Neutral Citation Number: [2012] EWHC 1000 (Ch)

Case No: HC10C02847
(Appeal No CH-2011-550)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
On appeal from Master Price

Royal Courts of Justice
The Rolls Building, London, WC4A 1NL

Date: 20/04/2012

Before :

HHJ DAVID COOKE

- -

Between :

Mortgage Express (an unlimited company)	**Claimant/ Respondent**
- and -	
Abensons solicitors (a firm)	**Defendant/ Appellant**

- -
- -

William Edwards (instructed by **Jeffrey Green Russell**) for the **Respondent**
Dan Stacey (instructed by **Plexus Law**) for the **Appellant**

Hearing dates: 9 March 2012

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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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HHJ DAVID COOKE

HHJ David Cooke:

1. This is a claim by a mortgage lender against a solicitors firm, alleging a failure to report various matters relating to two sets of transactions entered into by their borrower client in 2004 and 2005. It is said that if the true facts had been known, the lender would have refused to fund the transactions. The claim as originally issued was framed in contract and negligence. On 13 September 2011 Master Price allowed the claimant's application to amend the Particulars of Claim to allege additional factual matters and plead a new cause of action for breach of fiduciary duty, notwithstanding that the limitation period for such a claim had prima facie expired in relation to the first group of loans, made in 2004. The defendant solicitors appeal against that order, by permission of the Master himself.

2. The principal point arising on the appeal is whether allowing the amendments has the effect of depriving the defendants of a reasonably arguable limitation defence (in which case the claimant should be required to issue fresh proceedings and consolidate them in order that the limitation argument may be pursued at trial, see *Welsh Development Agency v Redpath Dorman Long* [1994] 1 WLR 1409). The Master accepted the claimant's argument that there could be no such defence available, because the cause of action sought to be pleaded required proof of deliberate breach of duty by the defendant which, if established, would inevitably also establish that the breach of duty had been deliberately concealed by the solicitors, so that limitation would be prevented from running in their favour by s32 Limitation Act 1980. Thus, it was said, the new claim would either be made out on the facts, in which case there could be no limitation defence, or it would fail on the facts, in which case the limitation issue would never arise.

3. Section 32 provides, so far as relevant, as follows:

> "32 **Postponement of limitation period in case of fraud, concealment or mistake**
>
> (1) … where in the case of any action for which a period of limitation is prescribed by this Act, …
>
> (b) 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…
>
> (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."

It is common ground that although a claim for breach of fiduciary duty is not one for which a limitation period is expressly provided by the Act, the court applies the limits specified for claims in contract and tort by analogy, and does likewise with the provisions of s32.

4. In his judgment, Master Price said this:

> "11. Section 32(1)(b) is relied upon. In particular it is the claimant's argument that any deliberate breach of fiduciary duty by a solicitor will give rise to deliberate concealment for the purposes of that provision because a solicitor has a duty to report matters to his client and because, if an initial breach of duty to the client was deliberate, that intention necessarily applies also to the failure to report it so that there is a form of deliberate automatic concealment. The claimant's case is that the defendant has deliberately chosen not to report the facts revealed by [its accounting] ledgers and on that basis alone the facts are deemed to have been concealed for the purposes of section 32(1)(b)…
>
> 15. … Although an attempt was made to persuade me that there had been deliberate active concealment by reason of the refusal to give access to the ledgers before an order for disclosure and that there had been a misrepresentation in correspondence… this is in fact disputed and I am reluctant to make findings of fact about this on the basis of the material before me.
>
> 16. … it does seem to me that the claimant is on stronger and safer grounds in seeking to rely on s 32(2)…
>
> 17. … in the circumstances of this case the Court can readily see that, if the [claimant] alleges breaches of fiduciary duty in deciding not to report were deliberate, section 32(2) is to be applied. This… results inevitably from the fact that no investigation is likely to be made until there is default…"

5. The Master therefore relied not on the argument that there had been what Mr Edwards referred to as "actual deliberate concealment", but on s 32(2) and "deemed deliberate concealment". By its Respondent's Notice Mortgage Express contends that the Master ought also to have found that it was entitled to rely on "actual deliberate concealment".

6. I summarise the relevant facts as follows:

   i) The borrower was a Mr Neal Consett. He applied to Mortgage Express in 2004 for loans to fund the purchases of four properties (Plots 1-4) on a site in Liverpool from the company building them, Cairncastle Ltd. In fact, it is alleged, Mr Consett was a shareholder and director of Cairncastle, he was the registered freeholder of the site on which they were being built, and the arrangements he made, to the knowledge of the defendant, were that he sold the properties to Cairncastle for nil consideration and then repurchased them on the same day for a full consideration expressed in the contracts, part of which he paid with the benefit of the claimant's loans.

   ii) Thus it is said that Mr Consett was effectively buying from himself. The Particulars of Claim as originally served alleged that the defendant negligently

and in breach of contract failed to disclose his connection with Cairncastle, the back to back sale and repurchase, the fact that Cairncastle appeared to have paid nothing to acquire the properties from Mr Consett so that the sales may have been voidable in the event of Mr Consett's bankruptcy, and that the sales and repurchases appeared not to have been properly authorised by shareholders and so were potentially voidable pursuant to s 320 Companies Act 1985.

iii) There are potential issues of fact as to the extent to which these matters were or should have been already known to Mortgage Express. Mr Consett appears to have been an existing customer, so that Mortgage Express is likely to have known something of his business affairs. The application form refers to him as Managing Director of Cairncastle, and the valuation states that the properties are being constructed by Cairncastle. Mortgage Express has not yet served any evidence as to the extent of its knowledge.

iv) It was also pleaded that "the evidence disclosed does not demonstrate that Mr Consett paid the balance of the purchase price … [or] that the defendant had control over all the purchase monies in relation to each of the properties". The loans from Mortgage Express were 80% of the stated price so that Mr Consett should on the face of it have paid a further 20% himself. The claimant was unable to plead in more detail because it did not have access to the defendant's accounting ledgers relating to these transactions. An issue arises because they had been requested but the defendant declined to provide them until an order of the court was obtained. The claimant's argument that this necessarily amounted to deliberate active concealment of a relevant fact was rejected at paragraph 15 of the Master's judgment (above).

v) A similar series of transactions took place in 2005 in relation to plots 7-10 and 'Aron House', all at the same site. I do not give any further details in relation to these, since Mr Stacey confirmed that he does not seek to appeal the Master's order in relation to any of them (accepting that on any basis the new claim is not limitation barred in relation to the later transactions).

vi) The borrower first defaulted in payment on 1 February 2006. Mortgage Express began to request the defendant's files and ledgers in 2010, and issued this claim on 6 September 2010. Initially the files were disclosed without the accounts ledgers. The ledgers were eventually received on 3 May 2011, after an order for disclosure.

vii) It is the claimant's case that the facts revealed by the ledgers made it possible to allege for the first time a deliberate breach of fiduciary duty arising from the way the funds advanced were applied.

7. The amendments sought and allowed by the Master, so far as they relate to plots 1-4 can be grouped as follows:

i) Allegations of fact that:

a) in relation to Plots 1 and 2 the "deposit" (in the sense of the difference between the loan and the stated purchase price) was received by the

solicitors from Cairncastle- the purported vendor- rather than from Mr Consett as purchaser,

b) in relation to Plots 3 and 4, the "deposit" was received from Mr Consett, but was just under £30,000 less than was required to make up the stated price. Accordingly the amount paid to the solicitors acting for Cairncastle was less than the stated price. Mr Edwards made the point that the correspondence does not show any prior arrangement to this effect, or any protest from the solicitors acting for Cairncastle, which would be surprising if the transaction was genuinely one at the stated price,

and that the defendant did not inform the claimant of any of these facts.

ii) Pleading the terms of the Law Society's "Green Card" advice to solicitors on avoiding fraud, emphasising the importance of ensuring that the true price was stated in the documentation and actually paid.

iii) A pleading of specific fiduciary duties, in paragraphs 10A (a)-(f), not to prefer the interests of Mr Consett over those of Mortgage Express, and one (para 10A(g), which Mr Stacey did not make any separate point about) alleging a separate fiduciary duty not "deliberately to withhold information from the claimant which it was under a duty to provide".

iv) Pleading in paragraph 14A that:

> "14A. Further, in the premises it is to be inferred that the defendant acted in deliberate breach of fiduciary duty in
>
> (a) deliberately withholding from the claimant the information and advice and deliberately failing to take the steps pleaded in paragraph [14] above
>
> (b) deliberately preferring the interests of Mr Consett and/or Cairncastle to the interests of the claimant…
>
> (c) continuing to act once an actual conflict of interest had arisen."

8. Mr Stacey attacks the conclusion that the claimant will not be able to make out any of the newly pleaded causes of action without inevitably overcoming any possible limitation defence. First, he points out that the matters pleaded as fiduciary duties are widely expressed and not all matters which can only be breached by deliberate or even intentional acts. He referred to paras 10A (e) and (f) as follows:

> "(e) to take care not to put itself in the position in which an actual conflict of duty existed such that it could not fulfil its duty to one client without being in breach of its obligations to another client
>
> (f) to cease to act if it found itself in the position in which an actual conflict of duty existed…"

which could at least arguably be breached if a conflict of duty arose, even if it was not appreciated at the time.

9. Secondly, Mr Stacey submits that it is not sufficient that the pleading in para 14A is of "deliberate" breach of the duties alleged. If the element of "deliberateness" is not an essential part of the cause of action, a claimant who pleads the additional and unnecessary element that a breach has been committed "deliberately" might nevertheless succeed at trial if he establishes a non- deliberate breach. In that event, the defendant would have lost the opportunity to rely on its limitation defence.

10. Thirdly, and this is where the main issue arises as it seems to me, Mr Stacey submits that it is not clearly settled by authority that liability for breach of fiduciary duty can only be committed deliberately, or that to the extent that any element of intentionality is required, it necessarily coincides with the state of mind required to show a "deliberate commission of a breach of duty" for the purposes of s 32(2). He referred me to the unreported decision of Mr David Donaldson QC sitting as a deputy judge of the High Court in *Mortgage Corporation v Alexander Johnson* (a firm) (7 July 1999) in which he refused permission to amend to plead breaches of fiduciary duty after expiry of the prima facie limitation period, saying:

> " … plainly the deliberateness of a breach of duty can rarely, if ever, be determined in advance of the question whether there was a breach at all. In the case of an amendment pleading such a breach as a cause of action after expiry of the primary limitation period, that would normally mean leave to amend should be refused. That can readily be seen in a case where the plaintiff seeks to raise a new case of breach of contract, rebutting limitation by the suggestion of deliberate breach; but there the deliberateness would not be an essential element of the breach. The position is less obvious where the deliberateness of the breach is an essential element of the cause of action and is therefore pleaded as such as part of the substantive claim; for in such a case without the deliberateness the claim will fail anyway and the limitation defence adds nothing.
>
> …there appear to be difficult questions… as to what "deliberate commission of a breach of duty" would mean and involve in the present case. These would include such questions as precisely what kind of mental state is included in the adjective "deliberate" and what that would amount to in the present case. Does this require consciousness that the conduct is in breach, or recklessness as to whether it is in breach or alternatively, consciousness that the conduct is in some way wrong or recklessness as to that? Or is it sufficient that the acts are intentional without reference to their quality as breaches of duty? "

11. So far as concerns the mental element required to amount to "deliberate commission of a breach of duty" for the purposes of s 32(2), the law has now been clarified by the decision of the House of Lords in *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384.

There were two substantive opinions delivered, by Lords Millettt and Scott. Lord Millettt said this (p 394 B):

> "23 As I have explained, in enacting the 1980 Act Parliament substituted "deliberate concealment" for "concealed fraud". This is a different and more appropriate concept. It cannot be assumed that the law remained the same. But reference to the old law explains why Parliament enacted section 32(2) and did not rely on section 32(1)(b) alone to cover the whole ground. With all reference to fraud or conscious impropriety omitted, there was an obvious risk that "deliberate concealment" might be construed in its natural sense as meaning "active concealment" and not as embracing mere non-disclosure. Section 32(2) was therefore enacted to cover cases where active concealment should not be required. But such cases were limited in two respects: first, the defendant must have been guilty of a deliberate commission of a breach of duty; and secondly, the circumstances must make it unlikely that the breach of duty will be discovered for some time.
>
> 24 Given that section 32(2) is (or at least may be) required to cover cases of non-disclosure rather than active concealment, the reason for limiting it to the deliberate commission of a breach of duty becomes clear. It is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalise him for failing to disclose it.
>
> 25 In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose."

12. Lord Scott, with whom the other three Lords agreed, said this in relation to s 32(2) (p403 F):

> " 60 …If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty—I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach—then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes. …

> 61 Morritt LJ said, in [*Brocklesby v Armitage & Guest (Note)* [2002] 1 WLR 598], that in general a person is assumed to know the legal consequences of his actions and that, therefore, if an act has been done intentionally, the actor's unawareness of its legal consequences would be immaterial and no defence. The premise is, in my opinion, much too wide to constitute a satisfactory approach to construction of a statutory provision such as section 32(2). A person may or may not know that an act of his or an omission to do or say something or other constitutes a breach of tortious or contractual duty. His knowledge or lack of it may well be immaterial to the question whether a cause of action for which he is liable has accrued to the person injured by the act or omission. But that is no reason at all why Parliament, in prescribing the circumstances in which the person injured by the act or omission can escape from a Limitation Act defence, should not distinguish between the case where the actor knows he is committing a breach of duty and the case where he does not. The clear words of section 32(2)—"deliberate commission of a breach of duty"—show that Parliament has made that distinction.
>
> 62 It follows that, in my opinion, the construction of section 32(2) adopted in the *Brocklesby* case was wrong."

13. Thus it is now clear that a limitation defence will only be blocked by s 32(2) if the defendant is shown to have been aware at the time of the alleged breach of duty that what he did, or omitted to do, amounted to a breach of duty. But, Mr Stacey submits, it is not clear on the authorities that the same awareness is a necessary condition of every actionable breach of fiduciary duty.

14. Mr Edwards on the contrary submits that deliberateness is an essential element of the cause of action for breach of fiduciary duty and that the required mental elements are the same so that this is an example of the case which Mr Donaldson referred to and the Master was right to allow the amendment. If he is right, the word "deliberate" in the allegations pleaded in para 14A would be redundant, it seems to me. He says further that on the facts, the solicitors must consciously have decided to prefer the interests of the borrower to those of the lender, but that of course will be a matter for the trial judge to determine in light of the evidence.

15. On the question of the necessary mental element in a claim for breach of fiduciary duty, Mr Edwards referred me to passages in the judgment of Millett LJ (as he then was) in *Bristol & West Building Society v Mothew* [1998] Ch 1 to the effect that the relevant conduct must be intentional, in particular at p 19E:

> "… if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other... I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.

> Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment. ”

16. The elements of the "duty of good faith" referred to are those pleaded in paragraphs 10A (a)-(d) of the amended Particulars of Claim. I accept therefore that in order to establish liability under any of those paragraphs, the claimant must show that Abensons were conscious of an obligation owed to the claimant to do something (or refrain from doing something), but felt, rightly or wrongly, that they were inhibited in complying with that obligation by reason that they were also acting for the borrower. Acting in ignorance, even negligent ignorance, of any obligation owed to the claimant would not be enough.

17. I accept also that this is sufficient to meet the standard set out by Lord Scott in *Cave*, above, that the defendant "knew he was committing a breach of duty, or intended to commit the breach of duty", so that insofar as those elements of the pleading are concerned, the overlap contended for by Mr Edwards exists and the limitation defence can not assist the defendant.

18. Paragraphs (e) and (f), of which Mr Stacey complains, set out a separate duty which Millett LJ described as follows:

> “Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v. Cox and Hatt* [1917] 2 Ch. 71; *Commonwealth Bank of Australia v. Smith* (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule." ”

19. Millett LJ went on to hold that there was no breach of the "actual conflict rule" in that case, because it could not be said that his actual instructions from the borrower did not allow him to comply with his instructions to the lender:

> “By instructing him to act for them, the purchasers must be taken to have authorised the defendant to complete the report without which the mortgage advance would not have been forthcoming; and to complete it truthfully. The defendant was required by the society to report on the purchasers' title as well as to confirm the absence of any further borrowing. The two stood in exactly the same case. The defendant would not have been in breach of his duty to the

> purchasers if he had disclosed the facts to the society any more than if he had reported a defect in their title."

20. An "actual conflict" therefore arises if the solicitor's instructions from one client are to do, or not to do, something which is contrary to his duty to another client, but not in cases where he has instructions from the first client that would allow him to perform his duty to the second, which instructions he fails to carry out because it would disadvantage the first client. What if the solicitor is in fact instructed by the borrower to do something (eg, to make a particular payment and not tell the lender about it) but is not aware that to do so is in breach of his obligation to his lender client, perhaps because he has negligently failed to appreciate that his instructions from the lender require that he be told? In such a case he has may well have failed to "take care not to find himself in a position where there is an actual conflict of duty", if that language implies that the standard of care required in avoiding an actual conflict is that of negligence. He will have failed to cease to act in circumstances in which his duty required him to do so, although he did not appreciate that this is the case because of his negligent failure to understand the extent of his duty to one of his clients.

21. Millett LJ does not explore in detail the mental element required in a case of "actual conflict", having held that it did not arise. Mr Edwards referred me to a short passage on p 20 of the judgment:

> "In my judgment, the defendant was never in breach of the actual conflict rule. It is not alleged that he acted in bad faith or that he deliberately withheld information because he wrongly believed that his duty to the purchasers required him to do so. He was not guilty of a breach of fiduciary duty."

but in this section Millett LJ is summarising the effect of his previous analysis- the first sentence deals with the "actual conflict" rule, which was not breached; the second relates to the "duty of good faith", which arose but was not breached on the facts. The latter is not a statement of the mental element required to establish a breach of the "actual conflict" rule.

22. Mr Edwards also referred me to *Leeds & Holbeck Building Society v Arthur & Cole* [2001] Lloyd's Rep PN 649, in which Morland J held that a claim for breach of fiduciary duty required that it be found that the solicitor "did not disclose matters which he admittedly ought to have done to the claimant, intentionally and consciously, knowing at the time that he should disclose them to the claimant." But that case was dealt with as one of breach of the "duty of good faith", as is evident from the passages from *Mothew* cited by Morland J beginning at p652. It was not a case of "actual conflict" and does not therefore establish that a solicitor must be actually aware of a conflict of duty in order to breach the "actual conflict" rule.

23. I do not need to determine myself what mental element is required in that context, and express no opinion on that matter. It is sufficient for Mr Stacey's case on this aspect that it is arguable that there is a difference, and that the difference is sufficient that a breach of duty might be established which is not a "deliberate" breach of duty for the purposes of s 32(2). That must be so, if a solicitor may be in breach through negligent failure to appreciate the incompatibility of his two sets of instructions.

24. I have considered whether the proposed pleading is sufficiently wide to catch an "actual conflict", in this sense. There is no specific pleading of any terms of the borrower's instructions that might have created such a conflict, but para 14 contains numerous allegations of "failure to inform" or "failure to advise" the claimant, to all of which the allegations of breach of duty in para 14A are applied, and to all of which, therefore, the duties pleaded at para 10A may be relevant. I must proceed on the basis that by pleading as it has in paragraphs 10A (e)-(f) the claimant seeks to cover a case where it is established at trial that failure to disclose a matter was by reason of the instructions of the borrower not to do so, and that there is a risk to the defendant that this may be found to establish liability even if the solicitors did not appreciate that they were in breach of duty to the claimant in doing so. I accept Mr Stacey's point that the potential cause of action claimed is not necessarily limited by the pleading of "deliberate" breach, if that is not as a matter of law a necessary ingredient. Whether these risks will eventuate, or are likely to do so, is not relevant.

25. On that point, therefore, Mr Stacey persuades me that the Master was wrong to hold that there can be no circumstances in which the amendments allowed deprive the defendant of an arguable limitation defence. In the circumstances it is not necessary to consider in detail his alternative argument that the defendant has been deprived of the opportunity of showing that the claimant could with reasonable diligence have discovered the matters complained about at some point before the primary limitation period expired. Shortly, in my view this point would have failed. It arises only if the matters of which the claimant was in fact aware at the time it lent were not sufficient to cause it to refuse to lend (for if they had been, no loss could be caused by any failure of the solicitors to disclose additional matters) but the claimant could with reasonable diligence (and not taking "exceptional measures"; see *Paragon Finance Plc v DB Thackerar & Co* [1999] All ER 400) have discovered those additional matters, or sufficient of them, after completion of the loan but before they in fact did so. I agree with the Master on this issue; there is no realistic prospect of success in contending that it would be anything other than "exceptional measures" for a lender, having accepted the position as known to it as being sufficient to make its advance, to make further investigations after completion into information held by its solicitor before something occurred to prompt it to do so, such as a default. It is not alleged that there was any such event before default, or that once default had occurred the lender did not act with proper diligence, so there is no realistic basis for suggesting that it should have found out what it eventually did at an earlier date that was in fact the case.

26. I also do not have to deal in detail with Mr Stacey's alternative argument based on the alleged inadequacy of the pleading of the facts said to constitute the breach of fiduciary duty. He referred me to the provisions of the CPR and various authorities on the requirement to set out clearly matters alleged to constitute fraud. But:

    i) He did not have permission from the Master to appeal on that ground;

    ii) An allegation of breach of fiduciary duty, even of "deliberate" breach of such duty, is not one of fraud, though of course it is potentially serious misconduct;

    iii) Since there is no appeal against the Master's decision to allow the amended pleading in its current form in relation to the claim so far as it relates to the second series of transactions, it cannot be a realistic position to take that

identically pleaded allegations in relation to the first series are prejudicial to the defendant

and accordingly I would refuse permission to appeal on that point.

27. Mr Edwards seeks to uphold the Master's order on the alternative basis that he should have found that a limitation defence would inevitably fail by virtue of s 32(1)(b) and "actual" deliberate concealment. This is said to arise in two ways:

i) The failure to admit the original wrongdoing was itself deliberate concealment- *Williams v Fanshaw Porter and Hazlehurst* [2004] 1 WLR 3185. But in that case it was found that the solicitor had failed to inform the client that her original claim against a doctor had been struck out although he was aware at the time that it was his duty to do so. Whether or not the defendant in this case was so aware is a matter that must be established at trial.

ii) Failure to produce the accounting ledgers when first requested amounts to deliberate concealment of the facts shown by them. There was a clear duty to disclose those records, independent of the order for disclosure that was eventually obtained, and failure to comply with it amounts to concealment. Here again Mr Edwards relies on *Fanshaw* and again, it seems to me, whether the fact that disclosure was not initially made amounts to "concealment" depends on showing that the defendant was aware of its obligation to disclose and chose not to comply with it. It is also apparent from that decision that the defendant must be aware that the matter not disclosed is relevant to some actual or potential claim against him. These are matters that may be established at trial, but it could not be assumed for the purposes of the application before the Master that they would be, and he was therefore correct in my judgment not to accept the argument based on s 32(1)(b), as he did in paragraph 15 of his judgment.

28. The result is that in my judgment the appeal should be allowed and the Master's order set aside insofar as it relates to the amendments in relation to the claim concerning the loans to acquire Units 1-4 only. The claimant has, I am told, issued a separate claim in relation to units 1-4 in terms corresponding to the amendments I have disallowed, which may now be consolidated and tried with this claim, with any point on limitation being determined at trial in the light of the facts found. I invite the parties to agree the order necessary to give effect to this judgment.

29. After preparing this judgment in draft, but before it was sent to the parties, Mr Stacey drew my attention to the judgment of Roth J in *Seaton and others v Seddon and others* [2012] EWHC 735 Ch, and in particular to the passages at paragraphs 38-49 in relation to pleading fraud, and 78-82 in relation to the obligation of a claimant to show that he could not with reasonable diligence have discovered relevant matters. I invited submissions from Mr Edwards on these points but he did not wish to make any. For the reasons given above, these are not issues on which I have based my decision. I do not need to add to what I have said on the first point, and in relation to the second I mention only that while no doubt the exercise of "reasonable diligence" implies a desire to know and investigate, there must be something arising which could reasonably be expected to trigger that desire in the circumstances of the case. There

was nothing here to cause the lender to investigate, after completion of the advance and before default.