Case No: HC-2014-001568

Neutral Citation Number: [2016] EWHC 170 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd February 2016

Before :

THE CHANCELLOR OF THE HIGH COURT

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Between :

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

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- -

Catherine Newman QC and Jordan Holland (instructed by **Addleshaw Goddard**) for the **Claimant**
Christopher Butcher QC (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: 20th January 2016

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Judgment

The Chancellor of The High Court (Sir Terence Etherton) :

1. This is an application by the defendant firm of solicitors, Harcus Sinclair, for an order that the Particulars of Claim and the Reply be struck out pursuant to CPR 3.4 or the inherent jurisdiction of the Court on the ground, among others, that they disclose no answer to the limitation defence pleaded by Harcus Sinclair; or, alternatively, that summary judgment be given under CPR 24.2 dismissing the entirety of the claim on the ground that the claimant, Trilogy Management Limited ("Trilogy"), has no real prospect of success because the claim is statute barred and there is no other reason why there should be a trial.

2. The application is supported by a witness statement of Timothy Bull, Harcus Sinclair's solicitor, and a witness statement of Keith Bruce-Smith, a partner in Harcus Sinclair. There is a witness statement of Louisa Caswell, Trilogy's solicitor, in opposition. There are substantial exhibits to the witness statements. Although some parts of the factual history are complex the areas of factual disagreement relevant to this application are few and narrow.

Factual Background

3. For the purposes of this judgment the background facts may be summarised as follows.

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 (who is referred to in the statements of case and I shall refer to as "OM", being short for "Old Man") died on 10 December 2001. He was survived by his widow ("Mrs C") and by his eight children, namely Patrick Cheung ("PC"), Antony Cheung ("AC"), Marina Cheung ("MC"), Liliane Cheung ("LC"), Christinia Cheung ("CC"), Joanna Cheung ("JC"), Michelle Cheung ("MWHC") 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 LC, PC, AC and MC (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 overwhelming majority of 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. In a judgment of the Royal Court of Jersey dated 10 November 2014, to which I will refer in more detail below, it was stated that the court had been told that the assets of JY were worth some US$ 500 million.

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.

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. 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, AC and MC, were resident in Australia.

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

12. There were negotiations between the members of the family in order 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.

13. In April 2004 PC and AC, 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. PC and AC were represented, in their capacity as executors, by the English solicitors Boodle Hatfield and the Jersey advocates Bedell Cristin. LC was the first respondent, in her capacity as executrix, and was represented by the English solicitors Herbert Smith and the Jersey advocates Carey Olsen. MC was the second respondent, in her capacity as executor, 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 executor, 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.

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

15. AC and PC were directors of YT.

16. CC, JC and MWHC ("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.

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

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

    (2) 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 four 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").

    (3) 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 four children executors and Mr Binnington were also to be directors of JY.

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

    (5) 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.

    (6) 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.

18. One of the matters in dispute in these proceedings is whether or not there was a legally binding compromise agreement on 11 June 2004. 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 not issued until 28 June 2004, although it was given the date 11 June 2004.

19. 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. 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). …"

20. That wording reflected the terms of the Memorandum of Understanding which had been shown to the Royal Court on 11 June 2004.

21. Later that day 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 of that year are available for dividend, recommend to the Company a dividend of not less than 75% of such profits…"

22. The email was sent shortly before or after a meeting between various of the parties and their representatives, but not including the Three Sisters or their legal representatives. That was the version of the material part of Article 96 which was approved, as part of the compromise, in the Act of Court retrospectively dated 11 June 2004.

23. The articles of JY were duly amended in accordance with that version of Article 96 as finally approved by the Royal Court.

24. On 13 December 2004 the Three Sisters wrote to (1) Mourant & Co. Trustees Limited, as trustee of the YT purpose trust, (2) the enforcers of the YT purpose trust, (3) YT and its directors, and (4) JY and its directors. By that time the eight charitable sub-trusts had been created. Each of the Three Sisters was a guardian of one of the sub-trusts ("the Three Sisters' sub-trusts"). Trilogy had not then been appointed the trustee of the Three Sisters' sub-trusts. The letter of 13 December 2004 concerned the "apparent reluctance to distribute assets to the sub-trusts in a timely manner". The Three Sisters stated in the letter that the intention at the time of the June 2004 compromise was that Article 96 of JY's Articles was to impose an obligation to distribute not less than 75% of all profits, including accumulated profits (subject to a proviso which is not relevant for present purposes). They observed that "it has been suggested that the obligation to distribute not less than 75% of profits applies only to year-on-year profits and not to accumulated profits". They said that the words "of that year" were not included in the draft of the proposed amended Article 96 which was circulated during the afternoon prior to the completion meeting on 21 June 2004, and that the words appeared to have been added "unilaterally, without notice or agreement".

25. That concern of the Three Sisters' was not resolved, and it and other matters led to the commencement of new proceedings in the Royal Court in Jersey in November 2010 ("the Jersey Trust Proceedings"). The proceedings were commenced 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. Judgment was given in favour of Trilogy. The judgment of the Royal Court dated 10 November 2014, to which I have already referred, was given following a trial before Commissioner Mark Herbert QC and Jurats Kerley and Nicolle. Harcus Sinclair was not a party to those proceedings and neither Mr Bruce-Smith nor Ms Gibson gave evidence in them.

26. A major complaint of Trilogy in those proceedings was that distributions from YT to the eight charitable sub-trusts had been slow in coming, irregular and insubstantial, so that the compromise had failed to further the charitable purposes of the Foundation. Trilogy argued that the structure imposed by the 2004 compromise was unworkable. A critical issue was the true interpretation of Article 96.

27. Mr Binnington swore an affidavit in the Jersey Trust Proceedings on 24 March 2011. It was received by Trilogy on 25 March 2011. There was exhibited to the affidavit 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 PC, LC and MC 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."

28. Another email, which was seen for the first time by Trilogy on 28 June 2013 following disclosure in the Jersey Trust Proceedings, was an email from Ms Gibson to PC dated 6 January 2005, in which she said as follows:

> "It is true that the original pre-Court hearing version of the amended article did not make it completely clear that only profits of the current year were to be treated in this way; hence there may have been an argument that accumulated profits of prior years would need to be distributed. However, Keith [Bruce-Smith] remembers that he himself was amongst those who wanted it made clear that only future profits would count. Given the rushing about that went on at the time that everything was finalized for the Court though, there is not clarity about how the newer version of the article was circulated; but it was incorporated in the final Court order."

29. The course of the compromise negotiations in 2004 was examined in close detail in the 10 November 2014 judgment. The court held that the words "of that year" significantly affected the meaning and effect of Article 96. The court held that, without those words, Article 96 would have required JY to distribute at least 75% of all distributable profits each year, including capital profits and undistributed profits brought forward from previous years. The court said that the addition of the words

"of that year" limited the mandatory distribution to the profits and gains specific to the year in question. The court said that, having considered the evidence of Mr Gowar and the Three Sisters, both in writing and in court, it had no doubt that they all believed that the provision for distribution was intended to apply to "distributable profits" in the full meaning of that term.

30. PC gave evidence in the Jersey proceedings. The Royal Court noted that in an email to Mr Binnington in October 2008 PC appeared to indicate that he was fully aware at the time of the presence and effect of the words "of that year" and approved them. In an affidavit sworn in November 2011, however, he said that the words "of that year" did not reflect the terms of the 2004 compromise. He was cross-examined about that contradiction. The Royal Court said that some of his answers to that cross-examination were unclear and confused, but observed that PC concluded by saying that his belief was that the words "of that year" were not something that was actually agreed. The Royal Court concluded that PC's evidence was that the words "of that year" were not agreed, and he presumably did not notice the added words on 21 June 2004.

31. AC also gave evidence in the proceedings. The judgment does not describe that evidence but Ms Caswell's witness statement states that he did not admit "to having been so much as aware of the amendment as early as June 2004". There was no challenge to that statement in the court hearing before me.

32. The Royal Court's judgment addressed the evidence of MC, whose position had always been, as had been that of Mrs C, that Article 96 was intended to apply only to the profits of each future year separately. In her first affirmation of 15 November 2011 MC gave clear evidence that the addition of the words "of that year" was made at her request, and that her request was made for the purpose of keeping the mandatory distributions to a minimum. Almost immediately, however, MC resiled from that position, and during her oral evidence in the Jersey Trust Proceedings in December 2011 and in a later affirmation in 2013 she described what she had said in her first affirmation as an error and that it was not she who had caused the relevant words to be added to the draft Article 96. The Royal Court speculated that this change was because she had by then been reminded of the 7 January 2005 email from Mr Binnington.

33. In paragraphs 73-78 of its judgment, the Royal Court reached the conclusion that the words "of that year" had been added by Miss Saker of Allen & Overy on the request of MC and that MC's later evidence on the point was not true. Those paragraphs are as follows:

> "73. In attempting to disentangle these facts, the Court has difficulty in reaching decisive conclusions on all points. The reason is that many of the relevant persons have not given evidence before us, either in writing or under cross-examination. This applies to Mr Taube, Miss Meek, Mr Moyse, Mr Kenyon and Miss Saker (though the latter contributed in the form of a letter supporting MC's latest position). We are also aware that Trilogy has already launched proceedings in England claiming that Harcus Sinclair added the words *"of that year"* without instructions, and it would be wrong

for this Court on the evidence before us to make findings on that question ourselves.

74. Even so, acknowledging that weakness, we reach the following conclusions relevant to the present case. First, Mr Gowar and the Trilogy sisters were in our view entitled to understand and expect that article 96 was to apply to distributable profits in the full sense of the term. That was what the memorandum of understanding had provided, or at least, once Mr Gowar's e-mail exchange with Mr Moyse [solicitor advising AC and PC in their capacity as executors] had clarified certain ambiguities, it appears that that was what the compromise was understood by both of them to provide. The addition of *"of that year"* defeated that understanding and expectation.

75. Second, that understanding and that expectation are consistent with everything that we have heard and read, from all relevant parties, about what Miss Meek and Mr Taube [acting for AC and PC] told Mr Gowar and the Trilogy sisters on the evening of 10th June, 2004. Mr Taube's analysis that the proposed terms of article 96, even when referring to 50 per cent distributions, would in practice lead to a total distribution of the assets of JY within 10 or 15 years, can in our view be explained only on the basis of two assumptions. The first is that future capital disposals would occur over the 15-year period, and that those profits would be distributable. But that alone would not be enough. The second assumption must have been that previous years' accrued profits were also in principle distributable. At the same time they may not have appreciated the full extent of the distributable profits of JY.

76. Next, the proviso to article 96 makes little sense, or at least that it is unlikely ever to apply in practice, once the earlier part of the article had been amended by adding the words *"of that year"*. Without those added words, the proviso does appear to us to have been a valid addition to the article.

77. On the other hand the understanding of Mr Taube and Mr Moyse does not appear to have been shared by all of the executors themselves, perhaps not fully by any of them. LC and MC claim never to have thought that article 96 would apply to previously accrued profits. And in our view this conclusion is to an extent justified also by PC's evidence, including the confused nature of that evidence. If we have correctly understood this evidence, it means that PC did contemplate distributions as including undistributed profits brought forward from previous years, but that he had not in fact contemplated a substantial dividend in the first year. But we question PC's reasoning given at the end of his 2008 e-mail, to the effect that the PTP payment would have made no sense if

the words 'of that year' had never been added. The PTP payment was agreed as an immediate payment, no doubt using part of accrued profits. The first mandatory payment of 75 per cent, without the words 'of that year', would doubtless have been more substantial, subject to the operation of the proviso, but it would have taken some time before that first distribution could be made, and the PTP provision cannot be said to have made no sense.

78. As for MC's contribution, the choice before this Court on the evidence is this. Her original affirmation of 15th November, 2011, stated that she had deliberately had the words *"of that year"* added by Miss Saker, and went to far as explain at some length, and with some cogency, her reason for doing so. In our judgment that is the kind of evidence which cannot have been a mere mistake or trick of memory. It was either true or a lie. If it was a lie, then it remains a mystery why Harcus Sinclair altered the text of the draft article 96, unless they had the understanding that the added words reflected that of the executors and the proposed boards of YT and JY as to the intended meaning of the article. If it was true, that may to some extent explain Harcus Sinclair's action, in which case MC's subsequent denials of her involvement in the point should be disregarded as self-serving untruths. One of the reasons why it is difficult for us to reach a conclusion on this point is that Miss Saker, now Mrs Murphy, who was advising MC in 2004 and attended the signing meeting on 21st June, did not give evidence before us, either in writing or orally, though (as we have mentioned) she has written a letter which MC has prayed in aid apparently to weaken the force of her own original evidence. Despite that difficulty we have come to the conclusion, after having seen and heard MC in the witness box, that on the balance of probabilities, and on the basis of the evidence which we have seen and heard, her original evidence was true and that her later evidence on the point was not."

The present proceedings

34. The claim form in the present proceedings was issued on 21 March 2014. There were originally two defendants: Harcus Sinclair and Mr Bruce-Smith. Mr Bruce-Smith is no longer a defendant. The claim form states that the claim is for damages for breach of contract and/or breach of duty of care in tort/and or breach of fiduciary duty arising out of or in connection with the defendants' retainer to act for YT and/or JY in or about June 2004.

35. The Particulars of Claim were served on 23 June 2014. They contain the following allegations of particular relevance to this application.

36. It is alleged in paragraph 13 that by 11 June 2004 it had been agreed by the executors, on the one hand, and BNP on the other hand, with the consent of Mrs C as well as that of the Three Sisters, that, among other things:

"(g) in each accounting year of JY 75% of the distributable profits of JY would be paid by way of mandatory dividend to YT as Trustee for the Foundation, and thence to the Eight Charitable Sub-trusts in equal shares. This would ensure a rapid flow of the wealth locked up within JY (which is not a charitable company) to the Eight Charitable Sub-trusts which would then become self-funding."

37. Paragraphs 16-20 of the Particulars of Claim are as follows:

"16. To give effect to the part of the Compromise which made provision for the annual mandatory dividend of 75% of the distributable profits of JY, it was necessary to draft a proposed amendment to the Articles of Association of JY. The relevant Article was Article 96. The drafting of the whole Compromise involved the creation and/or amendment of copious documentation. The Second Defendant participated in this exercise and the Claimant will contend that by virtue of the fact that he acted for YT he had a particular responsibility for the drafting of the amendments to the Articles of Association of JY. In the work which he undertook in relation to the drafting and approval of the constitutional documents of JY, he and therefore the First Defendant, owed a duty of care:

(a) To the Foundation, which was, by the Compromise, to be the owner of 99% of the A shares in JY;

(b) To the Charitable Sub-trusts, which were to receive the benefit of, inter alia, the mandatory dividends which were an integral part of the Compromise.

17. The scope of the duty was to:

(a) Ensure that the drafting accurately reflected the terms of the Compromise;

(b) Protect his client, the Foundation and the Charitable Sub-trusts from any attempts which MC or any other person might make unilaterally to alter its terms in a manner which would block or reduce distributions from JY;

(c) Advise his client, the Foundation and the Charitable Sub-trusts of any such attempts, especially successful ones, and to return to the Jersey Court in the event that any party attempted to alter the material terms of the Compromise during the drafting process.

18. Neither the Foundation nor the Eight Charitable Sub-trusts were separately represented in the drafting process.

19. The draft resolution of JY which was to amend the Articles of Association and which emerged from the drafting process did not reflect the terms of the Compromise. Instead it reduced the scope of the mandatory dividend to 75% of the profits of the year in question. It is to be inferred that the Second Defendant was responsible, alone or with others, for this change and that he was fully aware of its import and in particular of the reduction in dividend flow to the Charitable Sub-trusts which would follow were it to be passed in that altered form.

20. Wrongfully and in breach of the duty of care owed to the Trilogy Sub-trusts the Defendants (acting by the Second Defendant) failed to:

(a) Produce for execution a final draft resolution of YT to alter Article 96 of the Articles of Association of JY in a manner which accurately reflected the Compromise;

(b) Protect the interests of the Trilogy Sub-trusts which were adversely affected by the reduction in the mandatory dividend;

(c) Oppose the creation of a different structure which, with the reduced mandatory dividend, gave MC effective control over a level of distribution from JY which had been agreed should be encompassed in a mandatory scheme. MC instead had an effective veto over dividends over and above the reduced mandatory dividend;

(d) Clearly and fairly draw the successful attempt to alter the mandatory dividend which had been agreed to the specific attention of the Trilogy sub-trusts and the Three Sisters before the execution of the draft resolution in its altered form;

(e) Advise his client to bring the matter back before the Jersey Court before the resolution was passed so that any opposing views could be heard. Had he advised PC and/or AC (from whom he was taking his instructions) and/or Helen Chui to bring the matter back before the Jersey Court the Claimant contends they would have done so and the Three Sisters and the Trilogy Sub-trusts would have been notified and heard.

> The Claimant will content that the Jersey Court would take a dim view of one or more parties to the Compromise unilaterally altering its terms without bringing the matter back to the court which had approved the compromise."

38. It is alleged in paragraph 21 of the Particulars of Claim that, by reason of Harcus Sinclair's breaches of duty of care, Trilogy has suffered loss and damage.

39. The Defence is dated 13 November 2014. The material parts, so far as relevant to this application, are as follows.

40. It is admitted that Harcus Sinclair, acting on YT's instructions, were involved in the drafting of the proposed amendment to the articles of association of JY. It is asserted that Harcus Sinclair owed contractual and common law duties of care to their client, namely YT, and acted in accordance with the instructions received from their client. It is denied that Harcus Sinclair owed any duty of care to the Foundation or the charitable sub-trusts. The Defence states that Harcus Sinclair accept that their duties to YT included a duty to take reasonable care to ensure that the documents drafted for the purpose of giving effect to the compromise of the Jersey Probate Proceedings reflected the wishes and instructions of YT; to take reasonable care to ensure that the documents drafted for the purpose of recording and giving effect to the compromise of the Jersey Probate Proceedings reflected the terms upon which YT was intending to compromise those proceedings; and to advise YT in the event that the documents drafted for the purpose of recording and giving effect of the compromise of the Jersey Probate Proceedings (or any amendments proposed to those documents) did not in fact reflect the wishes and instructions of YT and/or the terms on which YT was intending to compromise the Jersey probate proceedings.

41. It is asserted that the words "of that year" in the draft Article 96 did reflect the terms agreed by the parties to the Jersey Probate Proceedings because it had never been agreed between those parties that the mandatory annual dividend payable by JY would not be less than 75% of the distributable profits of JY regardless of the year or years in which such profits had become available for dividend.

42. Paragraphs 46.2 to 46.4 of the Defence are as follows:

> "46.2 While it is admitted that the Defendants caused the words 'of that year' to be added to the draft resolution to amend Article 96 of JY's Articles of Association, the addition of those words was not to alter (and did not alter) the terms that had previously been agreed in principle for the compromise of the Jersey probate proceedings. Rather the addition of those words to the draft resolution to amend Article 96 of JY's Articles of Association.
>
> 46.2.1 Was to ensure that the wishes and intentions of YT, and the terms on which YT intended to compromise the Jersey probate proceedings, were reflected in the documents to be executed to effect that compromise, and

46.2.2 Was to ensure that the draft resolution did in fact give effect to the terms that had previously been agreed in principle by the parties to the Jersey probate proceedings for the compromise of the Jersey probate proceedings;

46.3 The addition of the words 'of that year' to the draft resolution to amend Article 96 of JY's Articles of Association was discussed by the legal representatives of the parties to the Jersey probate proceedings at the meeting that took place on 21 June 2004. All agreed to the addition of the words 'of that year' to ensure that the draft resolution to amend Article 96 of JY's Articles of Association reflected and gave effect to the terms that had previously been agreed in principle for the Compromise of the Jersey probate proceedings;

46.4 The draft resolution to amend Article 96 of JY's Articles of Association (with the words 'of that year' added) was sent to Mr Gowar and Ms Ruffel of Lawrence Graham (as well as Crill Canavan) on 21 June 2004. None suggested that the addition of the words 'of that year' in the draft resolution

46.4.1 Altered the terms of the in principle agreement that had been discussed on 11 June 2004, or

46.4.2 Meant that the draft resolution to amend Article 96 of JY's Articles of Association no longer reflected the terms that had previously been agreed in principle for the compromise of the Jersey probate proceedings

and none suggested that, contrary to the wording of the 'new' Article 96 of JY's Articles of Association, they had previously understood the in principle agreement reached on 11 June 2004 to have been to the effect that JY would distribute annually not less than 75% of its distributable profits, regardless of the year or years in which such profits had become available for dividend;"

43. Paragraph 64 of the Defence raises a limitation defence. It is alleged that any cause of action for breaches of a common law duty of care owed by Harcus Sinclair to the Foundation and to the Three Sisters accrued more than six years prior to the commencement of the proceedings and were, by the time that the claim form was issued, time barred under the Limitation Act 1980 ("LA 1980").

44. The Reply dated 25 February 2015 includes numerous denials of the assertions in the Defence. It states that no admissions are made as to the intentions of YT, as alleged in paragraph 46.2.1 of the Defence and that Harcus Sinclair are put to proof of the same. So far as concerns the limitation defence, the Reply says as follows at paragraphs 26 to 28:

> "26. As to the defence of limitation raised at paragraph 64, the fact that the Second Defendant altered the wording of Article 96 at a meeting at which the Three Sisters were not present or represented, being a fact relevant to the Claimant's cause of action was not discovered until the provision of documents in the Claimant's Jersey Representation by way of affidavit of Alan Binnington dated 24th March 2011 and could not have been discovered before that date by the exercise of reasonable diligence.
>
> 27. Alternatively, the Defendants acting by the Second Defendant deliberately altered the words of Article 96 in a manner which was a breach of the duty of care which they owed to the Claimant and to the Foundation as pleaded at paragraphs 16 and 17 of the POC, and which was unlikely to be discovered for some time.
>
> 28. In the further alternative, the Defendants acting by the Second Defendant deliberately altered the words of Article 96 without ensuring that they had instructions from AC and PC, in a manner which was a breach of duty of care which they admit they owed to YT and which was unlikely to be discovered for some time."

45. Harcus Sinclair subsequently served three requests for further information pursuant to CPR Part 18. Two of them sought further information concerning Trilogy's response to the limitation defence in paragraphs 26 to 28 of the Reply. In a response dated 27 March 2015 to one of those CPR Part 18 requests dated 5 March 2015, Trilogy said the following:

> "3. <u>Response</u>
>
> The Claimant relies on section 14A(5) of the Limitation Act 1980. Although the Claimant does not accept that the affidavit of Alan Binnington dated 24th March 2011 gave the Claimant "*the knowledge required for bringing an action for damages in respect of the relevant damage"* within the meaning of section 14A(6) of the Limitation Act 1980 as the claim was commenced within three years of 24th March 2011 the point does not arise. For the avoidance of doubt the Claimant avers that prior to 24th March 2011 the Claimant did not have the knowledge required for bringing an action for damages against the Defendants or either one of them."
>
> "4. <u>Response</u>
>
> The Claimant relies on section 32(1)(b) Limitation Act 1980 in circumstances where (a) the Defendants acting by the Second Defendant deliberately inserted the words "of that year" into

the resolution amending Article 96; and (b) did not at that time or any time thereafter inform the Three Sisters or the trustee of the Trilogy Sub-trusts that it had done so."

46. In a response dated 27 July 2015 to another one of the CPR Part 18 requests Trilogy said as follows in connection with LA 1980 section 14A(5):

> "6. <u>Response</u>
>
> In order to bring the claim, it was necessary for the Claimant to be aware of each of the following:
>
> "(a) That the words "of that year" had been inserted into the draft resolution amending Article 96 of the Articles of Association of JY prior to the execution of the special resolution;
>
> (b) That the resolution as executed had the effect of amending Article 96 to include the words "of that year";
>
> (c) That the insertion of the words "of that year" were an unapproved departure from the Compromise;
>
> (d) That the insertion of the words "of that year" into the draft resolution was not drawn to the attention of or approved by either the Three Sisters or the Royal Court;
>
> (e) The identity of the person who inserted the words "of that year" into the draft resolution.
>
> The Claimant first acquired knowledge which led it to believe that the Second Defendant inserted the words "of that year" into the draft resolution amending Article 96 of the Articles of Association of JY upon receipt of the documents of which YT provided discovery in the proceedings in the Royal Court of Jersey on 27 June 2013.
>
> In light of the foregoing, until 27 June 2013 the Claimant did not have knowledge of each of the facts and matters particularised at (a) to (e) above. As such, in accordance with s.14A(4)-(5) Limitation Act 1980, the limitation period for the purposes of the claim is three years from 27 June 2013. That period will not expire until 27 June 2016."

47. In the same document, in response to a request that there be set out each and every fact which Trilogy contends was deliberately concealed for the purposes of section 32(1)(b), the following was alleged:

> "7. <u>Response</u>

> The Claimant avers that the Second Defendant (a) deliberately inserted the words "of that year" into the draft resolution amending Article 96 of the Articles of Association of JY; and (b) deliberately made no attempt to draw this insertion to the attention of the Three Sisters, Mr Gowar or the Royal Court, either before or after the insertion and the execution of the resolution amending Article 96."

Discussion

48. Trilogy has inadequately pleaded its reliance on LA 1980 section 32 in response to the limitation defence. Further, on the Particulars of Claim as presently framed, Trilogy has no real prospect of rebutting the limitation defence.

49. Trilogy relies on LA 1980 section 32(1)(b), which provides that, where any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it. Section 32(2) provides that, for that purpose, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered from some time amounts to deliberate concealment of the facts involved in that breach of duty.

50. *Cave v Robinson* [2003] 1 AC 384 is binding authority that a "deliberate commission of a breach of duty" within section 32(2) does not occur merely because the defendant has intentionally done or omitted to do something which is a breach of the duty of care. What is necessary, for the purposes of section 32(2), is deliberate wrongdoing by the defendant, that is to say an intentional act or omission which the defendant is aware is wrongful.

51. Trilogy nowhere states in its Reply or in its responses to Harcus Sinclair's CPR Part 18 requests that the breaches of duty alleged and relied upon for the purposes of section 32(1)(b) – namely the insertion by Mr Bruce-Smith of the words "of that year" into the resolution amending Article 96 and the failure to warn the Three Sisters or the trustee of the Trilogy charitable sub-trusts that he had done so – were committed with knowledge that they were wrongful.

52. That omission could be remedied by permitting Trilogy to amend its statements of case so as to plead and give particulars of Mr Bruce-Smith's awareness that the act and omission relied upon were committed by him with knowledge of their wrongfulness. Even if that were done, however, Trilogy would still be left without any real prospect of defeating the limitation defence to the cause of action presently pleaded in the Particulars of Claim.

53. Trilogy set out in its 27 July 2015 responses to Harcus Sinclair's CPR Part 18 request the five matters which it claims it had to know in order to bring its claim. It was common ground that four of them were matters of which Trilogy was aware before expiry of the six year limitation period. For this purpose, it has not been suggested by Trilogy that any distinction is to be made between the knowledge of the Three Sisters and Trilogy itself. As appears from the letter from the Three Sisters dated 13 December 2004, mentioned above, the Three Sisters were aware at that time that the words "of that year" had been inserted in the draft resolution amending Article 96

during the afternoon of 21 June 2004 and that all or some of the directors of JY were asserting that the inserted words restricted the obligation to distribute to not less than 75% of profits on a year-on-year basis and did not extend to accumulated profits. The Three Sisters asserted in that letter that, if that was correct, it was a departure from the draft which was the basis of a compromise which had already been agreed, and was a change which was made without their knowledge and agreement and was never drawn to their attention.

54. The only issue in dispute on this aspect of the application concerns the date when the Three Sisters or Trilogy became aware or should have become aware that the words "of that year" were inserted at the administrative direction of Mr Bruce-Smith. Trilogy can only rely on section 32(1)(b) if that fact was deliberately concealed from it and the Three Sisters and could not have been discovered with reasonable diligence until, at the earliest (as pleaded by Trilogy in its Reply) 24 March 2011. By virtue of LA 1980 section 14A(10) Trilogy can only rely on the extended period in section 14A(4)(b) if Trilogy or the Three Sisters could not reasonably have been expected before that date to have acquired knowledge of that fact from facts ascertainable by them or from facts ascertainable by them with the help of appropriate expert advice which it was reasonable for them to seek.

55. As paragraphs 17 and 20 of the Particulars of Claim are presently worded, the only thing that the Three Sisters or Trilogy needed to know that was not expressly stated in the Three Sisters' letter of 13 December 2004 was that Harcus Sinclair was physically responsible for making the drafting change to the resolution concerning the amendment to Article 96 by the insertion of the words "of that year" or, indeed, even just responsible for sending out the draft with the amended wording. It is not a necessary ingredient of Trilogy's cause of action, as presently formulated in the Particulars of Claim, that Harcus Sinclair acted without instructions: see the "statement of claim" test reviewed by the Court of Appeal in *Arcadia Group Brands Limited v Visa Inc* [2015] EWCA Civ. 883 [2015] Bus LR 1362.

56. It is entirely fanciful to think that, if the action proceeds to trial, the Court will find that the Three Sisters and Trilogy could not have discovered the matters mentioned in the first sentence of paragraph 55 above with reasonable diligence within the usual six year limitation period or could not reasonably have been expected to have acquired that knowledge within that period from facts ascertainable by them or by the lawyers acting on their behalf. Schedules were sent by Boodle Hatfield to the various parties' lawyers, including Mr Gowar and also to Dan Boxall of Crill Canavan, who was acting for the Three Sisters, on 18 June 2004 and at 10.23 on 21 June 2004 showing that Harcus Sinclair and Mourants were to be responsible for preparing the documentation relating to changes in the Articles of JY and YT. Mr Gowar was at that time in email communication with Mr Bruce-Smith and Ms Gibson about that draft documentation.

57. At 13.36 on 21 June 2004 Ms Gibson of Harcus Sinclair sent an email to substantially the same lawyers, including Mr Gowar and Mr Boxall, apologising for the delay in sending out the JY/JT documents and stating that "We shall get them circulated asap". They were finally dispatched by her as an attachment to her email sent at 15.12 on that day. The addressees included Mr Gowar and Mr Boxall. Mr Gowar was apparently not in the office on that day but there has been no suggestion that the email was not successfully transmitted. The email sent at 17.00 on 21 June 2004, to which

the final form of the draft Article 96 was attached, was sent by Rosie Bruce, Mr Bruce-Smith's secretary to, among others, Mr Gowar, Ms Ruffel of Lawrence Graham and Mr Boxall. Again, there is no suggestion that the email was not successfully transmitted to all of them.

58. Those facts were, therefore, known to the Three Sisters' lawyers at all relevant times and, even if there had been any question about the respective roles of Harcus Sinclair and Mourants in the purely physical act of amending the wording of the draft resolution on 21 June 2004, there can be no doubt whatsoever that Harcus Sinclair's responsibility would have been apparent on investigation and enquiry.

59. For those reasons paragraphs 17 and 20 are unsustainable in their present form. I do not consider, however, that the claim should be immediately dismissed for that reason. Ms Catherine Newman QC, for Trilogy, submitted that paragraph 28 of the Reply asserts an alternative cause of action, namely that Harcus Sinclair was in breach of duty to Trilogy in making the amendment to Article 96 because they made and distributed the amendment without instructions from AC and PC and so in breach of duty to YT.

60. Mr Christopher Butcher QC, for Harcus Sinclair, submitted that paragraph 28 of the Reply does not allege any duty of care owed by Harcus Sinclair to Trilogy not to make the amendment without instructions from YT or any breach of such a duty. I reject that submission. Paragraph 28 of the Reply is not well drafted. Having regard, however, to its context, the development of each side's case in their respective statements of case and to the history of the 2011 to 2014 Jersey Trust Proceedings, including the disclosure and evidence in those proceedings, I am satisfied that paragraph 28 of the Reply is and is intended to be an allegation that Harcus Sinclair were in breach of a duty of care to Trilogy in making the amendment to the draft Article 96 on 21 June without instructions from YT.

61. Mr Butcher submitted that, even on that view of paragraph 28 of the Reply, what is there asserted is not a different cause of action to that currently pleaded in the Particulars of Claim, which ought to be struck out or dismissed for the reasons stated above. He described it as a "sub-set" of the currently alleged cause of action. No cases were cited at the hearing on this point. I consider that Mr Butcher's submission on this point is plainly wrong. An allegation that Harcus Sinclair wrongly failed to fulfil their duty of producing accurate documentation pursuant to a binding compromise is distinctly different from an allegation that, whether or not there was an existing binding compromise, they acted in breach of duty in producing a document without instructions from their client: compare *Senior v Pearson & Ward* [2001] EWCA Civ 229 at [19] (where an allegation of negligent failure by a solicitor to advise his clients was categorised as distinctly different from acting without or in disregard of instructions from the clients), and see also *Darlington Building Society v O'Rourke James Scourfield & McCarthy* [1999] PNLR 365 at 370 (in deciding whether an amendment pleads a new cause of action, it is necessary to compare the unamended pleading with the proposed amendment in order to determine whether (a) a different duty is pleaded; (b) whether the breaches pleaded differ substantially; and where appropriate (c) the nature and extent of the damage of which complaint is made), and Brett J. in *Cooke v. Gill* (1873) L.R. 8 C.P. 107 at 116 ("Cause of action has been held from the earliest times to mean every fact which is material to be

proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse").

62. Mr Butcher next submitted that it would be necessary to amend the Particulars of Claim to allege the new cause of action but that is precluded by LA 1980 section 35 and CPR 17.4. Again, no cases were cited by either side on this aspect. LA 1980 section 35 and CPR 17.4 restrict the circumstances in which it is permissible to add a new claim to existing proceedings after expiry of the limitation period. They do, however, give the court a discretion to permit a new claim in such circumstances if the new claim arises out of the same facts or substantially the same facts as are already in issue: LA 1980 section 35(5); CPR 17.4(2); *Goode v Martin* [2001] EWCA Civ 1899, [2002] All ER 610; *Hemmingway v Smith Roddam* [2003] EWCA Civ 1342.

63. That condition is satisfied in the present case because it is clear that, on the present statements of case, the question as to what instructions were given to Harcus Sinclair by the directors of YT would inevitably be in dispute at any trial. In paragraph 44.2 of the Defence Harcus Sinclair admitted that their duty of care to YT included ensuring that the documents drafted to give effect to the compromise of the Jersey Probate Proceedings reflected the wishes and instructions of YT. In paragraph 47.3.2(a) of the Defence Harcus Sinclair assert that the structure provided by the wording of the draft resolution to alter Article 96 accurately reflected YT's instructions on the terms of the compromise. Paragraph 28 of the Reply alleged, as I have said, that Mr Bruce-Smith altered the words of the draft Article 96 without instructions from AC and PC and in breach of duty of care to YT.

64. Mr Butcher then submitted that Harcus Sinclair would have a limitation defence to any such new cause of action pleaded by way of amendment to the Particulars of Claim or at the very least an arguable one, and in those circumstances the Court, rather than granting permission to Trilogy to amend the Particulars of Claim, should leave Trilogy to issue fresh proceedings. He referred, in support of that submission, to the notes at 17.4.2 on page 572 of the 2015 White Book. I consider that, on the material currently before the Court, particularly what is said by Louisa Caswell in her witness statement, Trilogy has an arguable case that it was not until disclosure in the Jersey Trust Proceedings at the earliest that it could with reasonable diligence have discovered or could reasonably be expected to have acquired knowledge (by facts ascertainable by it or the Three Sisters or with the help of expert advice) that Harcus Sinclair, in altering and sending out the amended version of Article 96, acted without instructions (if that was indeed the case). In the circumstances, the most cost effective and efficient course would be to permit Trilogy to apply for permission to amend the Particulars of Claim to raise the new cause of action on terms that Harcus Sinclair be entitled to raise and rely upon any limitation defence it would have if Trilogy issued fresh proceedings at the date of the amendment.

65. Trilogy has not yet placed before the Court proposed amended Particulars of Claim. I will adjourn this application for 28 days to enable Trilogy to do so and to make formal application for permission to amend.