Neutral Citation Number: [2021] EWHC 3475 (QB)

Case No: QB-2021-000165

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

IMRAN ARIF	**Respondent/ Claimant**
-and-	
DALBIR SINGH SANGER	**Appellant/ Defendant**

- -

Rachel Sleeman and Zachary Kell (instructed by **James Chan & Co**) for the **Respondent/Claimant**
Geoffrey Zelin (instructed by **Stradbrooks Solicitors**) for the **Appellant/Defendant**

Hearing dates: 23rd – 24th November 2021

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Approved Judgment

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

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The Hon. Mr Justice Bourne:

Introduction and factual background

1. This is an appeal by the Appellant, who is the Defendant in the underlying litigation, against a decision of Senior Master Fontaine ("the Senior Master"), who on 6 May 2021 dismissed his application for summary judgment. The Senior Master granted permission to appeal on 23 June 2021.

2. The Respondent, who is the Claimant in the underlying claim, alleged that he was induced by false representations on the part of the Appellant to enter into a joint venture with the Appellant for the purchase and development of a piece of land adjoining the Widow's Son public house in Devons Road, Bow ("the Land").

3. The false representations, as pleaded in the Respondent's claim and as summarised in the Senior Master's judgment, were:

    i) "It would be easily achievable to develop a block of 7-8 flats on the Land;

    ii) The members of the joint venture would easily make a profit with a significant enough return to make it worthwhile for the Claimant to invest;

    iii) The purchase price of the Land was £350,000, and that the price had been quoted or otherwise set at arm's length with a third party with whom the Defendant had no previous interest;

    iv) The Claimant had to "*act fast*" so that the Defendant could negotiate the purchase of the Land quickly with the selling agent or "*the deal would be off the table*" and that the Defendant was acting only on behalf of the joint venture company and the transaction was otherwise at arm's length;

    v) The Claimant, the Defendant and Mr Singh or Billy would all be parties to joint venture for the purposes of developing on the Land;

    vi) The stakes in the joint venture would be divided as to 35% for the Claimant, 40% for the Defendant and 25% for Billy/Mr Singh;

    vii) The owner of the Widow's Son was not, nor would not be, the Defendant or any corporate entity in which he was an office holder;

    viii) Sandhu & Shah would be acting only for the joint venture company in the purchase and would not also be the solicitors acting for the sellers;

    ix) The joint venture arrangement was in relation to the purchase of the Land and was not linked to the other purchase of any other property including the Widow's Son;

    x) The Defendant would act in accordance with his duties as a director of the joint venture company pursuant to the Companies Act 2006 and the Articles of

Association of the company; with four separately pleaded particulars in relation to this alleged representation."

4. These representations are alleged to have been false in the following ways (again as summarised in the judgment below):

i) "The site was a difficult one and development of the type represented would be extremely difficult if not impossible, because:

a) The Land abutted the Widow's Son which is a Grade II* listed building
b) The Land was tied to the Widow's Son by a restrictive covenant.

ii) For the same reasons, the overheads would be too costly for the joint venture partners to make a significant profit from the development.

iii) The purchase price was not set by a third party at arm's length: the Land and the Widow's Son were in fact being bought from Punch Partnerships (PTL) Limited ("Punch") by Dalco Developments Limited ("Dalco") (a company controlled by the Defendant) for £450,000 and the price of £350,000 for the sale of the Land to Bow Properties Developments Ltd ("Bow") was being set by the Defendant personally or as director and shareholder of Dalco.

iv) There was no need to negotiate the sale quickly as the only urgency came about as a result of the Defendant acting on behalf of Dalco seeking to buy the whole site, both the Land and the Widow's Son from Punch which required exchange by 19 February 2012.

v) It was never intended that Mr Singh would be part of the joint venture.

vi) The Defendant never intended the parties to share the stakes in the joint venture, and accordingly the Land; this is clear from the sudden changes in the corporate structure of Bow and the discrepancies over the price of the Widow's Son and the Land.

vii) The Defendant was negotiating with Punch for the purchase of the Widow's Son on behalf of Dalco.

viii) Sandhu & Shah, solicitors, were also acting for Dalco/the Defendant personally in the purchase of the Land and the Widow's Son from Punch as well as for Bow in the purchase of the Land.

ix) The joint-venture acquisition of the Land was inextricably linked to the purchase of the Widow's Son by Dalco.

x) The Defendant's interest in Dalco created an undisclosed conflict of interest between him and Bow, contrary to the Defendant's duties under sections 172

> and 177 of the Companies Act 2006 and under article 14 of the articles of association of Bow."

5. The representations were alleged to have been fraudulent and/or negligent. The Claimant claimed damages for losses suffered in relation to the transaction.

6. The issue in this appeal is limitation.

7. The claim form was issued on 5 July 2019, more than 6 years after completion of the purchase. The Appellant pleaded a limitation defence, relying on section 2 of the Limitation Act 1980 ("the 1980 Act") which imposes a 6-year time limit for claims in tort.

8. By his Reply, the Respondent denied that the claim was time barred. In particular he relied on section 32(1)(a) and/or section 32(1)(b) of the 1980 Act to extend the limitation period until after 5 July 2019.

9. Section 32 provides, so far as is material:

> "(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—
> (a) the action is based upon the fraud of the defendant; or
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> (c) the action is for relief from the consequences of a mistake;
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

10. In the alternative, in respect of his claim for negligent misrepresentation and/or under section 2(1) of the Misrepresentation Act 1967, the Respondent contended that he did not have the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action until 19 February 2019 at the earliest, enabling him to rely on section 14A(4)(b) of the 1980 Act. As I shall explain, section 14A is no longer material to this case.

11. On 14 October 2020, the Appellant applied for summary judgment under CPR 24 on the ground that the Claimant had no real prospect of succeeding on the claim and that there was no other compelling reason why the case should be disposed of at a trial, or in the alternative for the limitation issue to be determined as a preliminary issue.

12. The Respondent contends that he did not discover and could not have discovered the fraud or concealment at any time before 5 July 2013. If time did not start to run until after that date, the claim is in time.

13. On 14 January 2021 the summary judgment application was heard by Senior Master Fontaine, who noted that in the event of it not succeeding, both parties sought directions for a trial of a preliminary issue of limitation. Such a preliminary issue was a course which they had previously agreed among themselves subject to the court's approval.

14. The Senior Master received witness statements on behalf of each party. This being a summary judgment application by the Appellant, it was assumed for the purpose of the application that any conflicts of evidence would be resolved in the Respondent's favour.

15. The essential facts, as they were assumed to be, were the following:

    i. The Appellant is a property developer or builder.
    ii. Since the late 1990s, the Respondent has from time to time invested in buy-to-let properties.
    iii. From about 1999 the Respondent was aware of projects in which the Applicant was involved. In 2001 he bought two houses built by the Applicant which he then rented out.
    iv. In the course of his buy-to-let business the Respondent had briefly come into contact with an estate agent, Marvel Estates Limited, run by a Mr Singh and his son Billy, and he talked to Billy about property investments.
    v. In January 2012 the Appellant contacted the Respondent and asked if he would be interested in investing in a development in Bow, East London. The Respondent agreed to visit some sites.
    vi. On around 8 February 2012 the Appellant called the Respondent and said he had found a site ("the Land") costing £350,000, next to a pub, on which 7 or 8 flats could be built, yielding an easy profit, but it would be necessary to act fast.
    vii. On or around 9 February 2012 the Appellant called again, repeating that the site would be a "goldmine" but that the Respondent had to make a decision quickly. The Appellant said he would handle everything about planning permission and building the flats and the Respondent would just be an investor. The Respondent agreed to enter into the proposed joint venture. The Appellant said he would form a company in which he, the Respondent and Billy or Mr Singh would be directors. The Respondent assumed that this would be a legitimate way to manage his investment.
    viii. On 13 February 2012 the Appellant emailed the Respondent requesting his share (35%) of the deposit.
    ix. On 14 February 2012 the Appellant told the Respondent that the company (Bow Properties Developments Ltd) had been formed and the money should be transferred to Sandhu and Shah solicitors. The Respondent paid £12,250.
    x. The three participants became directors and the shares were distributed between them in agreed proportions.

xi. Also on 14 February 2012, the Respondent asked the Appellant by email: "If the landlord of the pub objects to the build can that damage the planning permission for the development?" The Appellant did not reply.

xii. Contracts were exchanged on 23 February 2012.

xiii. On 28 February 2012, unbeknownst to the Respondent, Mr Singh resigned as a director of Bow and transferred his shares to the Appellant's brother, Sarbjit Sanger who was purportedly appointed as a director on that date.

xiv. On 15 March 2012 the Respondent paid the balance of £115,435.

xv. On 22 March 2012 Dalco, a company owned and operated by the Appellant, bought the Land, and the pub next door, for £450,000. Sandhu & Shah acted for Dalco.

xvi. Also on 22 March 2012, a sale of the Land from Dalco to Bow for £350,000 was completed.

xvii. On 1 May 2012, unbeknownst to the Respondent, the Appellant resigned as a director of Bow.

xviii. On 17 September 2012, the Respondent asked the Appellant by email whether there were any developments as regards the planning permission, and the Appellant responded that the plans were in and he was awaiting a date for a meeting.

xix. The Respondent took no other relevant steps before 5 July 2013 which is the key date for section 32 purposes.

xx. On 25 September 2012, unbeknownst to the Respondent, the Appellant had a pre-application meeting with the local planning authority, the borough of Tower Hamlets.

xxi. On 8 October 2012, Tower Hamlets wrote to the Appellant. The letter showed that the Appellant's proposal was for 5 dwellings, not the 7-8 which had been discussed with the Respondent and that the development site included the pub. The letter also set out numerous concerns about the proposal, one of which was a lack of regard to the fact that the pub was a grade II* listed building. The Respondent did not see this letter until much later.

xxii. In telephone conversations in or around early 2013, the Appellant told the Respondent that Tower Hamlets were dealing with the planning application.

xxiii. On 20 March 2013 the Appellant submitted a planning application for a new flat above the pub and two 4-bed houses on the Land.

xxiv. On 15 May 2013 planning permission was refused.

xxv. In late July 2013 (i.e. after the key date for section 32 purposes), the Appellant told the Respondent by telephone of the refusal of planning permission.

xxvi. On 29 July 2013 the Respondent asked to see the plans and correspondence and the rejection notice. Having received no reply, he approached Tower Hamlets on 29 July 2013 and was provided with a copy of the rejection letter on 31 July 2013. He forwarded it to an architect and sought his advice.

xxvii. On 1 April 2014, the Respondent was removed as a director of the company without his knowledge.

The decision of the Senior Master

16. Following a hearing on 14 January 2021, the Senior Master gave a written judgment on 6 May 2021 by which she dismissed the Appellant's application. She ruled that (1) the Respondent had a real prospect of successfully relying on section 32 and that there was no compelling reason why that issue should not proceed to trial, but (2) the Respondent

had no real prospect of successfully relying on section 14A if for any reason section 32 did not apply.

17. The decision as regards section 14A turned on a different question, whether the Respondent could not have obtained the knowledge necessary to bring the relevant claim before 5 July 2016, and the factual matrix was therefore significantly different. That decision is not the subject of any cross-appeal and I therefore say nothing more about it. This appeal only concerns section 32.

18. This being an application for summary judgment, it was common ground that:

    i. the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success;
    ii. a "realistic" claim is one that carries some degree of conviction. i.e. it is more than merely arguable;
    iii. in reaching its conclusion the court must not conduct a "mini-trial";
    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;
    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;
    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; and
    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.

19. As to the application of section 32, the Senior Master directed herself that:

    i. Fraudulent misrepresentation may be treated as “fraud” for the purpose of section 32(1)(a).
    ii. The question is not whether a claimant should have discovered the fraud sooner but whether they could with reasonable diligence have done so.
    iii. The burden of proof is on the Respondent to show that he could not have discovered the fraud without exceptional measures which he could not reasonably have been expected to take.
    iv. The test was how a person carrying on a business of the relevant kind would act if they had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency.

v. A person has sufficient information when they know their "essential case" i.e. the facts necessary to plead their claim (as opposed to facts which would merely improve their prospects of success).
vi. When testing "reasonable diligence" it must be assumed that the claimant desires to discover whether there has been a fraud (or a deliberate concealment).
vii. There must be something to put the claimant on notice of the need to investigate, determined on an objective basis.
viii. Personal characteristics such as naiveté or inexperience in financial matters are not relevant, though a lack of specialist knowledge may be a relevant consideration in particular circumstances.

20. Reviewing the evidence of fact, the Senior Master found that the Respondent at the start "did not take any steps to monitor the progress of the transaction, or ask for copy documents such as the report on title, the contract or transfer form. He therefore had no independent verification that contracts had been exchanged or that the purchase had completed" [65] and "There is no evidence as to whether he asked for or received documents relating to the incorporation of Bow, his appointment as a director or his share certificate" [66]. From the start, he "took an unusually 'hands off' approach to an investment of substantial funds. From the evidence it is apparent that this approach continued throughout the progress of the property transaction. It appears that he made no enquiries nor asked for any documents until 17 September 2012" [67].

21. When on that date he enquired about the planning application and was told that a meeting date was awaited, the Senior Master further noted [68]:

> "The Claimant's evidence is that, despite his request 'the Defendant failed to keep me in the loop, receiving (unbeknownst to me at the time) the correspondence with Tower Hamlets directly at his 400 Roding Lane South address (which was not the registered office of Bow)'. In the Defendant's email to the Claimant of 17 September 2012 he states 'Waiting for a date for the meeting plans already in.'(RJ3) [HB 451]. Despite that, the Claimant did not ask for a copy of the plans submitted, had no further conversations with the Defendant, made no further enquiries, did not ask for the date of the planning meeting or ask to attend, ask for a report of the planning meeting, until in or around early 2013, when he was told that Tower Hamlets was dealing with the planning application. Again, he did not ask to see the planning application. It was not until 26 July 2013, when the Defendant told him in a telephone conversation that the planning application had been rejected, that he started to become concerned, and for the first time asked for copies of the relevant documentation. (Arif 1 paras. 29-30) [HB/34]. It appears that he had received no documents, nor had asked for any, until then."

22. The Senior Master concluded:

> "69. This seems, in my view, an extraordinarily lax approach to both a substantial personal investment and duties as a director, and I conclude that the Claimant did not act with reasonable diligence to the appropriate standard up to this date. However, it may not necessarily follow that had the Claimant made the enquiries that someone in his circumstances would undertake, if exercising reasonable

> diligence, he would have discovered something to put him on notice of the need to investigate that would have
> led him to discover facts of his 'essential case' in respect of the alleged fraud or concealment: see Biggs [62]-[63] [AB/590]."

23. At paragraphs 70-78 of her judgment, the Senior Master set out the steps which in her view would or could have been taken by a person exercising reasonable diligence, and what those steps would or could have revealed. At [71] she said:

> "None of these individual pieces of information on their own would have been a 'trigger', in my view, but the combination of all the information which he would have obtained would at some point have led a person acting with reasonable diligence to instigate further enquiries."

24. The Senior Master concluded that by the end of May 2013, the Respondent acting with reasonable diligence could have obtained the decision refusing planning permission and would have known that:

    i. the planning application had not been for 7 or 8 flats;

    ii. the Land abutted the pub and was tied to it by a restrictive covenant, though he would also have seen Sandhu & Shah's advice that the covenant might not be enforceable;

    iii. the planning application was not as originally discussed and the modified application had been refused;

    iv. neither Mr Singh nor Billy had any interest in the joint venture; and

    v. Sandhu & Shah was acting for the seller as well as for Bow as buyer of the Land, and the seller was Dalco and not Punch.

25. However, at paragraphs 80-82 of her judgment the Senior Master stated that she was not satisfied that the Respondent, if acting with reasonable diligence, could be expected to have made enquiries of the Land Registry or Companies House, revealing that the Appellant owned Dalco and that Dalco bought the pub and the Land, creating a conflict of interest for the Appellant, and that Dalco had set the sale price of the Land at £350,000. She found that it would have been reasonable for him to have relied on solicitors and their report on title. Nor was she convinced that Sandhu & Shah would have provided any information about the sale of the Land, because their client in that transaction was Dalco.

26. Nor was the Senior Master satisfied that if the Respondent had sought advice earlier from the architect, Mr Freegard, he would have discovered the link between the Appellant and Dalco before 5 July 2013. She decided that oral evidence will be needed to establish what the Respondent could have discovered by exercising reasonable diligence. Meanwhile the facts about the Appellant's role in Dalco:

> "… were crucial for the completion of the information required for the Claimant's claim, as it was not until the facts about the Defendant's role in Dalco was known

> that his conduct could have been shown to have been dishonest, even if the Claimant had acted with reasonable diligence. I have concluded that the Claimant's 'essential case' … was not complete without the information about the involvement of Dalco and the Defendant's role as controller of Dalco."

27. The Senior Master therefore decided that "although the Claimant is in some obvious difficulties in demonstrating that he acted throughout with reasonable diligence", he nonetheless had a real prospect of showing that he could not by 5 July 2013 have discovered the facts without which his cause of action would be incomplete, and/or that the need for oral evidence on these issues was a compelling reason for the matter to proceed to trial on the section 32(1)(a) issue.

28. The same was true under section 32(1)(b) in relation to the claim that the Appellant deliberately concealed his role with Dalco, the conflict of interest and the resignation of Mr Singh and the removal of the Respondent as a Director. The Senior Master further ruled that oral evidence with cross examination of the Appellant would be needed to resolve the issue of whether there was deliberate concealment, and this constituted some other some other compelling reason for the issue to proceed to trial.

29. Costs were dealt with at a subsequent hearing on 23 June 2021. The Senior Master decided that the costs of the application were in addition to what would have had to be occurred in any event to decide limitation at a trial (of the claim as a whole or of a preliminary issue). Therefore the Appellant would be ordered to pay the Respondent's costs of the application.

30. However, she went on to say:

> "… I do think that it is appropriate to make a discount on those costs because … the judgment has advanced both parties' understanding of the case, primarily, because I had to go into such detail on the facts and reach certain conclusions as to what the claimant ought to have done and his many failures as to what he would be expected to do.
>
> So it will be clear to both parties that, although I have found that there is a real prospect of success in defeating the limitation defence, it is not an easy path to do so, and that realisation may assist both parties to reach some settlement before yet further costs are incurred in going to trial, and so I do think there has been some benefit in exploring those issues and, perhaps, bringing home to both parties what they will have to confront at trial. For that reason, I propose to discount the figure that I come to in summary assessment by 15 per cent to reflect what I think are the advantages which both parties will have gained, I hope, from that early assessment of the limitation issues."

31. By ground 4 of the Respondent's Notice, the Respondent seeks to cross-appeal against the discount of 15% in the Senior Master's order for costs.

The meaning of section 32

32. To resolve this appeal, it is necessary to state with some care what was the central question for the Senior Master.

33. The application proceeded on the basis that the Respondent did not, in fact, discover the "fraud, concealment or mistake" before 5 July 2013. To succeed on his application, the Appellant needed to persuade the Senior Master that the Respondent had no real prospect of proving at trial that he could not with reasonable diligence have discovered the fraud, or the deliberate concealment of a relevant fact, before 5 July 2013, assuming any conflicts of evidence to be decided in the Respondent's favour for present purposes.

34. In argument before me, it was common ground that it is necessary to identify the date by which the Respondent could have discovered the falsity of all ten of the representations on which he relies. Mr Zelin, representing the Appellant, submits that the Senior Master could have severed and struck out those parts of the Respondent's case based on representations about which he could have had the requisite knowledge before 5 July 2013, but nevertheless concedes that a claim could at least in theory arise from representations about which the Respondent could not have had the requisite knowledge until after that date. It also seems to me that if the claim is based on reliance on all of the representations cumulatively, then the key knowledge is knowledge of the falsity of all of them.

35. It is critical to this exercise to determine the meaning of the words "could with reasonable diligence have discovered …" in section 32(1).

36. Both parties have referred me to *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at 418B-418D, where Millett LJ held:

> "… The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency …".

37. Ms Sleeman and Mr Kell, representing the Respondent, submitted that the test of reasonable diligence does not bite on a potential claimant until "there has been something to put the claimant on notice of the need to investigate whether there has been a fraud or concealment (as the case may be)".

38. In support of that submission they cited *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 where Henderson LJ said at [48-50]:

> "48 … It is agreed on both sides that the starting point remains the guidance given by Millett LJ in the *Paragon Finance* case. A further point of some importance was added by Neuberger LJ (as he then was) in *Law Society v Sephton* [2004] EWCA Civ 1627, [2005] QB 1013, at [116], where he endorsed

the view of the deputy judge in that case (Michael Briggs QC, as he then was) to the effect that:

> '… it is inherent in section 32 (1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in *Paragon Finance*…, that there must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word "could", as emphasised by Millett LJ, of much of its significance. Further, the concept of "reasonable diligence" carries with it, as the judge said, the notion of a desire to know, and, indeed, to investigate.'

49. Neuberger LJ added that 'one must be very careful about implying words into a statutory provision', but he said that the judge had not been seeking to imply words, or a new concept, into the statutory provision. He was merely 'explaining what was involved in the process of deciding whether a claimant, could, with reasonable diligence, have discovered the fraud which it now seeks to plead'. I respectfully agree. Another of way of making the same point, as I suggested in argument, might be that the 'assumption' referred to by Neuberger LJ is an assumption on the part of
the draftsman of section 32(1), because the concept of 'reasonable diligence' only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be).

50. It is a question of fact in each case whether the claimant could not with reasonable diligence have discovered the relevant fraud, concealment or mistake. As Webster J aptly said, in *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All ER 193, at 199:

> "I conclude, first of all, that it is impossible to devise a meaning to be put on those words [reasonable diligence] which can be generally applied in all contexts because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them [the mistaken attribution of an old master drawing], in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but that it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase."

39. Mr Zelin responds that section 32 does not require any "trigger event" before the claimant is put on enquiry, but rather that: "Any circumstance that can reasonably give rise to enquiry capable of revealing the relevant facts will engage the section."

40. It seems to me that although Mr Zelin's formulation is only subtly different from that put forward by Ms Sleeman, it is too broad.

41. The need for a "trigger" whose existence must be determined objectively as a question of fact has been confirmed by the Court of Appeal. In *DSG Retail v Mastercard* [2020] Bus LR 1360 at [65-66], Vos C stated that he approved the following passages from the judgment of Foxton J at first instance in *Granville Technology Group Ltd v Infineon Technologies AG* [2020] EWHC 415 (Comm):

> "45. … the application of s.32(1) in a number of the authorities has involved an enquiry into whether the claimant was on notice of something which merited investigation, with the courts holding that in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations … I believe that Henderson LJ in Gresport Finance at [46] was stating that the
> drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry).
>
> 46. I note that this is consistent with the view of Lewison J in JD Wetherspoon Plc v Van De Berg & Co. Ltd [2007] EWHC 1044 (Ch) at [42]. He was referred to the passage from Millett LJ's judgment in [Paragon Finance], and stated that "if there is no relevant trigger for investigation, then it seems to me that a period of reasonable diligence does not begin". It is also consistent with the interpretation of s.32(1) which Bryan J adopted in Libyan Investment Authority v JP Morgan & ors [2019] EWHC 152 (Comm), [30] when he stated: "It was held by Henderson LJ that the concept of 'reasonable diligence' only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake".
>
> 47. However, the issue of whether there was something to put the claimant on such notice must be determined on an objective basis."

42. The ruling in *DSG Retail* was applied by Males LJ in the Court of Appeal, dismissing an appeal in *Granville Technology* under the name *OT Computers Ltd v Infineon Technologies AG* [2021] 3 WLR 6 at [35].

43. In my judgment, therefore, the Court's task is to consider the circumstances and decide whether the Claimant could have discovered the essential facts by using reasonable diligence in response to something which put him on notice of the need to investigate whether there had been a fraud or a concealment of facts of the kind contemplated in section 32.

44. The use of reasonable diligence in that situation is to be distinguished from "exceptional measures which [he] could not reasonably have been expected to take", as per *Paragon Finance*.

45. In *OT Computers*, Males LJ emphasised at [30] that "what reasonable diligence requires in any situation must depend upon the circumstances", and went on to consider to what extent the test is qualified by the particular circumstances of the claimant. He

explained at [38] that personal characteristics, such as being "slothful, naive, shy, nervous, uncurious or ill-informed", are not relevant. As the Supreme Court had indicated in the *FII* case [2020] 3 WLR 1369 at [255], that is because the operative word is "could". Males LJ ruled that the fact that the claimant company had ceased to trade had to be taken into account. The Court had to consider what reasonably could have been discovered by a company carrying on the business in question during the period until it ceased trading. Once it was in administration, the question became what information could have been acquired by its administrators by the exercise of reasonable diligence. But treating the company as if it continued in business when in fact it did not would defeat the purpose of section 32, which was to ensure that a real (rather than a hypothetical) claimant was not disadvantaged by fraud, concealment or mistake.

46. In light of those rulings, it seems to me that the Senior Master's self-direction set out at paragraph 19 above was correct in all material respects. The issue on this appeal is whether she applied those principles correctly.

The Applicant's submissions on the facts

47. Mr Zelin contends that the Respondent could by the exercise of reasonable diligence have discovered the essential (alleged) facts of his claim before 5 July 2013. In particular, a person in his position could reasonably have been expected to do the following:

i. Obtain a copy of the report on title, which would have revealed the existence of the restrictive covenant.

ii. Contact Sandhu & Shah, which would have revealed that they were also acting for Dalco.

iii. Insist on seeing site plans for the proposed development, which would by the end of September 2012 have revealed that the proposal involved building only five flats on the Land.

iv. Follow up on the pre-application meeting, which would have led to the letter of 08.10.12 which in turn revealed that a block of 7-8 flats would not be easily achievable, that the proposal was for only 5 flats, that the development site included the pub and therefore involved the pub's owner, that the pub was Grade II* listed, that development of more than a two-storey building would not be acceptable and that the proposal presented difficulties for the amenity of neighbouring properties to the future residents of the flats.

v. Insist on sight of the planning application or periodically check the council's planning portal to check progress, which from March 2013 would have revealed that an application had been made for a new flat above the pub and two four-bedroom houses on the adjacent land, indicating in turn that the planning application had been made in conjunction with the owner of the pub.

vi. Make enquiries of the planning authority between 15 May 2013 and 5 July 2013, which would have revealed that the planning application had been refused.

vii. Investigate ownership of the site at the Land Registry, which would have revealed (a) the restrictive covenant, (b) that purchases of both the pub and the Land were completed on the same date and were registered on 16 April 2012 (the pub to Dalco and the Land to the company), (c) that both sites had been bought by Dalco from Punch for £450,000 and (d) that the onward sale of the Land to the company effectively valued the pub at only £100,000.

viii. Carry out an online company search of Dalco which would have revealed the Applicant's involvement in that company.

ix. Speak to Mr Singh or call for a Board meeting, which would have revealed Mr Singh's withdrawal and replacement by Sarbjit.

48. The Appellant's case is that a reasonable claimant, engaged in property business as the Respondent was, would have taken these steps by no later than 17 September 2012 when 6 months had passed from completion and he had received no information on any progress. On that date, in fact, he asked whether there were any developments with planning permission and was told that plans had been submitted and the Appellant was awaiting a date for a meeting with the local authority. He did not ask to see the plans. It was not until July 2013, when he learned that planning permission had been refused, that he contacted Tower Hamlets himself.

49. To wait that long, Mr Zelin submits, exceeded what was reasonably diligent, and making the inquiries which a reasonably diligent businessman would have made would have caused the fraud to unravel, enabling the Respondent to plead his claim. When the Respondent was told that planning permission had been refused, he immediately sought advice from Mr Freegard. Mr Freegard responded promptly by email, asking him to "clarify your land ownership" and noting that the planning application had been made in conjunction with the pub owner. Mr Zelin submits that if this advice had been obtained soon after the refusal in 2013, a reasonably diligent person in the Respondent's position could and would have uncovered the role of Dalco, and the Appellant, before 5 July 2013.

50. The Senior Master, on that view, was wrong to find that the reasonable train of inquiry stopped short of a Land Registry and/or Companies House search. Mr Zelin says that her approach was also erroneous in that, from time to time, she referred to what the Respondent "would" have discovered as opposed to what he "could" have discovered.

51. Mr Zelin also submits that the representations and the Respondent's pleaded reliance on them shed light on those matters which were important to him and about which, therefore, reasonable diligence could have led him to make inquiries. The tenth alleged representation in particular highlighted the importance of the Appellant avoiding or declaring any conflict of interest in the transaction. Therefore, Mr Zelin submits, a reasonably diligent investor could have been expected to assure himself that no such conflict arose. Having learned that Sandhu and Shah were representing Dalco as well as

Bow, that person would have wanted to know why this was, and who was behind Dalco.

52. When the Court is identifying the scope of reasonable inquiries, Mr Zelin contends, and the Senior Master agreed, that relevance should be attached to the fact that the Respondent was (or believed himself to be) a director of the company. He was subject to the general duties of a director set out in sections 171-177 of the Companies Act 2006, which include a duty to exercise reasonable care, skill and diligence (section 174). Case law on directors' duties state that whilst directors can delegate, they cannot abrogate responsibility or leave everything to others. They should acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to discharge their duties.

53. Accordingly Mr Zelin submits that the Respondent was legally obliged to make inquiries which would have uncovered the fraud. It follows that a reasonably diligent investor in his position would (and therefore could) have done so. If he did not know how to do so, that is the sort of personal ignorance or inexperience which the case law shows is irrelevant under section 32.

54. The submission based on the Respondent's statutory duties as a director is potentially important in this application because it would remove the need for a "trigger" – a need emphasised by Ms Sleeman in her submissions which I discuss below.

55. Meanwhile, Mr Zelin contended, the Senior Master was wrong to find "some other compelling reason" in the form of a need for oral evidence from the Appellant on the issue of deliberate concealment. On the facts of this case, any fraud or deliberate concealment occurred at the same time and so, if time is not extended under section 32(1)(a), it also cannot be extended under section 32(1)(b).

56. For all of these reasons Mr Zelin invites me to conclude that the Senior Master's decision was wrong, and that the Respondent has no real prospect of success under section 32 and there is no reason to proceed to a trial of the issue. The Court has the Respondent's statement of what he did between February 2012 and July 2013 and is well placed to assess it against a standard of reasonable diligence. That standard is to be applied robustly, following section 32 in balancing the requirements of fairness with the requirements of legal certainty.

<u>The Respondent's submissions</u>

57. Ms Sleeman submitted that the Senior Master reached the right overall conclusion, but also made certain criticisms of her reasoning which are identified in a Respondent's Notice. Although the occasional use of the word "would" did not affect the outcome, she submitted that the Senior Master failed to identify any trigger which put the Respondent on notice of the need to investigate. The Senior Master, she said, should have reminded herself of how the point was put by Foxton J in *Granville Technology* at [48]:

> "There will be many claims when it will be objectively apparent that something 'has gone wrong' – where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind –

> which event ought itself to prompt the claimant to ask 'why?' and investigate accordingly."

58. Ms Sleeman contended that there was no such trigger until the Respondent was told that planning permission had been refused. Whilst the Senior Master correctly directed herself that a trigger was needed, she then made the vague finding quoted at paragraph 23 above, that "at some point" the available information amounted to a cumulative trigger for further inquiries, albeit not including a Land Registry search or company search. This is the first of three grounds in the Respondent's Notice.

59. That finding, Ms Sleeman argued, was also on the incorrect premise that a director's statutory duties are relevant. The duties of a director are owed to the company, as can be seen from the various cases on directors' disqualification to which Mr Zelin referred for the details of the duties, and the test under section 32 is an entirely distinct one.

60. On that basis Ms Sleeman submitted that the Senior Master's findings went too far. She should have found that the Respondent, who at the relevant time had no experience in property development, did not engage in any improper delegation but placed legitimate reliance on the Appellant's expertise. He did not launch an investigation because he had no reason to do so. Unless and until there was a trigger, there was no requirement of reasonable diligence to prevent time from running for limitation purposes.

61. Ms Sleeman therefore rejects the findings made by the Senior Master at paragraphs 70-79 of her judgment. He did not ask the questions highlighted in the judgment because he had delegated the planning matters to the Appellant. She points out whenever he asked about progress, he received reassurance. Meanwhile the type of investor that he was – a hands-off investor – was, she submits, a relevant point of context and not an irrelevant characteristic of a purely personal kind such as naivety or inexperience. Differences in business approach to monitoring investments were considered arguably relevant in the recent case of *Allianz Global Investors GmbH v RSA Insurance Group Ltd* [2021] EWHC 2950. There a defendant's application for summary judgment on a section 32 issue failed because the claimants had a reasonable prospect of showing that the different nature of the business being carried on by each of them would affect the steps they could reasonably have taken to discover the fraud. These points are the foundation of the second ground identified in the Respondent's Notice.

62. On that basis Ms Sleeman says that the Senior Master was plainly right in the ensuing paragraphs of her judgment to reject the suggestion that the Respondent could have known the essential facts of his claim by 5 July 2013. She was also right not to assume that, by that date, the Respondent could have worked out that he needed to obtain the transfer document evidencing the sale from Punch to Dalco, obtain it and draw conclusions from it sufficient to enable him to plead fraud. Ms Sleeman also agrees with the finding that Sandhu & Shah, if asked, would not necessarily have provided information about Dalco.

63. Ms Sleeman also rejects the relevance, suggested by Mr Zelin, of the Respondent attaching importance (as demonstrated by his reliance on the representations) of the Appellant having no conflict of interest. The fact that he was "concerned" about potential conflicts, in the sense of caring about the issue, does not mean that there was any sign of a conflict which could act as a trigger.

64. Finally Ms Sleeman agrees with the Senior Master that a need for oral evidence to clarify these issues supplies "some other compelling reason" to refuse summary judgment.

65. The third ground identified in the Respondent's Notice need not be considered further. It concerns a question of which of the alleged representations may sound in damages, which would fall to be decided at any trial.

Discussion

66. In *OT Computers*, Males LJ made clear that a claimant will be treated as becoming aware of any "trigger" event of "which a reasonably attentive person in his position would learn".

67. By contrast with a standard of reasonable attentiveness, the Senior Master considered the Respondent to have taken "an extraordinarily lax approach to both a substantial personal investment and duties as a director". It cannot therefore be assumed that any difference between the "reasonably attentive" test and the test of "reasonable diligence" would necessarily have led to a different result.

68. However, there is a lack of discussion in the judgment about what it was that triggered the inquiries which the Senior Master considered that the Respondent should have made. She identified inquiries which should have been made from the very beginning of the transaction, before anything had gone wrong, for example in her conclusion that a reasonably diligent person would have asked Sandhu & Shah what was the pressure to exchange contracts quickly. This begs the question of whether an investor taking the hands-off approach of the Respondent was thereby disqualified from later relying on section 32 by not being "reasonably attentive" from the outset. That question is not discussed in the Senior Master's judgment.

69. In addition, there is a degree of vagueness in her conclusion that a combination of all of the information which the Respondent could have been expected to obtain would "at some point" have led him to make further inquiries which might have uncovered the role of Dalco.

70. It seems to me that oral evidence may shed more light on the question of whether, and when, there was a "trigger". Ultimately the Appellant may well establish that in late 2012 or early 2013, the Respondent "failed to receive something which he expected to receive", to use the language of Foxton J in *Granville*. That something was a grant of planning permission for a development of 7-8 flats or at least some tangible process towards such a grant. However, it is potentially important that the Respondent claims to have been told by telephone in early 2013 that the council was dealing with the planning application. In my view the Court may be assisted by exploring that evidence, before reaching a conclusion on when, exactly, a reasonably diligent investor would have made independent inquiries either with expert assistance or by finding out about the council's planning portal and interrogating it.

71. I am not convinced that the trigger can be found in the fact that the Respondent placed reliance on the Appellant not having any conflict of interest, absent some evidence of a conflict which would have come to the attention of the reasonably attentive investor.

72. I consider it unlikely that the description of the Respondent as a "hands off" investor will be held to be a relevant characteristic by analogy with *Allianz Global Investors* to which I have referred above, as opposed to an irrelevant personal characteristic.

73. Equally, I am not convinced that the statutory duties of directors are a relevant consideration. Applying *OT Computers*, it is necessary to decide which factual circumstances were relevant to the scope of what reasonable diligence required in this case, having regard to the purpose of section 32. A conscientious discharge of, for example, the section 174 duty might have led the Respondent to uncover relevant matters before 5 July 2013. However, the relevant sections of the Companies Act 2006 and the Limitation Act 1980 have different purposes. To hold that a breach of section 174 prevents a claimant from satisfying section 32 risks applying section 32 in a way which does not give effect to its purpose.

74. In my judgment the most relevant fact about the Respondent is that he was involved in a commercial property transaction. The correct question to ask is, what matters could he have discovered by making such enquiries as could reasonably have been expected, in the circumstances of this case, of a participant in a commercial property transaction, armed (as the case law requires) with moderate intelligence, a wish to discover any fraud, adequate resources and a reasonable but not excessive sense of urgency. I doubt that the answer will differ in two cases where the only distinction of fact is that a participant is named as a director of the corporate vehicle in one case but not in the other.

75. Every case, however, is fact-sensitive, as can be seen from *Allianz Global Investors*. In that case it is also notable that Miles J added:

> "80. I also agree with the submission of the Claimants that the issue of which characteristics the Court should take into account under s.32 is a developing and difficult legal question and that it would be far better to reach findings on the basis of the facts found at trial rather than at a summary hearing."

76. The question of what inquiries the reasonably diligent investor could reasonably have been expected to make, in the circumstances of this case, therefore remains outstanding.

77. Mr Zelin urges an alternative formulation of that question, of whether making particular enquiries would have been unreasonable. That is by reference to the judgment of Stuart-Smith LJ in *Forbes v Wandsworth HA* [1997] QB 402 at 412C-413A (dealing with the provision in section 14 of the 1980 Act):

> "One of the problems with the language of section 14(3)(b) is that two alternative courses of action may be perfectly reasonable. Thus, it may be perfectly reasonable for a person who is not cured when he hoped to be to say, 'Oh well, it is just one of those things. I expect the doctors did their best.' Alternatively, the explanation for the lack of success may be due to want of care on the part of those in whose charge he was, in which case it would be

> perfectly reasonable to take a second opinion. And I do not think that the person who adopts the first alternative can necessarily be said to be acting unreasonably. But he is in effect making a choice, either consciously by deciding to do nothing, or unconsciously by in fact doing nothing. Can a person who has effectively made this choice, many years later, and without any alteration of circumstances, change his mind and then seek advice which reveals that all along he had a claim? I think not. It seems to me that where, as here, the deceased expected, or at least hoped, that the operation would be successful and it manifestly was not, with the result that he sustained a major injury, a reasonable man of moderate intelligence, such as the deceased, if he thought about the matter, would say that the lack of success was 'either just one of those things, a risk of the operation, or something may have gone wrong and there may have been a want of care; I do not know which, but if I am ever to make a claim, I must find out.'"

78. I do not agree with Mr Zelin's interpretation of that passage. It seems to me that it makes a slightly different point, namely that a person may fail to acquire "knowledge which he might reasonably have been expected to acquire" despite acting in a way which is not unreasonable.

79. In my judgment the outstanding question cannot be decided on this summary judgment application. It requires oral evidence to explore what if anything the Respondent was told in early 2013, and further consideration of what if any of the details about him and his investment should be taken into account.

80. Those conclusions are sufficient to dispose of the application. However, moving on to the Senior Master's conclusion that, even with reasonable diligence, the Respondent might not have discovered the essential facts permitting him to plead his claim, I perceive no clear error in her reasoning. As the Senior Master said, it is possible that Sandhu & Shah would not have provided further information about Dalco in response to further inquiries. It cannot be simply assumed, without further evidence, both that the reasonably diligent investor could then have been expected to make further inquiries, for example at the Land Registry or at Companies House, and that such inquiries would have unravelled the fraud. These questions too will be more reliably decided at trial.

81. I therefore reject those of the Appellant's grounds of appeal which remain genuinely in issue on the refusal of summary judgment. The Respondent has a real prospect of success.

82. I do however accept Mr Zelin's contention that the outcome under paragraphs (a) and (b) of section 32(1) will be the same and that it is not necessary for resolution of the limitation issue to decide whether deliberate concealment took place.

83. Nor do I agree with the Senior Master that a need for oral evidence can be described as some other compelling reason to proceed to trial. The fact that the Respondent has a real prospect of success on the section 32 issue means that a trial with oral evidence will be needed – or, to put it the other way around, oral evidence will be needed because the Respondent has a real prospect of success on the section 32 issue.

84. None of this means that the Respondent has a strong case on section 32. As the Senior Master said, he "is in some obvious difficulties in demonstrating that he acted throughout with reasonable diligence".

85. Nor does it necessarily follow that limitation should be decided as a preliminary issue. If all the necessary evidence on that issue is heard, and if the claim is found not to be time barred, there may be little if any evidence left to be heard on the substantive issues in the claim. I shall invite the parties to make written submissions on what directions should now be made.

The cross-appeal on costs

86. The Respondent seeks to appeal against the reduction in the amount of costs awarded below.

87. Ms Sleeman repeated her submissions to the effect that the Senior Master's adverse findings against the Respondent were wrong, and on that basis submitted that the reduction in the costs was unwarranted. She emphasises that the Appellant's application entirely failed. Not only that, but one day before the hearing of the application, the Senior Master wrote to the parties expressing the view that limitation would be better dealt with as a preliminary issue and asking the Appellant if he wished to continue with the application. Ms Sleeman submits that the factors taken into account by the Senior Master in exercising her discretion under CPR 44.2, namely the fact that the Court had had to go into the detail and that the application may have brought home to the parties what they would have to confront at trial, were not relevant.

88. Mr Zelin pointed out that the cross-appeal requires permission and that it depends on my departing from the Senior Master's adverse conclusions on reasonable diligence. He submitted that the matters taken into account were relevant and that there is no sufficient reason to interfere with the Senior Master's exercise of her discretion.

89. CPR 44.2 applies a "general rule" that the unsuccessful party will pay the successful party's costs. The Court expressly may make a different order, including an order that a party pay a proportion of another's costs, and must have regard to all the circumstances including the parties' conduct, which in turn includes "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue", and whether a party has succeeded on part of its case even if not "wholly successful".

90. In my judgment the reduction was not outside the scope of the Senior Master's discretion, even having regard to the criticisms which I have made of parts of her reasoning. The reasons which she gave were in my view a reference to the fact that the Appellant pursued a serious limitation issue on which he may yet succeed, and to the fact that the parties' exploration of the authorities on section 32 in this application may save some time and costs at the next stage. Those were relevant matters. I give permission for the cross-appeal on costs but dismiss it.

Conclusion

91. The appeal is dismissed. The cross-appeal on costs is dismissed. No other order is needed in relation to the Respondent's Notice. I will invite written submissions in the

form of order to give effect to this judgment, including consequential matters and onward case management.