrepresentation and Conspiracy Amendments

32. The precise nature of the dispute between the parties over the content of the proposed amendments only became clear from the skeleton arguments and during the course of submissions. The written and oral submissions would have been more focussed had the nature of the First to Third Defendants' objections to the amendments been raised in correspondence or by way of evidence as permitted by Master McCloud. Mr Cooper KC pointed out that the objections did not require evidence to be served as he was content to rely upon his submissions of law or the witness evidence that had already been served in the claim. Mr Stewart KC argued that I should not entertain objections that had been first raised in a skeleton argument served a day before the hearing when the First to Third Defendants had four months to consider and raise them. While I accept that it would have been in accordance with the overriding objective for the parties to have cooperated in identifying and narrowing the issues that must be decided today, I do not think that the First to Third Defendants can be shut out from raising objections on that basis.
33. The complexity arises as the Claimants have applied to plead a new cause of action by amendment on the assumption that the new claims are torts where the damage was suffered within the jurisdiction, where the limitation period is extended by the English law of limitation (specifically s.32 of the 1980 Act) by reason of fraud or deliberate concealment and so the amendments do not add any claim after the expiry of the limitation period. The First to Third Defendants challenge that. Mr Cooper KC submits that the evidence already served demonstrates that the tort was or may have been committed in a foreign jurisdiction and not in England and Wales. On that basis he submits that a foreign rather than the English limitation period may apply, and he says that it follows that the Claimants cannot show that any potential limitation defence that his clients may wish to plead is not reasonably arguable.

Amendments outside a limitation period

34. This issue is central to the determination of this part of the application as the legal principles for permitting amendments after the expiry of the limitation period require additional steps before the exercise of the Court's discretion. This is because of the effect of s.35(1)(b) of the 1980 Act namely that the new claims that the Claimants have made in the course of this claim or action "shall be deemed to have been commenced on the same date as the original action".

35. The conditions for permitting such an amendment are in s.35(3) of the 1980 Act:

"Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

36. Sub-sections 35(4) and (5) of the 1980 Act provide that rules of court may provide for allowing a new claim to which subsection (3) applies subject to certain conditions which are set out for present purposes in CPR r.17.4. That provides:

"(1) This rule applies where—

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

(b) a period of limitation has expired under—

(i) the Limitation Act 1980; or

(ii) the Foreign Limitation Periods Act 1984; or

(iii) any other enactment which allows such an amendment,

or under which such an amendment is allowed.

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

37. The correct approach to CPR r.17.4 is to ask four questions which were recently reiterated in *Mulalley & Co v Martlet Homes* [2022] EWCA Civ 32 at [38]:

- a. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
- b. Do the proposed amendments seek to add or substitute a new cause of action?
- c. 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?
- d. Should the Court exercise its discretion to allow the amendment?

38. Mr Stewart KC has not contested that the proposed new claims amount to new causes of action. That must be correct as Millett LJ put it in *Paragon Finance Plc v DB Thakerar & Co (A Firm)* [1999] 1 All E.R. 400 at 406C:

“In my judgment, it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action.”

39. Mr Stewart KC also accepts that the proposed new causes of action do not arise out of the same or substantially the same facts as are already in issue. Once again that is a proper concession as *Paragon Finance* at 418H held that a claim based on allegations of negligence do not involve substantially the same facts as a claim based on allegations of fraud and dishonesty. There is a sharp dividing line between cases of fraud and dishonesty and cases of negligence and incompetence.

40. Therefore, Mr Stewart KC puts, as he must, his eggs in the first basket of showing that it is not reasonably arguable that the opposed amendments are outside the applicable limitation period. Mr Cooper KC says that the burden is on him to do so. The burden on an application such as this was considered in *Ballinger v Mercer Ltd* [2014] 1 WLR 3597 at [25]:

“It must be borne in mind that the context of the debate is the doctrine of relation back introduced by section 35(1) of the Limitation Act 1980. If a new claim is permitted by way of amendment, it is treated as having been made by way of a separate action commenced on the same date as the original action. So where an amendment is

permitted to introduce a new claim which was in time at the date of commencement of the action but arguably out of time on the date on which permission to amend is granted, the defendant is thereafter precluded from reliance at trial on the arguable limitation defence.”

41. The Court at the permission stage must not descend into factual issues which are seriously in dispute but must limit itself to considering whether the defendant has a ‘reasonably arguable case on limitation’ (*Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 at p 1425H). If a court refuses permission to amend, the Claimant’s remedy will be to issue separate proceedings in respect of the new claim and then the defendant can plead its limitation defence to be determined at trial without being prejudiced by the operation of relation back under s.35(1) of the 1980 Act.

42. *Ballinger* held that there is a form of shifting burden at [27]:

“Working from first principles however it is plain that, provided the defendant can show a *prima facie* defence of limitation, the burden must be on the claimant to show that the defence is not in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If the availability of the defence of limitation depends on the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a *prima facie* defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable.”

43. Therefore, the First to Third Defendants only have to raise and show a *prima facie* defence of limitation and then the burden is on the Claimants to show that such a defence is not in fact reasonably arguable.

The Applicable Limitation Period

44. Mr Cooper KC submitted that the proposed amendments were raised more than 2 years after the expiry of the limitation period. His skeleton argument explained the contention of the First to Third Defendants on limitation in concise terms at paragraph 14. It points

out (as is common ground) that the sale took place on 13 May 2013 and on 7 May 2019, QIPCO and Phoenix entered into a standstill agreement extending the limitation period by 6 months, from 13 May 2019 until 12 November 2020. On 12 October 2020 the Claimants served a notice of termination which terminated the Standstill Agreement and the 6-year limitation period for contract and tort claims expired against Phoenix on 29 October 2020. The Claimants issued the Claim against Phoenix on 22 October 2020.

45. The First to Third Defendants contend in their skeleton argument that “Assuming the Claimants are relying on English law, there is nothing in the APOC to suggest reliance on section 32 of the Limitation Act 1980 (the “deliberate concealment” provisions) to overcome the six-year time limit. On the other hand, if the law of some other jurisdiction applies – given that neither the actions complained of nor the damage suffered occurred within the jurisdiction – there is nothing to suggest that some other system of law would allow the claims to be brought. The whole issue of limitation is simply not addressed.”
46. The First to Third Defendants therefore put forward a *prima facie* defence that the 6-year limitation period has expired, and the Claimants are not availing themselves of the extended limitation period in s.32 of the 1980 Act. That is a *prima facie* defence that the claims are out of time which the Claimants must answer and overcome. Their second argument is if some other limitation law applies there is nothing to suggest that the claims would be allowed. The Claimants are not contending that any other law applies or trying to rely on any foreign limitation period which might apply under the Foreign Limitation Periods Act 1984. I have already recorded that the Claimants’ evidence is that the torts resulted in damage suffered in the jurisdiction of England and Wales. It is clear from the Amended Particulars of Claim that the new claims of deceit, fraudulent misrepresentation and unlawful means conspiracy are brought on the basis of the law of torts of England and Wales and no other law.
47. As I have explored above, in my judgment the First to Third Defendants had the opportunity to raise a positive case in evidence about what foreign law they say applies in the circumstances of this case and whether that has any consequential effect on the limitation that applies. They have chosen not to do so and Mr Cooper KC did not put forward any positive submissions about what foreign law applies. His point was that the

Claimants had failed to address the point or show that there was no reasonably arguable defence that a foreign law or limitation provision applies.

48. Following *Ballinger I* I find that it is not sufficient for the First to Third Defendants simply to raise the question of what law or limitation period might possibly apply. They need to at least raise a *prima facie* case that they do have an actual limitation defence based on some foreign limitation period which is in fact (*prima facie*) the one that applies to this claim. They have chosen not to put forward any positive case at all, even one meeting the low threshold of a *prima facie* basis – they have not suggested which foreign law is the one that they say applies instead of English law and they have not called evidence about what any such foreign limitation period is that might bar the proposed amended claims. Standing back and considering the overriding objective it seems to me that it is not just to simply challenge the Claimants to disprove that a foreign limitation period applies without at least giving proper notice and raising some evidence about what that law is and what the limitation period is that is said to apply. In those circumstances it is just that the Claimants do not have to show that a limitation defence is not reasonably arguable when they have not been set a potential target at which to aim.
49. In those circumstances the issue before me is only whether the Claimants can show that it is not reasonably arguable that a 6-year limitation period applies to the proposed claims and has expired.
50. The Claimants say the new claims against the Defendants are not time-barred as they rely on s.32 of the 1980 Act on the grounds that the new claims are based upon the fraud of the Defendants or a fact relevant to their right of action has been deliberately concealed by the Defendants. In those circumstances they submit that the period of limitation did not begin to run until they had discovered the fraud or concealment or could with reasonable diligence have discovered it.
51. The amendments in paragraphs 24F and 24G allege dishonest and therefore fraudulent misrepresentation. The amendments in paragraphs 29A and 29B are the claims against the Second and Third Defendants that the Second Defendant caused, procured or authorised Phoenix to make fraudulent misrepresentations and that the Third Defendant knew about them and assumed liability for those misrepresentations and/or acted in concert with the

other Defendants in defrauding QIPCO. The claim is also made against them under the tort of deceit in paragraph 29C. The amendments in paragraphs 29D and 29E are that the Defendants participated in an unlawful means conspiracy to cause financial loss to QIPCO and includes the pleaded inference that the Fourth Defendant caused or permitted documents to be created falsely representing matters of provenance, knowing that those documents would be used for fraudulent purposes.

52. Section 32 of the 1980 Act provides for the postponement of limitation period in case of fraud, concealment or mistake. It provides:

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

(a) the action is based upon the fraud of the defendant; or

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

(c) the action is for relief from the consequences of a mistake;

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

53. *Paragon Finance* at p.418 held that:

“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.”

54. The Claimants rely on Mr Pulford's statement to say that the fraudulent conduct and conspiracy of the Defendants has only recently come to light and could not have with reasonable diligence come to light earlier.

55. The parties gave standard disclosure on 16 February 2022 when Phoenix disclosed a report dated 21 July 2020 addressed to the Second Defendant from the Swiss Western

Customs Antifraud Department in collaboration with the Public Prosecutor's Office of the Canton of Geneva.

56. The Claimants considered the content of that report which I summarise below. They did not react immediately. The proceedings were stayed for ADR from 30 June 2022 to 18 November 2022 with a mediation taking place on 4 October 2022. That was unsuccessful and witness statements were exchanged on 26 January 2023 followed by this application to amend made in advance of the Pre Trial-Review on 8 March 2023.
57. Mr Pulford gives evidence that the Swiss Report alleged that Phoenix was smuggling genuine archaeological objects into Switzerland without payment of Swiss customs duty and the Second Defendant stored them whilst a false provenance was created for them. It says that the antiquities were then exported on the basis of a false invoice and sent abroad to arts fairs or auctions for sale. The Swiss Report alleged that the Second Defendant used false invoices to “launder” objects and that the Fourth Defendant was a “prospector for obtaining antiquities and false documents” receiving money from Phoenix or its agent Tanis. The Swiss Report concludes that “contradictory elements make it possible to establish that falsified documents were established by [the Fourth Defendant] to legitimize the recent acquisition of assets subject to control”.
58. On the basis of the Swiss Report the Claimants made numerous requests for further disclosure by correspondence in September and December 2022. I am satisfied that the Claimants could with reasonable diligence have discovered the alleged fraud or concealment after disclosure of the Swiss Report.
59. The Claimants' suspicions about the honesty of the Defendants were further raised by an article in the French news magazine 'Paris Match' on 10 January 2023. It reported that criminal proceedings brought against the Second Defendant in the Geneva Police Court on 10 January 2023 had resulted in a conviction and an 18-month suspended sentence of imprisonment and a fine of CHF 1 million. The article reported that the Second Defendant had confessed to producing false invoices and documents between 2010 and 2016 and breaching the Swiss law on the transfer of antiquities. He produced a false provenance either obscuring an illicit origin or facilitating their customs transfer with a view to their sale on the art market through Phoenix and its associated companies. It also

referred to a November 2021 conviction and fine of the Second Defendant for VAT fraud on objects imported into Switzerland.

60. The ‘Paris Match’ article stated that in 2016 the ‘Paris Match Belgium’ magazine had “revealed the seizure by customs in Brussels of archaeological objects belonging to the Phoenix Ancient Art company of the Geneva king of antiquities, Ali Aboutaam. The suspicions related to illicit trafficking”. The 2016 article is not before me but in my judgment a limited circulation news article about the seizure by Belgian customs of Phoenix’s antiquities did not make it possible for the Claimants to discover the fraud that is now alleged. The first mention of the alleged forging of provenance documentation – which is an essential element of the claims raised in the amendments - comes in the Swiss Report of 2022 and the Paris Match article of January 2023.
61. I do not think that an analysis of the metadata of any of the documentation including the Condition Report which was sent to QIPCO’s agent in April 2013 would of itself give rise to any realistic prospect of the fraud being discovered earlier. QIPCO’s expert believed Phoenix’s provenance statement which was supported by the Fourth Defendant. I do not think that the Claimants could have discovered the alleged fraud without exceptional measures before early 2022.
62. On that basis I must conclude on the evidence that is available at this preliminary stage that it is not reasonably arguable that a standard 6-year limitation period applies to the proposed new claims. They appear to me (for the purposes of the amendment application) to fall squarely within s.32 of the 1980 Act. An essential element of the new claims against the Defendants is their alleged fraud or dishonesty. It is plain that on the Claimants’ case the alleged forgery of the provenance documentation was deliberately concealed from the Claimants and on either basis the limitation period did not begin to run until early 2022. That was when the Claimants either discovered or could with reasonable diligence have discovered the alleged fraud or concealment.
63. For those reasons I answer the first question from *Mulalley & Co v Martlet Homes* (is it reasonably arguable that the opposed amendments are outside the applicable limitation period?) in the negative and must go to the fourth question which is should the Court exercise its discretion to allow the amendment?

Discretionary Factors

64. I have already set out the legal test for exercising my discretion. In my judgment the balance of justice is in favour of exercising my discretion to grant the amendments.
65. The Second Defendant has admitted being convicted for fabricating provenance documents for other works, Phoenix is implicated in the scheme and the Fourth Defendant is alleged in the Swiss Report to be a part of the associated operation. In his witness statement the Fourth Defendant has admitted that the Swiss authorities made accusations against him in 2020 including that he had fabricated documents. He denies fabrication but admits being fined CHF 8,000 (reduced from CHF 24,000) for a VAT offence.
66. I do not accept the submission of the First to Third Defendants that the amendments are an abuse of pleading which are unnecessary and are designed to discredit them and go merely to credit. The Claimants' existing case in negligence and breach of contract is being defended and could potentially fail on the issues of reliance or by reason of the contractual exclusion clause. As Mr Cooper KC accepted in oral submissions, the new claims in deceit and fraud could, if successful, overcome those potential defences. It is simply wrong to say that there is no advantage to the Claimants in adding these claims and the amendments are merely abusive. Neither do I agree that the evidence about the involvement in fabrication of provenance documents in relation to genuine antiquities would be inadmissible as 'similar fact evidence' in a trial of these allegations. Applying *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 the essential test in civil cases is relevance rather than the more restrictive admissibility tests in criminal cases. In a civil case the question of admissibility turns on whether the evidence which it is sought to adduce is probative (assuming provisionally that it is true).
67. Although the new amendments are not always concise and tend towards the pleading of evidence at times, they have the benefit of making it clear to the Defendants which facts the Claimants are proposing to rely upon when inviting the Court to draw inferences that the Defendants were dishonest in creating an allegedly false provenance statement.

68. Another factor which provides reasonable grounds for the pleading of the proposed amendments is that Phoenix had failed to disclose some of the documents specifically requested by the Claimants following the disclosure of the Swiss Report. The Claimants allege that Phoenix has failed to disclose:
- a. a copy of the original purchase invoice from the Fourth Defendant in native, unredacted format;
 - b. copies of documents relating to Phoenix's purchase of the Nike particularly relating to the payment made, its shipping and/or importation;
 - c. documents requested in respect of the indictment of the Second Defendant;
 - d. documents from the Second Defendant's Gmail account or mobile phone; and
 - e. the 2011 Adonis List referred to in some detail in the Swiss Report.
69. I do not for myself derive much support from the Claimants' assumptions about the metadata of copies of various documents faxed or emailed (whether or not they were disclosed late). They suggest that such metadata shows that the documents are forgeries and undermine the witness evidence served by Phoenix. Nor do I think that the allegedly inconsistent accounts of Phoenix's acquisition of the Nike are a significant factor and I do not draw assistance from the alleged inconsistencies in the statements served on behalf of Phoenix. However, the other factors that I have mentioned are sufficient to satisfy me that the new claims which are the subject of amendments cross the threshold of having a real prospect of success.
70. I bear in mind that the trial is listed for January 2024 and so these are late amendments which will require the parties to revisit significant steps in the litigation including new pleadings and disclosure. However much of that disclosure will involve documents (if they exist) which have already been the subject of specific requests. I accept that additional expert evidence may be required but there is time to serve such evidence and I do not think this will add to the already enlarged 11-day time estimate. Overall, I am satisfied that the Claimants have a good explanation for the delay in making the application in March 2023.
71. Although I must bear in mind the wider public interest so other litigants can obtain justice efficiently and proportionately, I agree with Mr Stewart KC's submission that public policy would tend to require fraud and dishonesty allegations to be properly pleaded and

aired rather than the trial proceeding on the basis of mere breach of contract and negligence when the Claimants' real case is one of deliberate wrongdoing. Although these amendments are substantial and will result in additional costs, Master McCloud has already expanded the time estimate of the trial and these are serious issues, so are not disproportionate to the amount of money at stake or the importance of the issues in the case.

72. I am satisfied that the amendments are set out with particularity and clarity and carry some degree of conviction. The pleading is coherent and has a sufficiently arguable factual basis. I do accept, as does Mr Stewart KC that the Claimants could have applied to amend based on the Swiss Report alone in 2022 but I note the stay for ADR during that year and the fact that it was not until January 2023 that what had been an allegation by the Swiss authorities became a conviction on which the Claimants can rely.

73. For those reasons and taking into account all the circumstances I exercise my discretion to permit the remainder of the proposed amendments in the form already served following the Order of Master McCloud dated 30 March 2023.