Neutral Citation Number: [2021] EWHC 105 (Ch)

Case No: BL-2019-001368

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane
London EC4A 1NL

Date: 28/01/2021

Before:

CHIEF MASTER MARSH

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Between:

JONATHAN MARK BROOMHEAD	**Claimant**
- and -	
(1) NATIONAL WESTMINSTER BANK PLC	
(2) THE ROYAL BANK OF SCOTLAND PLC	**Defendants**

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Louis Doyle QC and Martin Budworth (instructed by **Harrison Drury & Co Ltd**) for the **Claimant**
Charlotte Eborall (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing date: 22 October 2020

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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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CHIEF MASTER MARSH

Chief Master Marsh:

1. On 1 May 2020 I handed down a judgment ("the May Judgment"[1]) and made an order striking out Mr Broomhead's particulars of claim in their entirety on the basis that his claim, as it had been put forward in the particulars of claim, was bound to fail. However, I did not strike out the claim itself and paragraph 7 of the order made on that date gave him an opportunity to re-draft his claim if he wished to do so. On 12 June 2020 the Mr Broomhead served revised particulars of claim ("the Revised Claim"). The defendants ("the Bank") did not accept that the Revised Claim had any prospect of success and on 10 July 2020 the claimant issued an application seeking permission to serve the Revised Claim. The Bank's application dated 14 October 2019, seeking an order striking out the claim and/or an order for summary judgment, has also been restored for hearing.

2. The background to this claim and the First Claim in which HH Judge Klein dismissed Mr Broomhead's claim against the Bank is set out in the May Judgment at [25]-[30]. It suffices for the purposes of putting this judgment in its context to say that:

    (1) In the First Claim (as defined in the May Judgment), Mr Broomhead sought damages of £13.78 million relying upon a collateral contract based upon three promises he alleged had been made by Mr Mosley, who was an employee of the Bank. Two promises were said to have been made on 22 March 2004 and one promise on 21 May 2004.

    (2) The promises are centred upon an alleged agreement by the Bank to lend money to Mr Broomhead and his businesses for a term of 20 years (matching an offer Mr Broomhead had received from Yorkshire Bank). In addition, Mr Mosley is alleged to have promised that the overdraft facility would be renewed automatically, provided the overdraft limit was not exceeded, and later, on 21 May 2004, when Mr Mosley produced loan documentation that provided for a loan for a period of slightly in excess of two years, that the loan would be automatically renewed.

    (3) The collateral contract was inconsistent with the contractual documentation signed by Mr Broomhead and no contemporaneous communication between him and the Bank referred to its terms.

    (4) The First Claim was not issued until 2015 and, therefore, the disclosure exercise that took place in 2017 had to look back over 13 years.

    (5) The trial of the First Claim before HH Judge Klein lasted 11 days and the judge handed down a comprehensive judgment running to 85 pages and 374 paragraphs. Mr Broomhead's evidence was rejected in its entirety.

    (6) Mr Broomhead's subsequent application for permission to appeal was dismissed.

3. In this claim Mr Broomhead seeks the following relief, as it is described in the amended claim form issued on 29 August 2019:

[1] [2020] EWHC 1005 (Ch)

> "An action to rescind/set aside the judgment dated 21st June 2018 on the grounds of fraud (Jonesco v Beard [1930] AC 2981). The Defendant was consciously dishonest in relation to evidence given and documents disclosed, that dishonesty is relevant to the judgment being impugned." [sic]

4. The claim form refers to "evidence given and documents disclosed". It follows that the complaint relates to two aspects of the conduct of the Bank within the period in which the First Claim was pursued. The thrust of his claim is therefore directed to the conduct of the Bank's employees and legal advisers in the conduct of the claim. Mr Broomhead has, however, alleged in the evidence upon which he relies that documents were manipulated by the Bank over the period of his banking relationship.

5. The court's jurisdiction to set aside a judgment based upon fraud was discussed in the May Judgment at [19]-[24]. I concluded that the Supreme Court in *Takhar v Gracefield Developments Ltd and others* [2019] UKSC 13 had approved the applicable principles as they are summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] 1 CLC 596 at [106] and that there was no room for doubt about the test for materiality. Mr Doyle QC, who appeared for Mr Broomhead in this claim, suggested in his skeleton argument that the jurisprudence in this area of law can be regarded as developing. I indicated during the hearing that I do not consider that this submission is open to him given the conclusion reached in the May Judgment which has not been the subject of an appeal. I am, in any event, reinforced in the conclusion I expressed by helpful information supplied by Ms Eborall, who appeared for the Bank, after the hearing had concluded.

6. At paragraph [21] of the May Judgment I recorded that the decisions of the Court of Appeal in *Hamilton v Al Fayed* [2000] EWCA Civ 3012 and *Salekipour v Parmar* [2017] EWCA Civ 2141 were not cited to the Supreme Court in *Takhar*. The statement was correct if regard was had to the Weekly Law Reports which were cited to me. However, since then, the Official Law Reports have been published and it is clear that, in fact, both of these decisions were cited to the Supreme Court. It follows that although the Justices of the Supreme Court had the opportunity to accept, or at least make observations about, the alternative test for materiality as it is put forward by the Court of Appeal in *Hamilton* and *Salekipour*, they did not do so. It must follow that even though approval of the test in *Royal Bank of Scotland plc v Highland Financial Partners LP* was not part of the ratio of *Takhar*, it is right to regard the law as settled on this point.

7. Both Mr Doyle QC and Ms Eborall have revisited the principles that relate to applications to strike out a claim and applications for summary judgment in their skeleton arguments and in oral submissions. I do not consider, however, that it is necessary to set out those principles in detail in this judgment because to do so would repeat what is said at paragraphs [13]-[17] of the May Judgment.

8. Mr Doyle QC places particular emphasis upon three points:

   (1) The court can only be satisfied that the claim shows no reasonable grounds if it is bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266.

   (2) The court should have in mind that the function of a statement of case is to set out the case only in sufficient detail to enable the other party properly to

prepare an answer to it. *McPhilemy v Times Newspapers* [1999] 3 All ER 775 per Lord Woolf MR 792J - 793 A-B and *Three Rivers DC v Bank of England* [2001] UKHL 16 per Lord Hope at [49]-[50]. However, I note that Lord Hope goes on to say at [51]: "As a general rule, the more serious the allegation of misconduct, the greater the need for particulars to explain the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty."

(3) In relation to the application under CPR 24.2 the well-known principle derived from *Royal Brompton Hospital HHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 that "… 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."

9. It is common ground between the parties that in light of the May Judgment, and the order made on that occasion, the burden is upon Mr Broomhead to satisfy the court that the Revised Claim is not bound to fail. This involves focussing on the Revised Claim without regard to extraneous evidence other than evidence that is helpful to explain the issues that are pleaded or put them in their proper context. On the other hand, if the court considers that either the whole or an element of the Revised Claim is not bound to fail, the onus is upon the Bank to satisfy the test under the first limb of CPR Part 24.2. Mr Broomhead does not rely upon the second limb. For that exercise, the court is entitled to have regard to the evidence when considering whether Mr Broomhead's claim, or any part of it has a real prospect of success. It is trite that the court must not conduct a mini-trial and if there is a conflict of evidence on a material point, the court must not make findings of favour in one direction or the other unless it is able to discount evidence as being wholly implausible or fanciful.

10. It is only necessary to add the following observations:

(1) The allegations made by Mr Broomhead are of the utmost seriousness. He alleges that persons employed by, or acting as agent for the Bank (such as the Bank's solicitors), acted with conscious and knowing dishonesty in the conduct of the First Claim in relation to evidence given and documents disclosed.

(2) Other than Mr Mosley, Mr Broomhead does not name any employee of the Bank, or any other person, who is said to have acted dishonestly.

(3) It is right to record that at the first hearing of the Bank's application, Mr Roe QC, who then appeared for Mr Broomhead, expressly disavowed any suggestion that Hannah Summerfield, who as in-house counsel for the Bank signed the Disclosure Statements in the First Claim, had acted dishonestly. Mr Doyle QC did not seek to resile from this concession.

(4) The manner in which a claim that alleges dishonesty or fraud must be pleaded is not in doubt and both parties relied upon the summary at [20] in the judgment of Flaux J (as he then was) in *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 3073 (Comm).

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether a plea of fraud is a proper one and whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether the facts are pleaded which would justify the plea of fraud. If the plea is justified, then the court must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. …".

(5) It is well understood that a party alleging dishonesty may not be able to plead a claim with every particular because it will be necessary for the claimant to rely upon disclosure to flesh out the claim. That said, the minimum requirements, as they are expressed in *Kekhman*, must be met and if the claimant fails to meet this threshold, the claim is likely to be struck out. If the claim does not plead facts which justify a plea of fraud, there will be no basis upon which the claimant is entitled to obtain disclosure because there will be no issue or issues between the parties which may respond in disclosure.

11. Mr Doyle QC placed a good deal of reliance upon a letter sent by Mr Broomhead's solicitors, Harrison Drury, on 7 July 2020 to the Bank's solicitors, Addleshaw Goddard. The letter makes seven requests for disclosure and for information. In summary they are (in the order set out in the letter):

(1) Communications between the Bank and Iron Mountain requesting the May 2004 back-up tapes and subsequent communications about the tapes having been lost.

(2) The Bank's internal records about the back-up tapes.

(3) Confirmation that the Bank have no back-up tapes other than those stored at Iron Mountain.

(4) Disclosure of the E-Flex system with metadata.

(5) Disclosure of the full RMP system.

(6) Clarification about why the CIN number on documents that have been disclosed is not consistent.

(7) Clarification about why the documents disclosed identify only one Loan Account Code.

12. The Bank declined to provide the disclosure and clarifications sought by Mr Broomhead. Mr Doyle QC submitted that this showed that the Bank had something to hide and that a negative inference should be drawn. He further submitted that when considering the applications, the court could have regard to the sort of information and documents that may be forthcoming if the claim is permitted to proceed. The

difficulty for Mr Broomhead, however, is that (a) the Bank has no obligation to assist him by providing an answer to the letter from Harrison Drury, so is no basis for drawing an adverse inference and (b) he is not able to say with any certainty that if the additional documents and information are obtained that they will further his claim.

13. The court was provided with a good deal of further evidence by both parties for the purposes of the hearing. Surprisingly, Mr Broomhead did not provide any evidence in support of the Revised Claim. Instead, he has chosen to respond to the Bank's evidence. I accept Ms Eborall's observation that the Bank was entitled to assume when considering the Revised Claim, and Mr Broomhead's application to pursue it, that he would only rely upon the evidence that was before the court on the last occasion. The point is an important one because the only basis upon which Mr Broomhead was permitted to serve the Revised Claim was that immediately before the hearing that led to the May Judgment he served a witness statement from Mr Wright containing evidence the court found to be, as it was put in the judgment, "troubling". But for that evidence the claim form would have been struck out with the particulars of claim. Mr Broomhead now relies on further evidence from Mr Wright that is responsive to the Bank's evidence and is thus tailored to meet it.

14. In the May Judgment I was critical of the evidence provided by the Bank – see [32(1)]. I pointed out that Mr Lowans, who as an external solicitor provided evidence on behalf of the Bank, had failed to comply with the requirements of PD 32 18.2(2) by referring to his source of information as being "the Bank". The definition included three entities and did not identify any natural person as his source. The Bank's evidence for the recent hearing is provided principally by Daniel Coelho who worked as Legal Counsel within the Litigation and Investigations team of NatWest Group plc between September 2019 and August 2020. He does not profess to have any first-hand knowledge of the conduct of the first claim. However, he indicates in clear terms the persons to whom he has spoken in relation to each topic he covers and the basis of their knowledge. I consider that the approach he has adopted complies with the requirements of the CPR. For the purposes of an interlocutory application, it is convenient for evidence to be gathered by one person in order to avoid a plethora of short statements form persons with first-hand knowledge of the relevant information. All the more so where the evidence is covering a historic period and/or involves numerous elements of a complex organisation such as the Bank.

15. The Bank relies in addition upon a witness statement form Gearoid O'Laoithe who is head of eDisclosure at the Bank. He deals with a discrete allegation made by Mr Broomhead arising from a statement made in the Disclosure Statement in the First Claim that no back-up tapes for May 2004 had been located. Again, it seems to me that the approach adopted to the production of this evidence adequately complies with the requirements of the CPR. Mr O'Laoithe names his sources of information where he is able to do so. Inevitably, evidence about the Bank's IT systems dating back 16 years involves a degree of conjecture.

16. Mr Doyle QC was critical of this evidence but for the reasons I have given I do not consider that such criticism is justified. By contrast, however, in Mr Wright's second statement he says on numerous occasions that he has discussed a particular point with former employees of the Bank without naming those to whom he has spoken. They are referred to on occasion as being 'the whistleblowers'. Although I understand that there may be former employees of the Bank who are able to provide evidence who

would prefer not to be named, the references to such persons in Mr Wright's statements give no clear indication who the persons may be and whether the information they provide is likely to be credible. I am unable place any weight upon evidence that derives from unattributed sources.

17. At paragraphs 15 to 17 Mr Wright also refers to an unidentified "current senior bank employee" having reached out to him following press coverage of Mr Broomhead's case. Mr Wright says he has been told by this individual that "a variety of relevant documents" are not authentic. The individual is willing to provide a witness statement but would like to do so anonymously. I am unable to place any weight on evidence of this nature.

18. In addition, Mr Broomhead relies on a witness statement made by Mr Anthony Stansfeld who is the elected Police and Crime Commissioner for Thames Valley. He is also the elected Association of Police and Crime Commissioners' national lead regarding fraud. Mr Stansfeld has no first-hand knowledge of either the First Claim or the Bank's files as they relate to Mr Broomhead other than having discussed the case with Mr Broomhead and Mr Wright. He says he is well placed to speak about:

> "… a large number of cases involving allegations of systemic, fraudulent conduct by a number of UK banks, including the Defendants in this case (RBS and NatWest), Lloyds and HBOS. These cases have involved significant document tampering, including the forging of customer signatures, the fabrication of evidence in relation to legal proceedings and the giving of false statements by bank employees and their solicitors in Court".

19. The tenor of his evidence can be seen from the following passage:

> "14. I understand from Mr Wright that the authenticity of the documents disclosed by the Defendants in this case is also disputed by current employees of the Defendants who have raised concerns at board level in RBS. I am told that the Defendants have, to date, refused to provide voluntary disclosure of the relevant systems that would prove conclusively the authenticity of such documents; I am not surprised by this approach however.
>
> 15. From my own experiences in office, and from the evidence which I have been privy to, I can say that the allegations made by Mr Broomhead, as supported by the evidence of Mr Wright, are consistent with other similar cases involving document fabrication and manipulation by banks.
>
> 16. The issues regarding the evidence in this case and the alleged endemic fabrication of documentary evidence at RBS are extremely serious and fit within a broader national context of UK banks fabricating evidence to win court cases against customers. The same context also applies at an international level where significant investigations in the US and Australia have made findings of a similar nature to those being highlighted here in the UK.
>
> 17. In my opinion, and having regard to my experience of similar circumstances, the Court should consider carefully the evidence relied upon

> by the Defendants in the trial and exercise great caution before forming a view as to Mr Broomhead's case. Consideration of the original documents (which I understand will need to be disclosed by the Defendants, though I am not clear why those documents have not been disclosed to date, particularly in relation to the trial of the original case) by the Court and by the parties would allow certainty. I understand that the Defendants have been asked to provide these voluntarily, but at the time I give this statement, have chosen not to do so. I find this concerning in the face of such serious allegations which would be easily addressed with this disclosure.
>
> 18. Mr Broomhead's allegations may appear, at least to the uninitiated, as speculative, if viewed through the traditional lens and perception that the banks have enjoyed as trustworthy, professional organisations where criminal activity and efforts to conceal criminal activities would simply not occur. From my experiences, Mr Broomhead's allegations are unremarkable. As a result of my own knowledge and experience I can confirm that the behaviour of the type described and complained of by Mr Broomhead in his case (and in the evidence of Mr Wright), does occur and has done so with the full knowledge and co-operation of senior executives within the relevant banks."

20. The matters of which Mr Stansfeld speaks are clearly very serious indeed and his exhortation to the court to consider the evidence carefully and to exercise great caution before forming a view is noted. However, the assistance provided by Mr Stansfeld's evidence is very limited because the court must decide the applications based upon the Revised Claim and the evidence in this case, and only this case. Mr Broomhead does not provide admissible similar fact evidence. Furthermore, it is worth observing that this case concerns the conduct of litigation and it is not in dispute that a great deal of documentary evidence was provided by the Bank. Indeed, the process of disclosure in the First Claim is a convenient starting point.

Disclosure

21. Disclosure in the First Claim was conducted under CPR rule 31 and the parties were required to give standard disclosure. CPR rule 31 and Practice Directions 31A and 31B do not require a disclosing party to give disclosure of every document in their control. This is made clear by CPR rule 31.7 and PD 31A. The disclosing party need only undertake a reasonable search for documents (this is repeated in PD31B para 1.2 and PD 31B para. 20 to 24) and CPR rule 31.7(2) sets out the factors that inform the scope of the search that is reasonable in each case. PD 31A para. 2 makes it clear the principle of proportionality applies and gives examples of how this may permit limitations on the scope of the search including not searching for documents that came into existence before a particular date or limiting the search to documents in a particular place or places. PD31B paras 20 to 24 also provide that limitations on a search may be reasonable.

22. CPR rule 31.10(6) requires the disclosing party to state the extent of the search that was made in the Disclosure Statement. This obligation is extended by PD31A para 4.2 which provides that the disclosure statement should:

> "(1) expressly state that the disclosing party believes the extent of the search to have been reasonable in all the circumstances, and
>
> (2) in setting out the extent of the search (see rule 31.10(6)) draw attention to any particular limitations on the extent of the search which were adopted for proportionality reasons and give the reasons why the limitations were adopted, e.g. the difficulty or expense that a search not subject to those limitations would have entailed or the marginal relevance of categories of documents omitted from the search."

23. The Disclosure Statement contained in form N265, that derives from PD 31A, does not match the breadth of the obligation under PD 31A para 4.2 and the form does not expressly require the disclosing party to explain why, for example, the search was limited to one platform maintained by the disclosing party.

24. PD31B refers to the Electronic Documents Questionnaire ("the EDQ") and provides that the parties may agree to use it. Paragraph 5 of the EDQ specifies that all databases must be identified. However, use of the EDQ is not mandatory.

25. There is very little evidence about the extent to which the solicitors acting in the First Claim engaged prior to the Case Management Conference as they are required to do under paragraphs 8 and 9 of PD 31B. It is common ground, however, that an agreement was reached about the scope of the search for documents and in particular for emails. Unsurprisingly, the Bank has had to resort to back-up tapes to search for emails in view of the dates when the cause of action came into being. It was agreed that the Bank did not need to search for hard copy documents dating prior to 1 January 2001 or prior to 1 April 2008 for electronic disclosure. Mr Doyle QC submits that agreement about the date range does not make an inference of dishonesty impossible although he accepted that the inference is more difficult in light of the date range being agreed by Mr Broomhead's solicitors. The disclosure statement records this limitation on the scope of searches, the limitation being qualified in relation to electronic documents by the proviso "except for the limited back-up tapes detailed below".

26. The disclosure statement provides at section B a detailed explanation of the approach to searches for email data and explains that emails were stored on the Enterprise Vault Journaling System ("Vault"). The statement says that the Bank retrieved all available email data from the Vault for each of the Custodians within the Date range. It goes on:

> "6. Prior to the introduction of the Vault, the Bank stored its emails on Back-Up Tapes. The Bank's Back-Up Tapes recorded a monthly "snapshot" of every individual's email account. The Bank's Back-Up Tapes are stored in an off-site facility operated by Iron Mountain and accessible only by a process of manually identifying a potential relevant Back-Up Tape and restoring its data. That is a time-consuming and labour-intensive process. Notwithstanding this, the Bank has attempted to restore the back-up tapes containing the emails belonging to Mr Mosley for the period April, May and June 2004. Whilst Iron Mountain was able to identify the relevant back-up tapes for Mr Mosley for the period April and June 2004, no back-up tapes were located for May 2004." [sic]

27. I mention here the evidence provided by Mr O'Laoithe. He explains the nature of back-up tapes and how an individual's email account can be restored. He points out

that if a user has permanently deleted an email before the back-up is taken of the exchange server the deleted email will not be available. He goes on to say:

> "11.3 … But otherwise, the back-up captures the deleted items still within the mailbox, draft emails, and received and sent items. Because a back-up point effectively takes a snapshot of a user's entire mailbox at a single point of time, a back-up for a particular month will contain all emails in the mailbox as at that date and stretching back in time to the earliest dated email – again, provided the user has not permanently deleted emails."

28. Mr O'Laoithe also explains in some detail that he has checked the exercise the Bank undertook in 2017 and the list of back-up tapes showing those that had been searched for and those that could be restored. It is clear from his analysis that when the disclosure statement came to be prepared from a 'Delivery Report' produced by the Bank's eDisclosure team an error was made. In fact, it was not correct to interpret a statement that "only April and June available" meant that there was a May back-up tape that was missing. All the relevant emails for the period from 1 April to 15 June 2004 were available including emails from May 2004. A further check has been carried out for the period 16 to 30 June 2004 and no additional documents for disclosure based upon the agreed criteria in the disclosure exercise were responsive. In short, what might have appeared to be a gap in the Bank's disclosure in the First Claim is not a gap at all.

29. Section C of the disclosure statement deals with "Other Electronic Data" and paragraphs 11 to 13 identify the Relationship Manager Platform ("RMP"). There is no mention in the disclosure statement of any other platforms such as E-Flex or REMIT.

30. It is common ground that the parties did not complete EDQs. Had they done so, the existence of all the platforms upon which data had been stored by the Bank, including E-Flex, should have emerged.

The Revised Claim

31. The Revised Claim was settled by Martin Budworth who is Mr Doyle QC's junior. Although it is a fresh version of the claim, there are elements which are recognisable from the version that was struck out. That is not of itself objectionable because the pleading has to be considered as a whole.

32. Before dealing with the principal paragraphs, I observe:

> (1) The summary of what is said to be Mr Mosley's case in paragraph 6 is not accurate. This is clear from (in particular) paragraph [86] of His Honour Judge Klein's judgment.
>
> (2) At paragraph 8 it is stated that "a few weeks before trial" (in fact 6 weeks) the Bank provided further disclosure that showed expiry dates for Mr Broomhead's facilities of March 2020, some 16 years after the promises that are relied upon. In fact, documents showing this date had been disclosed in November 2017 with the original disclosure. It is correct that additional documents bearing the date in March 2020 were disclosed in the final tranche of disclosure closer to trial.

(3) In paragraph 12, the claimant pleads that:

"… by reason of post-trial discoveries and revelations he will be able to show in this action that the Defendants were guilty of conscious dishonesty in the presentation and pursuit of the Defence and in any event at this stage the primary facts below make the inference of dishonesty more likely than one of innocence or negligence …".

This is consistent with the claim form and makes it clear that the case is based upon conscious dishonesty in the presentation and pursuit of the First Claim. In any event, if there was, as Mr Broomhead alleges in his evidence, manipulation of documents before 2015 when the first claim was issued, it would only be relevant if the manipulation was known to those who had conduct of the claim. It is not said, for example, that Mr Mosley was involved in any document manipulation or was aware of it.

33. It is necessary to take the principal paragraphs of the Revised Claim in turn and to review them looking first at whether they plead a claim that is not bound to fail and then, to the extent it is necessary, to consider whether the Bank has established that the claim has no real prospect of success. Particulars of Mr Broomhead's allegations are contained in paragraphs 14 to 28 over 13 pages and the case on causation is pleaded at paragraph 29.

Paragraph 14

34. Paragraph 14 is pleaded at a very high level of generality. It principally alleges that (a) the promises Mr Broomhead relies upon must have produced notes and other documents and (b) the decision to limit the disclosure date range to commence on 1 April 2004 was deliberate. Neither of these allegations assist Mr Broomhead. As to the first, there will only have been documents created if Mr Broomhead's case is right and, after an exhaustive analysis at the trial, his case was rejected. As to the second point, the date range for electronic disclosure was agreed to commence on 1 April 2008 (not 2004) with the search of back-up tapes for Mr Mosely's emails being the exception; the search in his case being limited to April to June 2004 and 1 April 2008 to 31 December 2009. The point that conversations between Mr Broomhead and Mr Mosley were alleged to have taken place in March 2004 was an obvious one but, nevertheless, the scope of searches was agreed by Mr Broomhead's legal advisers. There is no reason to believe that they were deceived. It seems to me their agreement to these date ranges makes it impossible for Mr Broomhead to allege dishonesty and, in any event, he has agreed that Ms Summerfield was not a party to any dishonesty.

Paragraph 15

35. Paragraph 15 concerns searches made of back-up tapes as part of the Bank's disclosure. The allegation is centred upon the statement in the Bank's Disclosure Statement that it had reconstituted back-up tapes for April and June 2004 but not May 2004, because the May 2004 back-up tape could not be located. The court is invited to draw the inference that the failure to locate the May 2004 back-up tape is suspicious and that the stated loss of the May 2004 back-up tape was false and was "… motivated by the Defendants' knowledge that the May tape contained or was likely to contain contemporaneous documentation supporting the Claimant's case."

36. The grounds upon which the inference of falsity and dishonesty can be based are:

> (1) The failure to locate the May 2004 tape is suspicious in light of the location of tapes the April and June tapes.
>
> (2) Iron Mountain, which stored back-up tapes have a highly effective professional document storage system.
>
> (3) It is said to be "virtually certain" the bank would have a disaster recovery plan in place which would include reliance on copy data held securely by a professional third party.

37. It seems to me that the primary facts pleaded by Mr Broomhead fall some way short of supporting an inference that it is more likely than not that persons in the Bank, or associated with it, who had conduct of the litigation acted dishonestly. They amount to little more than assertion that a lost back-up tape is suspicious. It follows that this element of the claim is bound to fail.

38. Furthermore, and turning to the Part 24 test, surprisingly, the Revised Claim has not been amended in light of the evidence that has been provided by Mr Coelho and Mr O'Laoithe which confirms that the Disclosure Statement was mistaken.

39. There is also a more fundamental point about the allegation in paragraph 15 which is based upon a misconception about back-up tapes. They record a snapshot of the email data on a particular date and are cumulative. In this case the June 2004 back-up tapes will, unless emails were permanently deleted, include emails for the preceding period. In any event, the Bank has provided evidence that it has run the search terms agreed over the dataset that derives from the May 2004 tape and no new documents have been located.

40. There is nothing in the point that Bank should have searched for emails for the period prior to 1 April 2004 for the reasons already given. There is no basis for inferring dishonesty based upon the Bank proposing this cut-off date.

Paragraph 16

41. Paragraph 16 concerns the E-Flex record keeping system maintained by the Bank. The existence of E-Flex first emerged from Mr Wright's witness statement served just before the hearing on 28 February 2020. It is common ground that it was not referred to in the Bank's disclosure statement or in communications between the parties prior to disclosure being provided. Mr Wright says in his first statement that E-Flex works in tandem with RMP "as the two primary electronic systems for Customer's Facilities and Accounts." He also describes E-Flex as being:

> "… a key tool for the relationship management team to communicate with the credit documents team".

42. The purpose of E-Flex, as it is described in the Revised Case, is to process and generate facility agreements, to record internal management information and to provide an electronic stamp of who did what within the Bank's computer system and the date and time of such actions. It is alleged that there must have been a reason not

to identify E-Flex and that the Bank was motivated not to do so by the knowledge that it contained, or was likely to contain, contemporaneous documentation supporting Mr Broomhead's claim. The claim points to the Bank's obligations under CPR rule 31 and, in particular, to the obligation under paragraph 9(1) of PD 31B to at least identify the system.

43. There is no evidence provided by the parties about the process of giving disclosure other than that the date parameters for searching and search terms were agreed. Neither party produced an EDQ nor pressed the other to do so. The failure to serve an EDQ was not, in itself, a breach of the Bank's obligations. However, the parties were under an obligation under PD31B to discuss the disclosure of Electronic Documents before the first case management conference and the categories of systems and devices in paragraph 9(1) is wide enough to include different operational and storage platforms. It is right as a starting point, therefore, and disregarding the Bank's evidence about E-Flex, to proceed on the basis that there was a failure by the Bank to reveal the existence of a platform that might have revealed relevant documents. That failure, however, does not of itself enable Mr Broomhead to say that it is more likely than not that the failure was intentional and dishonest. It is just as likely that the Bank did not consider the precise terms of CPR rule 31 and PD31A and PD31B or the approach was careless. If the case pleaded is taken in isolation it does not establish a factual basis for establishing that an inference of dishonest intention is more likely than negligence.

44. There is strictly no need to consider the evidence in light of that conclusion. There are differences between Mr Coelho and Mr Wright about the way in which E-Flex functions. Mr Coelho's evidence about E-Flex is based upon information provided to him by David Ventris who is the E-Flex programme manager. E-Flex is described as a platform that hosts a variety of web-based applications on the Bank's intranet. It is, using his analogy, like a smart phone that is not itself an application but rather hosts a series of applications. Mr Ventris says E-Flex is not a core bank system and all the applications on E-Flex are described as non-business critical. It uses a database known as Oracle for all applications hosted on the platform and this database provides an audit for E-Flex applications only. Mr Wright does not appear to disagree with Mr Coelho on this point. In any event, as I have said earlier in this judgment, I am unable to accept unattributed assertions in Mr Wright's second witness statement.

45. Mr Ventris' team have carried out a search of the 45 Core applications on E-Flex. Core applications are those that are used in support of Commercial and Business Banking. There are a further 28 applications that are not considered to be Core because they were built outside of Commercial and/or Business Banking and would not contain any information about Mr Broomhead. Mr Coelho has reviewed the search results of the 45 Core applications and he says that none of the documents contained in them are relevant to issues in the First Claim or issues in the Revised Claim. There is no reason to decline to accept Mr Coelho's evidence on this or any other point.

46. Mr Broomhead is unable to show that the allegation in paragraph 16 is not bound to fail and if it is considered from a Part 24 perspective, he has no real prospect of establishing it.

Paragraphs 17 – 19

47. Mr Doyle QC did not make any submissions about these paragraphs during the course of the hearing. They concern allegations of document manipulation that were considered in the May Judgment. It is clear they do not further Mr Broomhead's case because the pleading gives no indication of when the manipulation is alleged to have occurred. They do not enable Mr Broomhead to maintain a claim that the Bank acted in a consciously dishonest manner in connection with the First Claim.

Paragraph 20

48. This allegation relates to September 2009 which Mr Broomhead says is the time when RBS' Global Restructuring Group ("GRG") first imposed punitive interest rates. The allegation concerns what is described as an electronic fingerprint that is left in the RMP system whenever it is accessed. Mr Broomhead's case is that on both 14 and 16 September 2009 sixteen of the Bank's staff had access to RMP files. There is however no contemporaneous documentation to show that the individuals concerned had access to RMP on those dates. This is said to be evidence of a decision to suppress documents from the three day period.

49. There is an explanation for how it may be that 16 people are shown to have accessed RMP in the three day period given in Mr Coelho's witness statement. Mr Wright puts the explanation in issue. It seems to me, however, that even if Mr Wright is correct, the facts that are relied upon do not assist Mr Broomhead. His case in the Revised Claim is based upon the conduct of the First Claim. 2009 is six years before the First Claim was issued. No link is made between what is alleged to have occurred in 2009 with the period after issue of the claim. What may have happened in 2009 cannot be evidence of the conscious misconduct Mr Broomhead alleges.

Paragraph 21

50. Paragraph 21 provides what are said to be nine "further general anomalies which are more likely to be explained by deliberate manipulation of documents rather than accidental error". The paragraph clearly finds its origins in paragraph 11 of the particulars of claim that was struck out by the May 2020 order and follows a similar pattern of making a large number of unfocussed allegations.

51. At the hearing before me Mr Doyle QC did not make submissions about paragraphs 21(1)-(4), (7) and (9) and I do not address them.

52. Paragraph 21(5) contains a lengthy statement of facts much of which does nothing to further Mr Broomhead's case. In addition, it refers to an electronic database held by RBS named REMIT that was maintained by the GRG for the purposes of dealing with its investment company, West Register. The complaint is that REMIT was not revealed by the Bank in the First Claim and, further, that no documents were disclosed from it. REMIT is said to be located within the shared drive in the GRG Real Estate Database. Mr Broomhead alleges that:

> "… the Defendants concealed the existence of REMIT, as it would reveal that the Defendants intended to try to force him into agreeing to a PPA by keeping his accounts in default by not renewing the facilities, seeking large capital

> repayments and by charging penalty interest and management charges ie the motivation to acquire the property prevailed over the bank continuing to act in accordance with the Mosley promises/collateral contract."

53. It is accepted by the Bank that the existence of REMIT was not disclosed as part of the process of disclosure in the First Claim. Unlike E-Flex, it seems to me that no real criticism can be made about this failure given that documents filed on REMIT were most unlikely to be material to the claim. Nevertheless, the existence of REMIT should have been disclosed and, if the Bank considered it was not proportionate to search it, an explanation the basis for this decision provided in the disclosure statement. As with the failure to disclose E-Flex, there is no basis for inferring it more likely than not that the failure was dishonest rather than negligent.

54. Mr Coelho has provided evidence that the REMIT database has been searched using the same search terms that were agreed between the parties for disclosure in the First Claim and that no documents that are relevant to the issues in that claim were identified as a result. Mr Doyle QC submits that the Bank cannot rely on that unchallenged evidence. It seems to me that even in the context of the very serious allegations made by Mr Broomhead the court is entitled to accept Mr Coelho's evidence given that what he says is credible. The process of giving disclosure operates on the basis that the disclosing party undertakes the exercise honestly and it is only if the other party is able to provide a basis for challenge an assertion made by the disclosing party that the court may intervene. It follows that even if this paragraph were to survive the initial strike out test, it does not make out a case with a real prospect of success.

55. Paragraph 21(6) does not relate to an allegation made by Mr Broomhead in the First Claim. It concerns the date from the GRG took over his accounts. Mr Broomhead alleges that the GRG had identified a way of profiting from his business as early as 3 June 2009 which was a month before the first time he met with representatives from the GRG on 1 July 2009. That was meant to be a meeting to establish a means by which the business could be turned around. The paragraph concludes with the assertion that the Bank had a collateral motive for moving his business into the GRG and combined with an inconsistency about the date when the GRG was first involved:

> "… makes it inherently more likely that the Defendants would be motivated to ensure that disclosure was managed so as to ensure that documents supporting the Claimant's case were either not disclosed or were manipulated by redaction or alteration."

56. Such an allegation does not provide facts that are more likely than not to establish conscious dishonesty in the way the First Claim was conducted.

57. Paragraph 21(8) concerns the "CIN" – the Customer Identification Number. Mr Broomhead alleges that all documents obtained from the RMP would bear the CIN whereas some documents disclosed by the Bank either do not contain a CIN or does so, but it is one that does not match the CIN on other documents. He relies upon evidence of Mr Wright in his first statement where at [35]-[36] he gives an example of how CINs work and says that contradictory CINs cannot occur because the CIN is 'pulled through' the system. The Revised Claim concludes paragraph 21(8) by saying:

> "Manipulation of the documents is the only apparent explanation for this anomaly."

58. Mr Coelho provides an explanation for there being duplicated CINs based upon information from a named employee of the Bank who has reviewed historic RMP records. The explanation is that the numbers do not duplicate. One is the RMP ID number and the other the CIN and therefore both identify with Mr Broomhead.

59. Mr Broomhead's third statement suggests, based upon documents obtained following a Data Subject Access Request made by him, that there is a third number ending 7045. The explanation for that is simple. It is indeed a separate CIN. It identifies Mr Broomhead personally rather than his businesses.

60. The allegation of conscious manipulation might just be sustainable on the pleaded case and not capable of being struck out. However, in light of the Bank's evidence it is an allegation that has no real prospect of success.

61. At paragraph 23 Mr Broomhead refers to the last tranche of disclosure provided by the Bank before the trial. In fact, the Bank had previously given disclosure of documents that showed the expiry of the loan as being March 2020. At the trial Mr Mosley was cross-examined about the March 2020 expiry date and His Honour Judge Klein held that he was satisfied with the explanation given by him. His evidence was accepted. Mr Broomhead relies upon Mr Wright's evidence to the effect that it would have been impossible for bank staff to have missed the error. That view was not accepted by the trial judge and Mr Broomhead is unable to show that this allegation is not bound to fail. A similar point can be made about paragraph 28 of the Revised Claim.

62. Paragraphs 24 to 27 of the Revised Claim were not dealt with by Mr Doyle QC.

63. Paragraph 29 of the Revised Claim attempts to satisfy the test for materiality as it is put in *RBS v Highland Financial Partners LP*:

> "'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was."

64. Mr Broomhead sets out six particulars of materiality, although they are put at a very high level of abstraction. The evidence provided to His Honour Judge Klein was considered with great care and in detail in his judgment. He had before him evidence in the form of documents showing a 2020 loan expiry date that was contrary to the Bank's case and the documents were considered carefully alongside the oral evidence. Mr Mosley's evidence was preferred to the evidence given by Mr Broomhead. The fresh evidence Mr Broomhead now seeks to rely upon would have to have been of sufficient weight to entirely change the way in which His Honour Judge Klein approached the case and to have led him to reject Mr Mosley's explanation and have

accepted Mr Broomhead's evidence. The enormity of the task facing Mr Broomhead cannot be underestimated.

65. Mr Broomhead's case on materiality depends upon there being material documents that have been suppressed and a court accepting everything Mr Wright has said. It ignores the fact that the Bank's case was not without its difficulties and some of the documents that were before the court were helpful to Mr Broomhead.

66. Even though each case turns on its own facts, it is worth reflecting that in *Takhar* the new evidence the claimant had uncovered was that her signature had been forged. There was handwriting evidence that supported her case. It was therefore clear that the issue about whether she had signed the relevant agreement considered at the trial would be viewed in an entirely different light. In contrast, Mr Broomhead asks the court to assume that there will be additional documents that are favourable to him. He has been unable to establish it is more likely than not that E-Flex or REMIT or a back-up tape, that is not in fact missing, would produce any further documents let alone documents that would transform his case.

67. Additionally, Mr Broomhead has also not been able or willing to identify which persons or classes of persons with conduct of the First Claim suppressed documents, manipulated documents or put forward documents they knew had been manipulated. It is clear from paragraph 30, in which he seeks to rely on what is said to be similar fact evidence, that he will rely on evidence of document manipulation being rife in the Bank. This is some distance however from mounting a credible case that manipulation and suppression of documents took place during the conduct of his claim and that it was adopted by the Bank's legal teams, or that the fresh evidence Mr Broomhead wishes to rely upon would have entirely changed the way in which His Honour Judge Klein approached the case.

68. I have considered each of the material elements of the Revised Claim in turn and expressed my conclusions about them. It is sometimes the case that stepping back from the detail and looking at a case in the round might lead to a different conclusion. That is not the case here.

Conclusion

69. I conclude that Mr Broomhead should not be given permission to amend to enable him to bring the Revised Claim because (a) he is unable to show that any element of it is not bound to fail and (b) even if that is wrong, when regard is had to the evidence, the Bank has established on the balance of probabilities that the Revised Claim has no real prospect of success.