Case No: HC-2014-001568

Neutral Citation Number: [2017] EWHC 1164 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2017

Before :

MRS JUSTICE ROSE

- -

Between :

TRILOGY MANAGEMENT LIMITED	**Claimant**
(A company incorporated in the Bailiwick of Jersey)	
- and -	
HARCUS SINCLAIR (A Firm)	**Defendant**

- -
- -

CATHERINE NEWMAN QC (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
CHRISTOPHER BUTCHER QC and HARRY WRIGHT (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 27, 28 April and 2 May 2017

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Judgment

Mrs Justice Rose :

1. This is an application issued on 14 October 2016 by the Defendant firm of solicitors for an order that the Claimant's Amended Particulars of Claim and Amended Reply be struck out pursuant to CPR r 3.4 and/or that reverse summary judgment dismissing the Claimant's claim be granted in favour of the Defendant pursuant to CPR r 24.2. The Defendant submits that the Claimant's pleadings disclose no reasonable grounds for bringing the claim and there is no reasonable prospect of the claim succeeding because (a) the Defendant did not owe the duty of care alleged to the Claimant that duty being a duty to the Claimant to act only in accordance with instructions properly received from the Defendant's client and (b) because the claim is statute barred.

2. The application is supported by the fourth witness statement dated 12 October 2016 of Timothy Bull, a partner in Reynolds Porter Chamberlain LLP instructed by the Defendant and the second witness statement of Keith Bruce-Smith, the solicitor in the Defendant firm who is alleged to have committed the breach of duty giving rise to the claim. In opposition to the application there is a witness statement of Michelle Wai-Han Cheung, who is a director of the Claimant company.

Factual background

3. This is the second application by the Defendant to strike out the claim. The first application was disposed of by a judgment of the then Chancellor Sir Terence Etherton CHC: see [2016] EWHC 170 (Ch) ("the Earlier Judgment"). He set out the background facts which are equally relevant to this application. The following summary gratefully adopts a substantial part of that judgment.

4. The proceedings arise out of a family dispute concerning a charitable trust, the Yee Tak Charitable Foundation International ("the Foundation") which was established by the late John Cheung on 28 May 1987.

5. Mr Cheung is referred to in the statements of case as "OM", being short for "Old Man". He died on 10 December 2001. He was survived by his widow ("Mrs C") and by his eight children, namely Patrick Cheung ("Patrick"), Anthony Cheung ("Anthony"), Marina Cheung ("Marina"), Lilian Cheung ("Lilian"), Christinia Cheung, Joanna Cheung, Michelle Cheung ("Ms Cheung") and another daughter who has played no part in the subject matter of these proceedings.

6. OM left a will dated 30 June 2001 ("the Will"). His executors and the trustees of the Will were four of his children, namely Lilian, Patrick, Anthony and Marina (together "the children executors") and, in the events which occurred, Caroline Garnham, a partner in the law firm Simmons & Simmons.

7. Clause 6 of the Will contained a bequest to the Will trustees of the A shares in Jan Yee International Limited ("JY"), a Jersey investment company, and all of the issued shares in Yee Tak Charitable Foundation (International) Limited ("YT"), which was the trustee of the Foundation. The share capital of JY was divided into 40,000 A shares and 10,000 B shares. The A shares carried the voting rights, and the holders of a majority of those shares were entitled to remove and appoint directors. The B shares carried the right to dividends and other distributions.

8. At the date of OM's death, YT held the B shares in JY on trust for the Foundation. The A shares in JY and all the shares in YT were owned by OM personally. Patrick and Anthony were directors of YT.

9. Clause 6 of the Will provided that the Will trustees should hold the A shares in JY and all the shares in YT "with a view to supporting [the Foundation], or any other trust succeeding or replacing it and having the same principles or character of [the Foundation]…".

10. OM's residuary legatees were BNP Paribas Jersey Trust Limited ("BNP"), as the trustee of a settlement ("the BNP trust"), and Mrs C.

11. Advice was received from leading counsel that the meaning of clause 6 of the Will was uncertain and that the trust on which the shares were to be held might not be exclusively charitable, in which case the bequest in clause 6 would be void. It was also thought that the estate or the trust was potentially exposed to adverse tax treatment because two of the executors, Anthony and Marina, were resident in Australia. There were negotiations between the members of the family to find a way of dealing with the shares in the capital of JY and YT without exposing the Foundation and JY to Australian taxes.

12. In April 2004 Patrick and Anthony, as executors, began proceedings in the Royal Court of Jersey regarding the terms and effect of clause 6 of the Will ("the Jersey Probate Proceedings"). The various parties to these proceedings, and their representatives, were as follows. Patrick and Anthony were represented, in their capacity as executors, by the English solicitors Boodle Hatfield and the Jersey advocates Bedell Cristin. Lilian was the first respondent in her capacity as executrix and was represented by the English solicitors Herbert Smith and the Jersey advocates Carey Olsen. Marina was the second respondent in her capacity as executrix and was represented by the English solicitors Allen & Overy and the Jersey advocates Carey Olsen. Caroline Garnham was the third respondent in her capacity as executrix and was represented by the English solicitors Simmons & Simmons and the Jersey advocates Viberts. YT was the fourth respondent as trustee of the Foundation and was represented by Harcus Sinclair and the Jersey advocates Bailhache Labesse. BNP was the fifth respondent, as trustee of the 99% residuary subsidiary, and was represented by the English solicitors Baker & McKenzie and the Jersey advocates Ogiers.

13. Keith Bruce-Smith was the partner in Harcus Sinclair dealing with the matter, and he was assisted by his colleague Lucy Gibson.

14. Christinia Cheung, Joanna Cheung and Ms Cheung ("the Three Sisters"), who were beneficiaries of the BNP trust, were not parties to the Jersey Probate Proceedings. They were, however, interested in the outcome and they participated in the negotiations to compromise the family dispute. They retained the English solicitors Lawrence Graham and the Jersey advocates Crill Canavan. The partner dealing with the matter in Lawrence Graham was Martyn Gowar.

15. By 11 June 2004 various matters had been agreed - in principle at least - between the negotiating parties, and were the subject of a Memorandum of Understanding shown to the Royal Court of Jersey on that day. They included the following:

a) A new purpose trust was to be established, with the children executors as its enforcers.

b) The purpose trust was to hold 96% of the share capital of the trustee company YT, 1% was to be held by Mrs C, and the remaining 3% by another discretionary trust (which it is unnecessary to describe in this judgment). The children executors were to be the directors of YT, together with Alan Binnington, a partner in the Jersey firm of advocates Mourant du Feu & Jeune ("Mourants").

c) 99% of the A shares in JY were to be transferred to YT, which would continue to hold the B shares. The remaining 1% of the A shares were to be transferred to Mrs C. The children executors and Mr Binnington were also to be directors of JY.

d) Eight new charitable sub-trusts were to be established, each with one of OM's children as its guardian.

e) An instrument of appointment was to be made by YT, as trustee of the Foundation, to ensure that all the income and any capital distributions from JY would be paid to the trustees of the eight sub-trusts in equal shares.

f) The Articles of Association of JY were to be amended, in particular by including a new Article 96, which was to provide for a minimum distribution of profits.

It is that last matter which lies at the heart of these proceedings.

16. One of the matters in dispute in these proceedings is whether or not there was a legally binding compromise agreement on 11 June 2004. That is material to the question whether the alleged duty of care was owed. The Claimant's case is that because the compromise was fully concluded on 11 June 2004 (subject to being written up in legal documents) there was no conflict of interest between YT and the Three Sisters or the three sub-trusts of which Trilogy is currently the trustee. The draft documents to give effect to the compromise were not finalised until some two weeks after that date. The Jersey Act of Court, with the finalised documents scheduled to it, was issued on 28 June 2004, although it was given the date 11 June 2004.

17. Harcus Sinclair and Mourants were given the task of preparing the compromise documentation relating to, among other things, the change in the Articles of JY.

18. At 15:12 on 21 June 2004, Ms Gibson circulated to representatives of the various parties involved in the negotiations an email with 18 attachments, including a proposed resolution for a new Article 96 for JY. The proposed new Article 96 included the following provision:

> "… Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits are available for dividend, recommend to the Company a dividend of not less than 75% of such profits (or such greater amount as a majority of the Directors shall agree, notwithstanding the

> terms of Article 76), provided always that if the payment of such a dividend would result in the net asset value of the Company, as disclosed in the accounts of the Company for that financial period, reducing to less than 10% of the net asset value of the Company as disclosed in the accounts of the Company for the preceding period, the Directors shall recommend a dividend of not more than 50% of such profits. If the Directors make such a recommendation, the Company in general meeting shall ratify and approve such dividends accordingly."

19. That wording generally reflected the terms of the Memorandum of Understanding which had been shown to the Royal Court on 11 June 2004. However, there was one problem with it which related to the penultimate sentence. The reference to the directors' recommendation of a dividend of not *more* than 50% of such profits was wrong; it should have said not *less* than 50% of such profits.

20. Later on 21 June 2004 at 17:00, Rosie Bruce, Mr Bruce-Smith's secretary, sent an email with one attachment containing, among other things, a revised form of words for the proposed new Article 96. In particular, the words "of that year" were inserted so that the material part read as follows:

> "Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits <u>of that year</u> are available for dividend, recommend to the Company a dividend of not less than 75% of such profits (or such greater amount as a majority of the Directors shall agree, notwithstanding the terms of Article 76), provided always that if the payment of such a dividend would result in the net asset value of the Company, as disclosed in the accounts of the Company for that financial period, reducing to less than 10% of the net asset value of the Company as disclosed in the accounts of the Company for the preceding period, the Directors shall recommend a dividend of not more than 50% of such profits. If the Directors make such a recommendation, the Company in general meeting shall ratify and approve such dividends accordingly."

21. I need to make clear here that the emphasis in the passage quoted above is mine; there was nothing in the attachment to Ms Bruce's email to draw attention to those words.

22. The email was sent shortly before a meeting attended by various family members and their representatives at the offices of Herbert Smith. This was referred to by the parties as the signing meeting. The Three Sisters and their legal representatives did not attend that meeting. There is a dispute as to whether they were invited to attend or were excluded from the meeting. However, as I shall describe later the two emails with the different drafts of the proposed Article 96 were forwarded to Ms Cheung in Vancouver immediately after they were received by her solicitors in London. She saw both versions of Article 96 before the signing meeting. Her attention focused on the mistake in the proviso which should have read "not less than 50%".

23. Following the meeting on 21 June 2004, further work was done to finalise the documentation and the documents were signed on 24 or 25 June 2004. The version of Article 96 which was subsequently incorporated into the articles of association of JY and approved by the Jersey Court was the version that corrected the mistake in the proviso but which included the words "of that year". I shall refer to the words "of that year" henceforward as "the additional words".

24. It is important to understand the significance of the additional words. The Three Sisters have always contended that the intention at the time of the June 2004 compromise was that Article 96 of JY's Articles would impose an obligation to distribute not less than 75% of all profits in the company, including accumulated undistributed profits (subject to the proviso). The effect of the additional words was to limit the distribution to the eight sub-trusts to not less than 75% of profits generated in a particular year thereby excluding from distribution to the sub-trusts the very substantial accumulated, undistributed profits that were at that point held by JY. The additional words therefore led to a very substantial reduction in the amount of money flowing from JY through the Foundation to the eight sub-trusts.

25. In the present proceedings Trilogy alleges that the additional words were inserted into the draft Article 96 by Mr Bruce-Smith at his own instigation and without instructions from Harcus Sinclair's client YT.

26. The dispute between the different members of the family as to whether the additional words were properly included in Article 96 led to further litigation in the Royal Court in Jersey. Proceedings were commenced in the Royal Court in November 2010 ("the 2010 Representation") by Trilogy which had been appointed trustee of the Three Sisters' sub-trusts on 2 August 2005. In those proceedings Trilogy sought, among other things, the removal of YT as trustee of the Foundation.

27. The 2010 Representation proceeded in two stages with preliminary issues about the construction of Article 96 first and then a trial of the factual disputes between the parties. The evidence and disclosure provided by the different family members in the course of the 2010 Representation revealed what their recollection was of the events surrounding the 21 June 2004 meeting. Thus, on 24 March 2011, Advocate Binnington served a witness statement, with the exhibit following the next day. On studying that exhibit, the Claimant learned that on 14 December 2004, Mr Binnington had emailed Mr Bruce-Smith asking to discuss the introduction of the additional words in Article 96. In the absence of a reply, Mr Binnington formally wrote to Mr Bruce-Smith on 23 December 2004 asking for a meeting.

28. The exhibit to Mr Binnington's witness statement of 24 March 2011 also contained an attendance note of a conversation which Mr Binnington had with Mr Bruce-Smith on 6 January 2005. The note recorded Mr Bruce-Smith's confirmation that the additional words were not part of the draft resolution to amend Article 96 prior to the Royal Court hearing on 11 June 2004. The note records Mr Bruce-Smith telling Mr Binnington that it was intended that the Head Trust would keep the capital and the sub-trusts would receive income as beneficiaries of the trust. Mr Binnington had then reported the results of this conversation to the children executors telling them that the additional words were included at Mr Bruce-Smith's insistence.

29. The second event is that on 15 October 2013 Patrick and Anthony were cross-examined in the Royal Court of Jersey. At that point each of them gave evidence that they had not been aware of the amendment made in June 2004 and that they had not given Mr Bruce-Smith instructions on behalf of YT to insert the additional words into the draft resolution amending Article 96.

30. The outcome of the 2010 Representation was that the additional words were expunged from Article 96 and YT was removed as a trustee of the Foundation. This in turn led to a substantial outflow of funds from JY to the eight sub-trusts such that, as I understand it, the Trilogy sub-trusts have now received all the dividends that they would have received had the additional words never been included in Article 96. The damages sought in the proceedings therefore are now limited to the Three Sisters' share of the costs incurred in pursuing the 2010 Representation.

The test to be applied and the appropriate approach in this case

31. There was no dispute between the parties as to the test to be applied by the court in determining the Defendant's application. Under CPR r 3.4(2)(a) the court has power to strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim. Under CPR r 24.2(a)(i) the court may give summary judgment against the claimant on the whole of the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

32. The principles to be applied are those set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15. The correct approach on applications by defendants is as follows:

> "i) "The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that

> can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

33. Mr Bruce-Smith vehemently denies committing a deliberate or any breach of duty as now pleaded in the Amended Particulars of Claim. Mr Butcher QC appearing for the Defendant describes it as a serious and extremely unattractive plea and asks the rhetorical question "Why should a respected solicitor deliberately breach his duty to make an amendment to a document which in no way benefited him personally?". However, the Defendant recognises that that is not an issue that can be resolved in summary proceedings.

34. Mr Butcher dealt first with the question of whether it was arguable that Harcus Sinclair owed a duty of care to Trilogy not to act without its client's (YT's) instructions when drafting the resolution to amend Article 96. He made submissions as to why none of the tests proposed in the many authorities dealing with the scope of the duty of care in respect of economic loss is satisfied here. He referred to the

incremental test as described by Phillips LJ in *Reeman v Department of Transport* [1997] PNLR 618 at 625. He submitted that it would be a significant extension of the law of negligence to find that a solicitor acting in relation to a transaction for Party A owed to Party B a duty to comply with A's instructions particularly where B had its own legal adviser. He then analysed the threefold test in *Caparo Industries plc v Dickman* [1990] 2 AC 605. He submitted that the third limb of that test is not satisfied here because it would not be fair, just or reasonable to impose the pleaded duty on Harcus Sinclair. It was agreed that there was no pleaded case that Harcus Sinclair had assumed responsibility to the Claimant in the manner considered in cases alleging a negligent misstatement.

35. Miss Newman QC appearing for the Claimant argued that on the particular facts of this case there should be a duty of care owed by Harcus Sinclair to the Claimant – or at least that the issue as to whether such a duty exists is not suitable for summary determination. Assuming for this purpose in the Claimant's favour that a binding compromise was arrived at on 11 June 2004, the interests of all the parties were aligned in implementing that agreement through the documents discussed at the meeting on 21 June 2004. She submitted that there was therefore no potential or actual conflict of interest between YT, as trustee, and the beneficiary sub-trusts. The effect of the compromise was that YT would become a mere conduit of the dividends intended to flow from JY to the eight sub-trusts without any discretion on the part of either JY or YT in that regard. At the meeting on 21 June, she submits, Mr Bruce-Smith knew that the additional words would greatly reduce the flow of money to the sub-trusts and he and his client also knew that this would be contrary to the binding compromise. Trilogy accepts that if at the trial Harcus Sinclair succeeds in showing that Mr Bruce-Smith had instructions from YT nonetheless to make that change then Trilogy would have no cause of action against the firm. But if Mr Bruce-Smith acted without instructions then, Miss Newman submits, he stepped out of the role of agent for his client and started acting as a principal. In that capacity he did owe a duty of care to Trilogy.

36. Mr Butcher's submissions on the problems that would be created by finding that a duty of care arises in this case have a great deal of force. But this is not straightforward. It would also be unsatisfactory to arrive at a concluded view on whether or not it is arguable that the pleaded duty of care can exist in the unusual circumstances of this case, if the claim based on a breach of that duty of care is in any event statute barred. Therefore, despite the very careful and illuminating submissions made by both counsel on this issue, I will address the limitation issue first and determine the duty of care issue only if I conclude that the Defendant cannot succeed on the statute bar point alone.

The limitation defence

37. Trilogy relies on two provisions in the Limitation Act 1980 (the 'LA 1980') as defeating the Defendant's reliance on the expiry of the limitation period.

38. Section 32 of the LA 1980 postpones the commencement of the limitation period in case of fraud, concealment or mistake. It provides so far as relevant:

> "32 (1) … where in the case of any action for which the period of limitation is prescribed by this Act, either-

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

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

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

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

…

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

39. Where the commencement of the limitation period is postponed pursuant to that provision, the full six year period runs from the postponed date of commencement.

40. The other provision on which the Claimant relies is section 14A of the LA 1980. Section 14A provides that in relation to actions brought in the tort of negligence, an action shall not be brought after either the ordinary six year period has expired or after three years from the starting date specified in subsection (5). Subsection (5) provides that the starting date is the date on which the claimant had "both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". Subsections (6) to (10) then set out a series of rules about what knowledge counts:

"(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

41. Because of the Earlier Judgment and paragraphs 4 and 5 of the order made by Sir Terence Etherton CHC, the present claim is to be treated as having been brought only on 29 April 2016. In order to show that their action has been brought in time in reliance on section 14A, Trilogy must establish that they did not know that Harcus Sinclair had acted without instructions before Patrick and Anthony were cross-examined on 15 October 2013 and that they could not reasonably have been expected to acquire that knowledge before 29 April 2013. Thus, if the court finds that they could reasonably have been expected to find out about the lack of instructions earlier, for example on 25 March 2011 when they saw the exhibit to Advocate Binnington's affirmation in the 2010 Representation, then they cannot rely on section 14A to defeat the limitation defence because the limitation period applicable under section 14A is only three years, not six.

(a) The Claimant's case relying on section 32 of the LA 1980

42. The Claimant relies on the application of section 32(1)(b) as extended by section 32(2) on the grounds that:

a) Harcus Sinclair deliberately committed the breach of duty towards Trilogy because Mr Bruce-Smith deliberately inserted the additional words into the draft of Article 96 knowing that he had no instructions from YT to do so; and

b) that deliberate breach of duty was deliberately concealed from Trilogy because it was committed in circumstances in which it was unlikely to be discovered for some time; and

c) the fraud was only discovered by Trilogy on 15 October 2013 when Patrick and Anthony Cheung were cross examined in the Royal Court of Jersey during the course of the 2010 Representation; and

d) 15 October 2013 was also the earliest date on which the Claimant could with reasonable diligence have discovered the concealment; alternatively the earliest date on which the Claimant could have discovered the concealment was 25 March 2011.

43. Particulars as to deliberate concealment are given in paragraph 23 of the Amended Particulars of Claim. It is pleaded that the Defendant's breach of duty was committed in circumstances where it was unlikely to be discovered for some time because:

a) the additional words were inserted at a meeting described as a signing meeting rather than a meeting at which any substantial amendments were likely to be discussed. Further, the Defendant knew that the meeting would not be attended by any of the Three Sisters or their representatives;

b) the email sent at 17:00 just before the meeting attaching the draft with the additional words did not indicate by track changes or other means that the amendment had been made;

c) the insertion of the additional words was not drawn to the attention of the Three Sisters or the Trilogy sub-trusts by the Defendant;

d) once the Three Sisters became aware of the additional words in mid September 2004 their attempts from December 2004 onwards to find out from Advocate Binnington how this had happened were rebuffed because he and Mr Bruce-Smith decided to take the joint stance that they need not engage with the Three Sisters but could refuse to answer their questions.

44. In *IT Human Resources plc v David Land* [2014] EWHC 3812 (Ch) ('*IT Resources*') Morgan J said (my emphasis):

> "135. Section 32(2) refers to deliberate commission of a breach of duty amounting to deliberate concealment of the facts involved in "that breach" of duty. **Where section 32(2) is relied upon the relevant circumstances are those surrounding the relevant breach of duty. Section 32(2) will not operate to cover an earlier breach of duty to which section 32(2) was not separately applicable.** In order for there to be a "deliberate commission of a breach of duty" within section 32(2) there must be a deliberate breach of duty, that is, a breach of duty which is committed intentionally…".

45. I accept therefore Mr Butcher's submission that the allegations that Advocate Binnington and the Defendant did not reply in and after December 2004 to enquiries

about what happened at the signing meeting are not relevant to the question of deliberate concealment. That was some time after the alleged breach of duty in June and also some time after Ms Cheung accepts in her witness statement that she was notified by her Canadian legal adviser of the potential problems associated with the additional words on 14 September 2004.

46. Since the Earlier Judgment was handed down, Ms Cheung has served a witness statement which was produced shortly before the hearing before me. She described that she was in Vancouver on 21 June 2004. The time in Vancouver is eight hours behind London time. Because the Three Sisters' advisers Mr Gowar of Lawrence Graham and Mr James of Crill Canavan were both away from the office on 21 June 2004, Ms Cheung had arranged with Ms Thorne-Booth of Crill Canavan to forward to her in Vancouver any incoming emails from the various lawyers in the run up to the signing meeting.

47. Thus she was almost immediately sent the email sent by Ms Gibson of Harcus Sinclair at 15:12 on 21 June 2004 with its attachments comprising a large number of documents to be considered at the meeting. These included the draft Article 96 which did not include the additional words. Ms Cheung recalls that she read that version of the draft resolution because she noted the mistake in the proviso reading "not more than 50%" when it should have read "not less than 50%".

48. Ms Cheung also received the email from the Defendant sent at 17:00 London time with a single attachment almost immediately after it was sent. That attachment was the copy of the proposed draft amendments to the articles of association. That still contained the incorrect proviso and it did contain the additional words. Ms Cheung's evidence is that she did not notice that the further draft contained that new small but vitally important change which, she says, was inserted without any warning or notification. She says she trusted the people circulating the documents to draw her attention to amendments made and alert her to important matters of principle.

49. Ms Cheung recalls that she telephoned her brother Patrick and spoke to him just before he went in to the signing meeting to point out the error in the proviso. He agreed that this was a mistake and that it would be corrected at the signing meeting. Her brother did not draw her attention to the inclusion of the additional words.

50. Ms Cheung also later notified Mr Gowar of the mistake in the proviso and was assured the next day that this had been corrected. He mentioned to her some other matters that had been discussed at the meeting but did not mention the insertion of the additional words. She says that in the subsequent months she received many emails from her brother Patrick about the payment of dividends but he did not refer to the additional words. Her attention over the summer and autumn of 2004 was focused on getting the initial endowment of $80 million from JY into the eight charitable sub-trusts. There was disagreement amongst the family members about this over those months but she says not a single member of the family stated that they had changed the wording which she understood to have been agreed.

51. Having regard to that evidence and the contemporaneous documents it is, in my judgment, impossible to envisage how the Court at the trial of this action might find that the alleged breach by the Defendant was committed in circumstances where "it was unlikely to be discovered for some time". On the contrary it was overwhelmingly

likely that it would have been discovered immediately or at any rate well within a year or so of its commission.

52. It is common ground that Patrick and Anthony were directors of YT, Harcus Sinclair's corporate client and that they were the officers who gave Mr Bruce-Smith any instructions he received. It is also accepted by the Claimant that Patrick and Anthony were present at the meeting on 21 June 2004. Mr Moyse of Boodle Hatfield was also at the meeting, advising the brothers in their capacity as executors. There is a dispute between the parties as to whether there was in fact any discussion of the additional words at the meeting. There seems to be no attendance note of the meeting recording that there was such a discussion. The clues to be found in manuscript amendments made at the meeting or from subsequent references in emails to changes made to documents at the meeting are ambiguous and do not clearly point to this particular revision of Article 96 having been discussed. But even if the change was not mentioned, and even if it was not indicated by any form of highlighting in the documents used at the meeting, I do not accept that that amounts to deliberate concealment in the extended sense described in section 32(2) of the LA 1980. The documents were being pored over by a large number of highly respected lawyers to whom the drafts were circulated and who were tasked with making sure that their clients' interests were properly taken into account in the drafting. Everyone knew that until at least 11 June 2004, the precise scope and value of the dividend payments had been the subject of hard fought contention between the family members and that at least some of them were still unhappy about the result of the Jersey Probate Proceedings. Everyone, including Patrick and Anthony as well as the Three Sisters and their lawyers, had the chance to read carefully the draft including the additional words before or at the meeting and during the days between the meeting and the actual signing of the documents. It is impossible to contend that Mr Bruce-Smith deliberately concealed from Patrick and Anthony the fact that he was making changes to the draft resolution without their instructions. I cannot see how a court could possibly find that the absence of instructions was deliberately concealed by Mr Bruce-Smith from the Three Sisters or Trilogy when Mr Bruce-Smith's conduct was done in plain sight of his client and the lawyers advising Patrick and Anthony in their capacity as executors and the brothers were in close contact with Ms Cheung about the wording of the documents.

53. Although the meeting was described as a signing meeting nonetheless there were many different lawyers there. The fact that Miss Cheung arranged for emails to be forwarded to her in the early morning in Vancouver demonstrates that she was aware that this meeting was not going to be a mere formality. In fact the documents were only signed some days later. She herself was pushing for an amendment to be made to the draft resolution to correct the proviso. To suggest that section 32(2) is satisfied because the additional words were not highlighted whether by track changes or otherwise in the draft version circulated at 5 pm on 21 June is in my judgment impossible. Similarly, the alleged failure to draw the attention of the Claimant to the insertion of the additional words cannot amount to deliberate concealment even in the extended sense provided for in section 32(2).

54. I therefore hold that even if, which is denied by the Defendant, there was a deliberate breach by Mr Bruce-Smith of the alleged duty to the Claimant by the insertion of the additional words, there is no prospect of the Claimant establishing at trial that the

commencement of the limitation period for that breach was postponed by operation of section 32(1)(b) as extended by section 32(2). The alleged breach was not committed in circumstances in which it was unlikely to be discovered for some time.

55. The parties also made submissions as to when the Claimant could with reasonable diligence have discovered the concealment for the purposes of the final sentence of section 32. This overlaps with the submissions under section 14A of the LA 1980 to which I now turn.

(b) The Claimant's case relying on section 14A of the LA 1980

56. The Three Sisters accept that they knew about the damage arising from the additional words in September or December 2004. They cannot rely on section 14A(6)(a) to postpone the commencement of the limitation period. The other fact relevant to the current action mentioned in subsection (8) on which Trilogy does rely is the identity of the defendant, a relevant fact within subsection (8)(b). Trilogy submits that it was only when it discovered that Mr Bruce-Smith had acted without instructions that it realised that it had a cause of action against the Defendant firm rather than against Patrick or Anthony or YT. Miss Newman reminds me that she need only persuade me that the Claimant has a real prospect of establishing that it can rely on section 14A. She referred to the judgment of Hamblen J in *Kays Hotels Ltd (t/a Claydon Country House Hotel) v Barclays Bank Plc* [2014] EWHC 1927 (Comm) where he said at paragraph 27:

> "For all those reasons I am satisfied that the claimant does have a real prospect of establishing that he is entitled to rely on Section 14A. In any event, one has to have regard for the fact this is a summary application and therefore not the type of application that should be determined if there are likely to be facts which need to be investigated at trial and which cannot be dealt with simply on the basis of witness statement evidence. This is a case where the facts will be important. It is quite right to point out, as the defendant does, that one is not just concerned with actual knowledge; constructive knowledge is sufficient under Section 14A(10). However, that section requires one to enquire into the knowledge which a person:
>
> > 'Might reasonably have been expected to acquire: (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek,'
>
> That is an objective test but it is a test that has to be considered in the context of the circumstances applicable to the person in question."

57. Trilogy argues that mere knowledge of the fact of the insertion of the additional words would not fix it with knowledge that it was Harcus Sinclair that was solely responsible. No reasonable person would easily jump to the conclusion that a solicitor had acted without proper instructions from his client. Nothing suggested that Mr Bruce-Smith had acted without instructions until Patrick and Anthony gave evidence

at the trial in Jersey in October 2013. Having discovered the fact of the alteration, the Claimant submits that it did make proper and persistent enquiries from Advocate Binnington and Mr Bruce-Smith as to who was responsible for what had happened. But the efforts to find out the details were rebuffed by Mr Bruce-Smith and Mr Binnington who said that the Three Sisters were not entitled to information about the drafting of the documentation.

58. I cannot accept that it is arguable that the Claimant could not have acquired the knowledge that the insertion of the additional words was instigated by Harcus Sinclair without its client's instructions at an early stage. Ms Cheung's evidence shows that she had in her hands a draft of the Article 96 which contained the additional words and that she was discussing that draft with her brother Patrick before the meeting. If she or her solicitors had read the draft properly they would have spotted the additional words and could have asked Patrick why they had been included. That would have revealed that he did not know about the insertion and that he had not given instructions for those words to be included. In her witness statement she also refers to a meeting she attended in Singapore on 28 September 2004 where Patrick and Anthony were present and the distributions from JY were discussed.

59. There was a further meeting between her and Patrick and Anthony on 4 October 2004 at which the value of the dividend stream was discussed. It appears to be after that meeting that friendly relations between her and her brothers broke down, sometime after she was alerted to the potential problems associated with the additional words in mid September 2004. There is no reason why, if the issue had been raised with Patrick or Anthony as soon as the additional words were brought to her attention, they would not have told her that the additional words were a surprise to them to, if that was the case.

60. I accept that the Three Sisters' focus was first on making sure that the initial $80 million was paid to the sub-trusts and then on getting the additional words expunged by the 2010 Representation. But the contemporaneous documents attached to Mr Binnington's affidavit received by Trilogy on 25 March 2011 made clear Mr Bruce-Smith's role in the insertion of the additional words. Exhibited to the affidavit was an attendance note of a conversation on 6 January 2005 between Mr Binnington and Mr Bruce-Smith, the substance of which was repeated in an email from Mr Binnington to Patrick, Lilian and Marina dated 7 January 2005. That email was also exhibited and was as follows:

> "I spoke to Keith Bruce-Smith yesterday … He said that he recalled the words "of that year" being added to the amendment to the articles in connection with the JY dividends as it was effectively at his insistence. The thinking was that the sub-trusts and their guardians were at that time totally untried and untested and he did not think that, apart from the initial funding, they should receive further significant funds immediately. He pointed out that it is always possible for more than 75% of the profits to be paid out if the trustees feel that the sub-trusts are being operated effectively. He believes that BNP were aware of the change at the time. He also agreed with my view that we should try to ensure that further communication on the subject is channelled through BNP and not the guardians

> as, like me, he does not feel that they have any standing in the matter."

61. Although Ms Cheung complains that no one told her that the additional words had been put in without the instructions of Patrick or Anthony on behalf of YT, it is clear from her evidence, from the correspondence and from the progress of the 2010 Representation that the whole issue of how the additional words came to be incorporated was the subject of close scrutiny from September 2004 onwards. Knowledge of the fact, if it is a fact, that Mr Bruce-Smith acted without instructions could have been discovered during the course of that scrutiny if Trilogy and its advisers had been more determined in response to the reticence of Advocate Binnington or Patrick and Anthony.

62. This is not a case where there might be more evidence to come out about the insertion of the additional words. The 2010 Representation was a full examination of what happened and all the correspondence that there is to be disclosed on the matter has been seen by all the parties. The different family members have all given their evidence about their recollections, some of which were accepted and some rejected by the Royal Court.

63. I therefore find that there is no prospect of the court finding that Trilogy could not reasonably have been expected to acquire the knowledge that the additional words were inserted without instructions long before Patrick and Anthony gave their evidence in the 2010 Representation.

64. The claim is in my judgment undoubtedly statute barred and summary judgment should be entered for the Defendant.