Neutral Citation Number: [2018] EWHC 3188 (Comm)

Case No: CL-2017-000727

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 30/11/2018

Before :

MR. JUSTICE TEARE

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Between :

David James Coulter Cunningham	**Claimant**
- and -	
Lawrence Charles Alexander Ellis	**Defendants**
Douglas Ronald Graham	
Giles Francis John Penn	
Bank of Scotland PLC	
Ernst & Young	

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The Claimant represented himself
William Buck and David Gregory (instructed by **Schofield Sweeney LLP**) for the **First to Third Defendants**
Ian Wilson QC (instructed by **DLA Piper LLP**) for the **Fourth Defendants**
James Brocklebank QC and Ralph Morley (instructed by **Orrick Herrington & Sutcliffe LLP)** for the **Fifth Defendant**

Hearing dates: 15 and 16 October, 8 November 2018

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Judgment Approved

Mr. Justice Teare :

INTRODUCTION

1. In April 2009 Allerton Group Limited ("AGL"), the holding company of a group involved in steel fabrication and the manufacture of bridges, went into administration and in June 2009 the business and assets of AGL were sold. The Claimant was the majority shareholder and feels very aggrieved by the events which led to that sale. He has commenced proceedings against the First to Third Defendants (three former directors of AGL), the Fourth Defendant (AGL's bank) and the Fifth Defendant (an accountant instructed to prepare an Independent Business Review of AGL (an "IBR")). In these proceedings he seeks to recover the loss he says he suffered as a shareholder and, by way of an assignment to him of AGL's claim, the loss suffered by AGL. The total sum claimed is some £20 million plus some £18 million in respect of interest.

2. All the Defendants seek an order striking out the claims which have been brought against them; alternatively, they seek summary judgment.

3. The Claimant has alleged not only that the Defendants breached duties owed to AGL and/or himself but also that there was an unlawful conspiracy to injure him and that there have been fraudulent misrepresentations.

4. The matters giving rise to this claim took place in the first part of 2009. Since that time, the Claimant has pursued numerous avenues of complaint, before the police, UK regulatory authorities and the Isle of Man Courts.

5. The Claimant, who is aged 73, represented himself before me as a litigant in person, assisted by a Mackenzie friend. He described himself in his skeleton argument as impecunious. He prepared his oral submissions with care and made them clearly and firmly. When asked questions by the court his replies were realistic but, at the same time, he made clear, calmly and politely, that he maintained his case.

THE PARTIES

6. Long before the events giving rise to the present case the Claimant had qualified as an accountant in Scotland and then as an advocate at the Scottish Bar. He told me that he had had a career in business and finance. At the relevant times, the Claimant was the majority shareholder in AGL. He held these shares in the name of 'Glencairn & Co', an Isle of Man trading name with no independent legal identity. He is now retired, and resident in the Isle of Man.

7. On 3 September 2007, AGL acquired 100% of the share capital in Allerton Industries Limited ("AIL") (of which the First Defendant had previously been the majority shareholder). It thereby became the parent company of AIL's two subsidiaries: Allerton Engineering Limited ("AEL"), a steel fabrication business, and Allerton Bridges Limited ("ABL"), a bridge manufacturing company. Collectively, I shall refer to AGL, AIL, AEL and ABL as the "Allerton Group".

8. Glencairn & Co acted as Company Secretary to the companies in the Allerton Group. The Claimant was disqualified from acting as a company director in England and Wales, and concern was expressed by the company's auditors that the Claimant may have been acting as a shadow director, which would have been illegal.

9. The First to Third Defendants were Directors of AGL at various times. The Chairman of AGL was Mr Richard Kilner, who is not a party to these proceedings. Mr Kilner and the Second Defendant (via an Isle of Man company, Colorado Holdings Limited) were minority shareholders in AGL.

10. The Fourth Defendant ("the Bank") provided banking services to the Allerton Group under contracts with AGL and AEL. These included in particular: *(i)* a £3.3m term loan facility to AGL; *(ii)* a working capital overdraft facility of £100,000 to AGL; *(iii)* a confidential invoice discounting facility (the "CID facility") to AEL. Under the CID facility, the Bank released funds to AEL against invoices issued by AEL (prior to payment of those invoices by the debtors). Under the terms of the CID facility, the Bank would generally pay 85% of the value of each invoiced debt. The facility included a cap on the Bank's advance in respect of certain debtors, and provided that no advance would be made in respect of invoices to other Allerton Group companies.

11. The Fifth Defendant ("EY") was instructed by the Bank and the directors of the Allerton Group companies, in February 2009, to perform an Independent Business Review ("IBR") of the Group.

12. The scope of the IBR was set out in Appendix 3 to EY's Engagement Letter as follows: *(i)* 'Analyse and comment on the short term cash flow to May 2009'; *(ii)* 'Comment on the Group's recent trading and cash flow performance for the 13 months ended 31 January 2009'; *(iii)* 'Analyse and comment on the Group's balance sheet position as at 31 January 2009'; *(iv)* 'Comment on the Group's trading and cash flow forecasts for the year ending 31 December 2009'; *(iv)* 'Provide options and recommendations for BoS and the Group based on our work and analysis'.

EVENTS GIVING RISE TO THE CLAIMS

13. The background to the present claims is the financial position of the Allerton Group at the start of 2009. There was substantial disagreement on some matters but some undisputed facts can be taken from the Allerton Group's accounts and other contemporaneous documents. In 2008 the combined turnover of the Group was £8.8m, but it made a combined net loss of £170,000. By the end of 2008 it was in arrears as to corporation tax, and PAYE. The Group was owed £331,000 under a loan made to the Claimant, via Glencairn & Co.

14. On 6 February 2009 (following a meeting with the Directors and Mr. Cunningham on 3 February 2009) the Bank gave formal notice to AGL's Directors that it considered that AGL was in breach of financial covenants in its contracts with the Bank. It noted that it had the right to withdraw its support of the Group. The Claimant did not accept that there had been a breach but there can be no doubt that the Bank made its views known in what the Claimant accepted was a "straightforward letter."

15. On 11 February 2009 the Board and the Claimant discussed the Group's position.

16. The IBR was commissioned on 18 February 2009. The IBR was issued in draft in March 2009, and in its final form on 3 April 2009. The report concluded that the group needed between £500,000 and £1m in additional short-term funding; that it was 'currently experiencing extreme creditor pressure'; that the Group's forecast of £1.935m of pre-tax profit in 2009 was 'optimistic… based on assumptions which lack

detail and are not supported by recent or historical trends'; and that the Group was 'clearly insolvent' and therefore 'the Directors are at risk of wrongful trading'.

17. In a report dated 5 March 2009[1] in respect of the year ended 31 December 2007 Deloitte expressed concern as to the role of the Claimant in the company given that he had been disqualified from acting as a director.

18. By letter dated 18 March 2009 to AGL and the Claimant the Third Defendant expressed his concern that the further investment thought to be available (less than recommended by EY) would be lost and might expose the Directors to legal action in circumstances where insolvency was "unavoidable".

19. At a meeting on 26 March 2009 at EY's Leeds offices, AGL instructed EY to assist in the sale of the Allerton Group's business and assets under an Accelerated Disposal Process ("ADA"). The terms of this engagement are set out in an Engagement Letter sent by EY dated 27 March 2009.

20. The meeting on 26 March 2009 was recorded by EY in a contemporaneous file note. The Claimant told me that the file note was not accurate but he accepted that any errors were not "deliberate". He said there was no discussion of the short term cash position but the file note expressly recorded that that was discussed. He said that some matters were missing from the file note, in particular, a "tirade" by the First Defendant against himself. But the file note refers on several occasions to matters on which the First Defendant and the Claimant disagreed. He also said that Mr. Kelly of EY threatened not to pay wages and salaries. But the file note records Mr. Kelly as stating that the Directors must consider carefully whether the Group was solvent and could pay its debts as they fell due. Although there may be disputes between the Claimant and EY as to what was said or not said at the meeting on 26 March 2009 it is clear that those present decided that a sale of AGL's business and assets was required. EY's letter setting out the terms of its engagement recorded as follows:

> "We have been retained by the Group, to assist in the sale of the share capital or business and assets of AGL and its subsidiaries (the Group). The Group is currently suffering a cash crisis and requires an urgent equity injection which is being pursued by the Directors/Shareholders. Given the current financial position of the Group and urgency of the situation, the Directors have also instructed us to pursue a sale of the Group's share capital or business and assets."

21. The Third Defendant (Mr Penn) registered an interest as a prospective purchaser around 27 March 2009. Since he was a Director within the Group, EY referred him to Sterling Corporate Finance LLP ("Sterling") for independent advice.

22. On 1 April 2009 there was a board meeting of AGL and its subsidiaries during which Glencairn & Co resigned as Company Secretary. The Claimant informed the Directors that he had spoken to possible investors and was looking for an investment of about

[1] I am told that this may only be the date on which the report was internally printed, so its external date may have been earlier.

£1 million. That and other solutions (including administration) were discussed and then the Claimant left the meeting.

23. On 2 April 2009 after a further board meeting the Directors resolved to file a notice of intention to appoint administrators in respect of all the Allerton Group companies. By email dated 3 April 2009, the Claimant (as Glencairn & Co) expressed an interest as a prospective purchaser.

24. On 8 April 2009, the First to Third Defendants presented an offer to purchase the business and assets of the Allerton Group to EY (as the intended administrators of the Group).

25. On 9 April 2009, Mr Robert Hunter Kelly and Mr Jonathan Sumpton of EY were appointed joint administrators of the Allerton Group companies. The Claimant challenged the validity of that appointment in unsuccessful proceedings in May 2009. The joint administrators openly marketed the business; it was sold to a third party (unconnected with the First to Third Defendants) on 2 June 2009.

26. The administration of AGL and its subsidiaries came to an end on 29 September 2011. AGL was dissolved on 7 January 2012.

PROCEDURAL HISTORY

27. The Claimant first complained about the events leading up to AGL's entry into administration almost immediately after those events. Thus on 24 April 2009 he complained to the administrators that there had been fraudulent deception by the Directors, that the administrators had been unlawfully appointed and that the Directors were "attempting clandestinely a management buy-out". He has pursued his complaints by various routes consistently since that time.

28. On 1 September 2009 the Claimant made a statement to the North Yorkshire Police alleging that the First and Second Defendants were party to a criminal conspiracy to defraud him and/or the Allerton Group.

29. In late October 2010, the Claimant complained to the Financial Services Authority.

30. On 31 May 2011, the Claimant prepared a lengthy draft witness statement setting out his position on the events set out above, alleging a fraudulent conspiracy on the part of the First to Fourth Defendants to create a 'pre-pack' administration of AGL. This statement was sent to the joint administrators on 13 June 2011.

31. On 18 November 2011, a Deed of Assignment was entered into between AGL as assignor and the Claimant as assignee[2]. Under that agreement, AGL assigned to the Claimant 'all and any claims, rights of action and demands against, and all other choses in actions and rights whether lying in contract, tort or for breach of any duty owed to the Assignor by its (i) former Directors, Lawrence Charles Alexander Ellis, Douglas Ronald Graham, Giles Francis John Penn and John Edward Riddle (ii) its former bank, Bank of Scotland PLC and (iii) it *[sic.]* former accountants Ernest *[sic.]* & Young (the "Defendants"), as are now vested in the Assignor, in relation to a claim

[2] This assignment was, I am told, to the Claimant and Mr. Kilner. The latter subsequently assigned his share of the claims to the Claimant on 6 March 2015.

for breach of duty arising from a conspiracy to a pre-pack administration of the Assignor and sale to a corporate vehicle instigated by Sterling Corporate Finance LLP involving the Defendants prior to the date hereof […]'.

32. On 28 July 2013, the Claimant sent a complaint concerning certain of these matters to the Insolvency Service. On 6 September 2013, the Claimant complained to the Institute of Chartered Accountants of Scotland ("ICAS"). There followed protracted correspondence with ICAS, including fresh complaints made by the Claimant.

33. On 22 September 2015 the Claimant filed a claim in the High Court of the Isle of Man against the First to Fourth Defendants. That claim was dismissed by Deemster Corlett, on jurisdictional grounds, on 27 January 2017. The Deemster held that England was the most appropriate forum for the claims in those proceedings.

34. The present proceedings were issued in the Liverpool County Court on 22 August 2017. On 12 January 2018 they were transferred to the High Court.

THE APPLICATION TO STRIKE OUT

35. The Claimant advances his claims in two capacities. First, he claims as assignee of AGL under the 18 November 2011 Deed of Assignment. Secondly, he claims 'shareholder losses' for the diminution in the value of his shareholding in the Allerton Group companies.

36. The Defendants seek to strike out the claims for conspiracy and fraudulent misrepresentation on the grounds that they have been inadequately pleaded. They also seek to strike out the claims on limitation grounds.

37. I shall first consider the adequacy of the pleadings in the context of the conspiracy and fraudulent misrepresentation claims.

38. Unfortunately the Claimant is not legally represented. However, he has had legal assistance in the past, and his Particulars of Claim in this court are modelled on the Particulars of Claim settled by a Manx advocate in the proceedings before the High Court in the Isle of Man. Notwithstanding the provenance of the Particulars of Claim, considerable effort is required to understand what is relied upon by way of particulars of the very serious charges made by the Claimant against the Defendants. That is because the structure of the Particulars is to set out in chronological form the facts relied upon (itself a helpful approach) but then, when pleading allegations of conspiracy and fraudulent misrepresentation, to say that such matters are to be inferred from "the acts set out above". That is unhelpful where the "acts set out above" are pleaded between paragraphs 20 and 105.

39. Fortunately, counsel for the Fifth Defendant ("EY") have carefully analysed the Particulars of Claim and the further information provided by the Claimant and have summarised the allegations in a manner which the Claimant accepted, when asked by the court, was a "fair summary of his position". He also gives a similar list in his Skeleton Argument at paragraph 5.

40. Counsel's summary of the case advanced against EY is to the following effect. The Claimant alleges that the Defendants conspired to render AGL insolvent so that, as it

is put in paragraph 30 of the Particulars of Claim, the First, Second and Third Defendants ("the Directors") could purchase AGL's business for themselves at an artificially deflated value. The conspiracy manifested itself in six ways. First, the Third Defendant starved AGL of cash by not reporting to the Bank all of the invoices raised by AEL between January and March 2009 so that the Bank did not make advances under the CID facility in relation to those invoices. Second, the Bank fraudulently withheld cash due to AEL under the CID facility between 8 March and 9 April 2009. Third, EY did not mention either the under-invoicing or the CID retention in its IBR; such failure was a fraudulent misrepresentation. Fourth, the referral of the Directors by EY to Sterling was deliberately kept secret as was the offer by the Directors to purchase the assets and business of AGL. Fifth, the board minutes of 2 April 2009 authorising the appointment of two partners of EY as administrators were fraudulent. Sixth, EY rejected AGL's forecasts and did not discuss them with the Claimant. By "ignoring" the forecasts EY "intentionally deceived" AGL. Similar allegations were made in respect of AGL's order book. (The fifth and sixth matters are not pleaded in the Particulars of Claim but are mentioned in the Further Information supplied by the Claimant in response to a request from the Fifth Defendant.)

41. The Claimant's pleading was said to be defective in essentially two respects. First, the allegation of fraudulent misrepresentation, which is relied upon both as a cause of action and as the unlawful means by which the Defendants conspired to injure the Claimant, was defective because facts from which dishonesty could be inferred were not pleaded. Second, the allegation of a conspiracy was defective because sufficient facts enabling the conspiracy to be inferred were not pleaded.

42. Before considering the adequacy of the pleading it is necessary to note what the law requires in this regard. In *Portland Stone Firms Limited and others v Barclays Bank and others* [2018] EWHC 2341 (QB) Stuart-Smith J. referred, at paragraph 26, to "many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty". Also, at paragraph 29, he said that where an allegation of fraud or deceit rests upon the drawing of inferences about a defendant's state of mind from other facts "those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends." Stuart-Smith J. endorsed and adopted the following passage from the judgment of Flaux J. in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at paragraph 20:

> "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."

43. In applying those principles it is nevertheless appropriate to have in mind a "generous approach to pleadings" because if the underlying allegation of fraud is true the defendant will "have tried to shroud his conduct in secrecy"; see *Portland Stone* at paragraph 27 per Stuart-Smith J.

44. With those principles in mind I turn to the case pleaded against the Defendants.

45. The case pleaded against the Directors is at paragraphs 106-113 of the Particulars of Claim. Paragraph 106 pleads that what follows can be inferred from "the acts set out above". Paragraph 107 alleges a "combination or agreement between the Defendants to perform such acts with the sole or predominant purpose of injuring AGL and/or the Claimant and/or RJ Kilner [the Chairman of the board of AGL] and dishonest assistance in, or procuring of, the disposal of any asset of AGL in breach of fiduciary duty." Paragraph 108 alleges "false representations (including active concealment of material facts), knowing such representations were false."

46. As with the claims against the Directors the claims against the Bank and EY are described towards the end of the pleading, after the chronological account of the material events. Thus the claim against the Bank is pleaded at paragraphs 114-118 (false representations, breach of fiduciary duty and conspiracy to defraud) and the claim against EY is pleaded at paragraphs 119-123 (false representations, breach of fiduciary duty and conspiracy to defraud).

47. When one refers to "the acts set out above" one finds in paragraph 28 the following:

> "It has since the events of January-April 2009, transpired that the Fourth Defendant colluded with the First, Second, Third and Fifth Defendant to create a deliberately manufactured insolvency to cause an administration whereby the First, Second and Third Defendant would purchase at a "knockdown" price the business of AGL from the Fifth Defendant (as administrators) with finance from the Fourth Defendant."

48. The events of January to April 2009 are then described between paragraphs 30 and 90.

49. Paragraphs 31-33 concern the appointment of the Second and Third Defendants as directors of AGL on 29 January 2009 and plead that the next day a customer of AGL was informed that AGL was to go into receivership and that a management buy-out headed by the First Defendant would take place.

50. The Claimant told me that this was the start of the conspiracy. The Directors "were part of a cabal and took control of the Board – that is sufficient to show dishonesty." However, the events described are, at best, equivocal. Indeed in circumstances where the Group had made a loss in 2008 and was in arrears with its payment of tax the events described are unsurprising and do not justify an inference of improper conduct.

51. Paragraphs 34-35 concern an alleged fraudulent "under-invoicing" of the turnover of AEL by the Third Defendant, the finance director. The Claimant relies heavily on this and so it is necessary to understand the allegation. Paragraph 34 refers to the Claimant's file note of 18 November 2016 which explains how the under invoicing of £390,778 has been calculated. That figure is the difference between the figure for invoiced sales in the management accounts for January 2009 of £751,387 (to which has been added VAT at 17.5% of £131,493 making a total of £882,880) and the value of invoices (less credit notes) in the "debtors ledger" prepared by Lloyds TSB for that month in the sum of £492,102. The allegation in the file note is that "these sums" (presumably the figure for invoiced sales) should have been put into the CID system (presumably by the Third Defendant). There are difficulties with the reliability of

these figures. The figure for invoiced sales included, so I was told, inter-company invoices which were not relevant to the CID system. The figure for VAT was wrong because VAT was at 15% and inter-company invoices would not attract VAT. (The Claimant accepted that the rate of VAT was in error but said that that error made only a modest difference.) Again, since inter-company transactions were not relevant to the CID system it does not follow that, because the invoices in the ledger are less than the invoiced sales, there has been under-invoicing. The Claimant stressed that his calculations were the best that he could do. But apart from the VAT rate point he offered no answer to the other difficulties. In the result I considered that the under-invoicing complaint carried no degree of conviction and therefore was not a complaint with any real prospect of success. However, when considering the adequacy of the pleading I must assume that the primary facts alleged are true. Although it is not entirely clear (and the Claimant had difficulty in explaining or identifying the document in which the Third Defendant "under invoiced" the turnover of AEL) my understanding of the allegation, when read with the file note referred to in the pleading, is that the Third Defendant "put into the CID system" a lesser figure for the invoiced sales of AEL than the invoiced sales in the management accounts in respect of the period January – March 2009.

52. It is alleged that the Third Defendant did so "deliberately and fraudulently" to "significantly restrict the cash flow of AGL"; see paragraph 35, and also paragraph 51. This is an allegation which requires to be particularised by pleading those facts from which such a fraudulent state of mind can be inferred. I do not understand that any such facts have been expressly pleaded in support of the allegation. When I asked Mr. Cunningham about this, I understood his answer to be that the inference of fraud was one which could be drawn from the facts of the case as a whole: "overall the events point to dishonesty". I shall therefore defer considering whether this allegation has been properly pleaded until I have reviewed all of the matters relied upon by him.

53. At paragraph 50 it is alleged that the Bank "had illegally retained CID monies from 8 March to 26 March 2009 in the sum of £914,995 from AEL." Similarly, at paragraph 64 it is alleged that between 8 March 2009 and 9 April 2009 the Bank "deliberately starved AGL of its CID cash flow in the sum of £1,114,938". Particulars of how those figures are reached are set out in a file note of the Claimant dated 3 January 2014 which is referred to in paragraph 66. At paragraph 67 the Claimant avers that this was done "to bring AGL down quickly so that the fraudulent plans of the Defendants could be implemented." Again, there are difficulties with the Claimant's assessment of these figures. First, they assume that the figures in the sales ledger for a particular month and the amounts drawn down in that month under the CID system relate to the same transactions. They may not do so. Second, the figures take no account of the circumstance that under the CID system the amount advanced by the Bank is 85% of the invoice and, in the case of a number of invoices relating to a particular customer, may be much less. Third, the calculations done by the Claimant in his file note dated 3 January 2014 show that between 15 and 21 March, between 29 and 31 March and between 1 and 7 April, the Bank paid more than was due. This does not appear to be consistent with an intention to starve AGL of cash and may indicate that the figures in the sales ledgers for a particular period and the amounts drawn down for the same period do not relate to the same transactions. So again, as with the allegation of under-invoicing, I consider that the allegation carries no conviction and that there is no real prospect that the allegation will be proved. But, as with the criticisms of the "under-

invoicing", I shall, when considering the adequacy of the pleading, assume the truth of the allegation that the Bank retained monies which should have been paid over pursuant to the CID system.

54. As to the allegation that that was done deliberately to further a fraudulent plan to bring down AGL the Claimant relies, as I understood his submission to me, upon an inference to be drawn from the facts as a whole. I shall therefore defer consideration of this question until I have reviewed all of the matters relied upon by him.

55. The Claimant has alleged in the paragraphs to which I have referred that the Third Defendant's unlawful invoicing was done "with the knowledge of the First and Second Defendant" (see paragraph 51) and that the Bank's withholding of CID cash was done "with the collusion and knowledge" of the Directors (see paragraph 64). Again, no particulars of the alleged knowledge or collusion are stated and I infer that the Claimant relies upon an inference to be drawn from the facts as a whole. The Claimant made much of a note in his diary for 5 October 2012 in which he recorded having been advised on the telephone by Mr. Sillett of the FSA "that he had evidence of collusion between the 3 directors and the Bank." What that evidence is I was not told. In any event, having "evidence" is not the same as being able to plead a fact or facts from which collusion can be inferred.

56. With regard to EY the allegation is made that EY ought to have referred to the under-invoicing and to the withholding of CID monies in the IBR; see paragraphs 50 and 51. As a result of the failure to do so, the IBR was a "dishonest document"; see paragraph 53. In paragraph 64 it is alleged that the starving of AGL of cash by the Bank was done with "the collusion and knowledge" of EY. Again, there is no pleading of the particular matters relied upon in this regard. When I asked the Claimant about this he again referred to the inferences to be drawn from the facts as a whole.

57. The final manifestation of the alleged conspiracy (at least in the Particulars of Claim) is the allegedly "secret" introduction of Sterling by EY to the Directors so that they could purchase the business of AGL; see paragraph 53. It is further alleged that EY should have been aware that it was "supporting an illegal transaction"; see paragraph 54. It is said that the Directors failed to advise AGL of "this conflict of interest and/or interest in a proposed transaction as they were obliged to do under common and/or statute law"; see paragraphs 55 and 56.

58. The Directors then made an offer to purchase the business of AGL on 8 April 2009; see paragraph 77. That allegation is not denied but it is difficult to describe the offer as secret. It is accepted that Mr. Kilner was aware of it by 13 April 2009 and appeared to be supportive of it. The Claimant also accepted that he became aware of the offer later that month. His letter dated 16 April 2009 shows that he was aware of it by that date at the latest. He emphasised in his oral submissions that he did not know that the offer was a "pre-administration" offer. The significance of this was not explained. The offer itself was addressed to the administrators though it was dated 7 April 2009, a day or two before which the administrators were in fact appointed.

59. It is of some significance that nothing came of this offer. The business of AGL was sold by EY (or rather the two partners acting as administrators) to another purchaser on 2 June 2009. There is no pleaded explanation as to why, if the Bank and EY were acting in an unlawful conspiracy with the Directors to procure the sale of the business

to them, that was not achieved. (I note however that in his statement dated 31 May 2011 the Claimant attributes this to the fact that he "rumbled" the pre-pack plan and so the Bank had instructed EY that the offer could not be accepted. No such instruction has been pleaded and the Claimant has, in resisting the limitation defence, suggested that he only discovered the fraud much later.)

60. The allegation with regard to board minutes (in the Further Information) is that the minutes of the meeting dated 2 April 2009 were fraudulent in that they were signed by Mr. Beales, the managing director, rather than by Mr. Kilner, the chairman. However, these are Mr. Beales' notes of the meeting. They are not fraudulent. There are, however, formal minutes which record the board's intention to appoint administrators but which were signed by the First Defendant as "chairman". The Claimant complained of this in his oral submissions because the First Defendant was not the chairman. However, it is to be noted that Mr. Beales' note of the 1 April 2009 board meeting recorded that Mr. Kilner "had no problem in resigning the chairmanship" and the Claimant, in his witness statement dated 31 May 2011, said that the First Defendant "had presented himself as the self-appointed chairman with documents already drafted as "Lawrence Ellis, Chairman" in the signature section." Thus the First Defendant's "chairmanship" was not hidden. In fact Mr. Kilner noted in his own notes of the meeting on 2 April 2009 that the First Claimant had signed the notices of intention to appoint administrators. The Claimant's further criticism is that the document signed by the First Defendant made no mention of a statement by the First Defendant, noted in Mr. Kilner's notes of the meeting, that further investment in AGL was not acceptable. However, there can have been no secret about this because Mr. Kilner noted what the First Defendant had said. The minutes signed by the First Defendant did not mention this. That may make them incomplete. It does not make them fraudulent.

61. The allegation with regard to the forecasts is that EY ignored the forecasts and "by so doing have intentionally deceived AGL". With regard to the order book a similar allegation is made. This was, with respect to the Claimant, a good illustration of how, having formed the view that EY was involved in a conspiracy to injure, he tended to interpret all events as supporting that conclusion. EY did not ignore the forecasts in the IBR. On the contrary, EY referred to them but said there was "limited supporting analysis" and that they were "not supported by recent or historical trends". The Claimant may disagree with EY's views but it is impossible to say that the forecasts had been ignored or that there had been some form of intentional deception. The Claimant has complained that EY did not discuss the forecasts with him but that is not a deceit.

62. Those then are the principal matters which are said to manifest the alleged conspiracy and the alleged fraudulent misrepresentations. The Particulars of Claim contain further allegations as to what was said on certain occasions (see for example paragraphs 37, 43, 47, 52, 70 and 73). I have also borne them in mind.

63. I now turn to the criticisms made of the pleaded case and whether it is adequate.

64. The criticism made on behalf of the Directors of the allegation of conspiracy is that it lacks the required detail and is instead a "general vague assertion". The criticism made on behalf of the Bank is that it is "unsupported by pleaded primary facts". The criticism made on behalf of EY is that it "fails to plead all the necessary ingredients of

his cause of action". There is no allegation of how the agreement came about involving EY and no indication of the date on which the agreement was made or how.

65. In judging these criticisms and bearing in mind the "generous approach" which is appropriate when assessing the adequacy of allegations of fraud I consider that it is reasonably apparent from the pleading that the allegation of a conspiracy is based upon an alleged agreement formed by the Directors and the Bank, in the period January – April 2009, which was joined by EY after it had been instructed to prepare the IBR.

66. However, the cause of action relied upon appears to be a conspiracy to injure by unlawful means, namely, fraudulent misrepresentations made by the Directors "knowing" that they were false, by the Bank "knowing" that they were false and by EY "knowing" that they were false; see paragraphs 108, 115 and 120 of the Particulars of Claim. The false representations would appear to concern the alleged under-invoicing and CID retention. It is to be noted that in the Further Information the allegation is not that EY "knew" but that EY "knew or ought to have known"; see paragraphs 5, 6 and 8 of the Further Information. Much criticism was made on behalf of EY as to the use of the phrase "knew or ought to have known" which is not regarded as sufficient when pleading fraud; see *Paragon Finance v DB Thakerar* [1999] 1 AER 400 at p.407 D per Millett LJ.

67. The Claimant pleads that the Third Defendant, when under-invoicing, did so deliberately and unlawfully. It is said that the First and Second Defendants and the Bank knew that. No particulars are given of those alleged states of mind but it is said they can be inferred from the facts as a whole.

68. The Claimant has chosen to view the actions of those parties in the worst possible light. The test which I have to apply, following the guidance of Flaux J. in *JSC Bank of Moscow v Kekhman*, is whether facts have been pleaded which make an inference of guilt more likely than innocence. I do not think that such facts have been pleaded.

69. Under-invoicing: The facts are at least as equally consistent with the Third Defendant's alleged under-invoicing, if it occurred, being merely negligent.

70. No particular facts have been alleged in support of the alleged knowledge of the First and Second Defendants either of the under-invoicing or of it being deliberate. The Claimant relied upon the appointment of the Second and Third Defendants as directors on 29 January 2009 at the insistence of the First Defendant as the start of the conspiracy. But the Second Defendant had invested £500,000 into AGL and the First Defendant was owed money (I was told some £1 million) in respect of the sale of his shares. The Third Defendant was AGL's finance director. Given the concerns reported by the Bank as to the company's cash flow position and the concerns shared by Deloitte as to the Claimant's role at AGL, these appointments do not appear surprising. For the same reason the proposed management buy-out does not appear surprising. In judging these matters, it is necessary to bear in mind that "unless one is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct"; see *Mohammad Jafari-Fini* [2007] EWCA Civ 261 at paragraph 40 per Carnwath LJ.

71. Withholding CID payments: The Claimant alleges that the Bank deliberately withheld CID payments to "starve" the company of cash. But even if it did withhold CID payments, no fact is pleaded from which it can be inferred that the withholding was deliberate or that the Directors were aware of that, as the Claimant pleads.

72. With regard to EY, it is alleged that failure of EY to report on the alleged under-invoicing and retention of CID monies was a fraudulent misrepresentation. However, no facts have been pleaded from which it can be inferred that, if the alleged under-invoicing and retention of CID monies had taken place as alleged, EY knew about it. If it took place EY's failure to report it is at least as consistent with a negligent failure as with a fraudulent failure; nothing has been pleaded from which it can be inferred that the failure, if established, was fraudulent. EY had been introduced to prepare an IBR. The suggestion that it chose to make fraudulent misrepresentations in its report to assist in bringing about the insolvency of a modestly sized company so that it could earn modest fees as administrator of the company appears to me to most unlikely.

73. EY's referral of the Directors to Sterling does not advance the case for inferring a conspiracy. It is likely that it came about because of EY's proper wish to avoid a conflict of interest.

74. I have considered the additional allegations in the Further Information concerning the board minutes and the order book and forecasts. I am unable to see any pleaded facts from which it can be inferred that there was intentional wrongdoing in these respects.

75. The Claimant has said that a conspiracy to injure and dishonesty in the making of misrepresentations can be inferred from the facts of the case as whole. This is, of course, how fraud is often established. But the facts alleged must be such as to make the inference more likely than not. I do not consider that such facts have been pleaded.

76. The allegation is of a substantial conspiracy involving the Directors, the Bank and EY. In circumstances where the Allerton Group was suffering from a lack of cash (which, from his oral submissions, I understood the Claimant to accept) and where the Bank believed that there had been a breach by AGL of its banking covenants there is an obvious explanation for the appointment of the Second and Third Defendants as Directors, for the instruction to EY to prepare an IBR and, following receipt of the IBR, for the decision to sell the business and then to place AGL in administration. That obvious explanation is that those steps were considered appropriate to preserve as much of the value of the Allerton Group as was possible. That is what Mr. Brocklebank QC, on behalf of EY, described in his oral submissions as a "perfectly ordinary story".

77. The Claimant prefers to believe that the Directors, the Bank and EY conspired "to create a deliberately manufactured insolvency" so that the Directors could purchase the business of AGL "at a knockdown price". In this regard the Claimant must, it seems to me, rely upon the allegations of under-invoicing and retention of CID monies ("deliberate starving of cash") as being facts from which the alleged conspiracy can be inferred. But if the Third Defendant and the Bank under-invoiced or retained CID monies as alleged, there is, as I have said, no fact from which it can be inferred that this was deliberate or that, if it was deliberate, the other Defendants knew of such behaviour and colluded with those responsible for such behaviour.

"Starving" AGL of cash would be an unwise move for the Directors and the Bank who would have been interested in recovering what value there was in the Allerton Group. It is, it seems to me, no more than speculation to suggest that the Directors intended to recover the value in the Group by deliberately starving AGL of cash and purchasing its business at a deliberately achieved "knockdown price". The speculation is yet greater in the case of the Bank. It would have nothing to gain from the sale of the business at a price below that which it would have achieved had AGL not been "deliberately starved of cash". With regard to EY it is also, it seems to me, nothing more than speculation to suggest that, having been instructed to carry out an IBR on a business which was suffering from a shortage of cash, it then deliberately chose not to mention the alleged under-invoicing and retention of CID monies in order to assist the Defendants in creating a need for AGL to be placed into administration in order that the Defendants might purchase the business of AGL at an under value and that EY might earn the modest fees which could be earned from the administration of a modestly sized company.

78. For these reasons I have concluded that the Claimant's Particulars of Claim, though extensive, are inadequate for the purpose of alleging conspiracy to injure by unlawful means or fraudulent misrepresentation. In essence, whilst the Claimant has described the conclusions he wishes the court to reach he has not pleaded the primary facts from which it can be inferred that all the Defendants were party to a deliberate and unlawful conspiracy. The Claimant believes that the facts he has pleaded enable such an inference to be drawn but I must disagree. His belief is speculation for which there is no rational support.

79. In his oral submissions the Claimant relied upon the fact that the Defendants have served Defences of some length. He suggested that that shows that the Claim cannot have been inadequately pleaded. However, the First to Third Defendants stated in terms in paragraph 1.4 of their Defence that the Claimant had "failed to provide proper particulars of his various allegations of collusion and fraud". The Fourth Defendant said in its defence that the Claim should be struck out and that the allegations made are "inadequately particularised"; see paragraphs 2.2 and 4. The Fifth Defendant said that the claims were liable to struck out because "the Claimant has failed to identify any sufficient factual basis for them"; see paragraph 2 of the Summary of the Defence. In those circumstances I do not consider that the Claimant can gain any benefit from the fact that defences have been pleaded.

80. Although the Claimant has alleged a breach by the Directors of their common law and statutory duties (see paragraphs 110 and 112 of the Claim) it appears that this allegation is based upon the allegations of conspiracy to injure and fraudulent misrepresentation. Similarly, although the Claimant has alleged a breach by the Fourth and Fifth Defendants of their common law duty of care (see paragraphs 117 and 122 of the Claim) it appears that this is based upon the allegations of conspiracy to injure and fraudulent misrepresentation. Thus the allegations of breach of duty add nothing to the allegations of conspiracy to injure and of fraudulent misrepresentation.

81. I have therefore concluded that the claims should be struck out.

THE APPLICATION FOR SUMMARY JUDGMENT

82. It is not necessary for me to consider this application in view of my conclusion that the claims should be struck out. But in case I am wrong in my conclusion that the Claimant's case is based upon nothing more than speculation and that the alleged conspiracy cannot rationally be inferred from the pleaded facts I shall also consider, but shortly, the submission by the Defendants that the allegations of conspiracy to injure by unlawful means and fraudulent misrepresentation have no real prospect of success and that accordingly the Defendants should be given summary judgment in respect of them.

83. As I have already remarked the claim of an unlawful conspiracy must be based primarily upon the allegations of under-invoicing and withholding of CID payments. It is the allegation that such actions took place deliberately and fraudulently which convert "a perfectly ordinary story" into an unlawful conspiracy. I have so far assumed that the fact of under-invoicing and CID retention can be established. However, I have noted above the difficulties with the arithmetical analyses carried out by the Claimant in support of these allegations. The Claimant's analyses are simplistic and do not make allowance for the complications noted by the Defendants (save only for the point about the VAT rate which the Claimant says would bring about a modest reduction in the claim). In those circumstances I am not persuaded that the Claimant has any realistic prospect of making good his allegations of under-invoicing and withholding of CID payments. The calculations relied upon are too simplistic to carry any degree of conviction; and if they do not carry some conviction they lack the necessary realistic prospect of success; see *Easyair Ltd. v Opal Telecom Ltd*. [2009] EWHC 339 (Ch) at paragraph 15 per Lewison J. If there is no realistic prospect of establishing those allegations then the Claimant has no realistic prospect of establishing an unlawful conspiracy and so the Defendants are entitled to summary judgment.

LIMITATION

84. In the light of my decision that the claims should be struck out (or, alternatively, that the Defendants are entitled to summary judgment) it is unnecessary to consider the question of limitation. However, in case I am wrong and since the matter has been argued, I shall consider the question of limitation.

85. All the alleged events took place in 2009, and the proceedings before this court were not commenced until August 2017. Thus, unless the Claimant is able to rely upon section 32 of the Limitation Act 1980 the claims are time-barred. Section 32 provides as follows:

> "(1) Subject to subsections (3) and (4), 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;
>
> ……..

> 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."

86. The Claimant contends that the relevant fraud or concealment was not discovered and could not have been discovered with reasonable diligence until a date or dates much later than 2009, such that the claims are not time-barred. The Defendants submit that he has no real prospect of establishing this and so the Defendants say that they should be granted summary judgment.

87. For the purposes of section 32(1)(a), an action is only 'based upon a fraud' if fraud is an essential element of the cause of action (see McGee, *Limitation Periods* (8th ed.) at [20-009]; *Phillips-Higgins v Harpe*r [1954] 1 KB 550). This includes a claim for fraudulent misrepresentation (*Regent Leisuretime v Natwest Bank* [2003] EWCA Civ 391*)*, but not 'moral turpitude' falling short of fraud (*Chagos Islanders v AG* [2004] EWCA Civ 997). For these purposes, that which must have been discovered or discoverable by the claimant before the limitation period will begin to run is knowledge of the essential facts constituting the alleged fraud. It is not sufficient that the claimant knows that there has been some unspecified deception (see *McGee* at [20-013] and *Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727) or only of a fraud "in a more general sense" as opposed to the precise deceit" (see *Horner v Allison* [2014] EWCA Civ 117 at paragraph 14).

88. For the purposes of section 32(1)(b), 'any fact relevant to the plaintiff's right of action' is one which is an essential element of the claimant's cause of action: *Johnson v Chief Constable of Surrey* (CA) (*The Times*, 23 November 1992). For these purposes, limitation does not begin to run until the alleged 'concealment' by the defendant was discovered or discoverable (see *Williams v Lishman Sidwell Campbell & Price Ltd* [2010] EWCA Civ 418).

89. In considering section 32(1)(b), I also have regard to section 32(2), which provides that '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.'

90. Concerning section 32(1)(b), Lord Scott said in *Cave v Robinson Jarvis & Rolf (A Firm)* [2003] 1 AC 384, at [60]:

> "I agree that deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, ie, the concealment, must be an intended result. But I do not agree that that renders subsection (2) otiose. A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, none the less, proof of intention,

> particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. 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. I do not agree … that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."

91. To invoke section 32(2), it must be shown that the defendant was aware at the time that what he was doing was a breach of duty (see *Grace v Black Horse Limited* [2014] EWCA Civ 1413).

92. Section 32(1) postpones the running of the relevant limitation period until the relevant fraud or concealment was discovered or discoverable by the claimant with reasonable diligence. The burden of proving reasonable diligence is on the claimant. As Millett LJ said in *Paragon Finance v Thakerar* [1999] 1 All ER 400, 418:

> "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. I respectfully agree."

93. The meaning of 'reasonable diligence' has been considered more recently in *Gresport Finance Limited v Battaglia* [2018] EWCA Civ 540, at [48] – [50] by Henderson LJ:

> "48. Before considering these grounds of appeal, I must first say a little more about the relevant law. 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."

94. I must now seek to apply those principles to the present case.

95. The action which the Claimant seeks to bring against the Defendants is for a conspiracy to injure by unlawful means. Fraudulent misrepresentation is relied upon

in that regard. The question for the purposes of section 32(1)(a) is whether that cause of action is based upon fraud in the sense that fraud is an essential element of the cause of action. Given that the alleged fraudulent under-invoicing and retention of CID monies is an essential part of the claim (being the alleged unlawful means) it appears to me that fraud is an essential element of the cause of action relied upon by the Claimant.

96. The CID retention: In his Particulars of Claim the Claimant alleged that this "discovery was made during a forensic accountancy examination by the Claimant on 3 January 2014 when various accounting papers were made available to him by RJ Kilner." However, by his letter dated 29 January 2018 he has accepted that he had the relevant Bank of Scotland Cashflow Financing Facility statement (the "BOSCFF" account) in 2010. Thus he could have done the calculation in question then. Indeed his letter to the Bank dated 15 January 2010 suggests that he had done the calculation. He said: "From an examination of this it is clear that there was a withholding of funds (with concentration) due to AEL from BOSCFF from around 12 March 2009 until 9 April 2009 (Administration Date)." The Claimant says that in 2010 he had only detected a breach of contract, not a fraud. However, in his statement dated 31 May 2011 he referred in terms to "the fraud" and to the "pre-pack fraud". Indeed he alleged that the offer by the Directors was not accepted because EY had been instructed by the Bank that the sale could not go ahead as the "pre-pack plan had been rumbled by me". This was more than 6 years before the commencement of proceedings before this court. In these circumstances there does not appear to be a real prospect of the Claimant establishing that the alleged CID fraud was not discovered or discoverable with exercise of reasonable diligence until less than 6 years before these proceedings were issued.

97. The under-invoicing: In his Particulars of Claim he alleged that this was not "discovered until a forensic accountancy examination on 18 November 2016." The alleged under-invoicing is based upon the management accounts, which he has said he had on 18 March 2009 (see paragraph 7 of his Further Information), and on the BOSCFF statement which, as has been admitted by him, he had in 2010. Thus he could have discovered the alleged under invoicing in 2010. The Claimant has said in a witness statement that it was only when he obtained a copy of the Directors' offer in the Isle of Man proceedings that it became clear that the Third Defendant had played a major part in the fraud of AGL. In his oral submissions he emphasised that section 32 refers to "reasonable diligence" and that it would not be reasonable to expect him to examine the documents unless there was a "triggering point" which he said was his discovery in November 2016 that the Third Defendant had played an important role in the offer to purchase the business of AGL. He made that discovery, he said, because the copy of the offer disclosed in the Isle of Man proceedings contained the Third Defendant's redacted private email address. Counsel described this assertion as "not credible". Given that by letter dated 24 April 2009 to the administrators the Claimant had referred to the Third Defendant's role in "fraudulent deception", "unlawful appointment of EY as administrators" and "attempting clandestinely a management buy-out for themselves", that description is justified. In these circumstances there does not appear to be a real prospect of the Claimant establishing that the alleged "under-invoicing" could not with reasonable diligence have been discovered in 2010. The Claimant had already decided in 2009 that the First to Third Defendants were "attempting clandestinely a management buy-out." When he considered the financial

documents in 2016 he was able to analyse them and draw conclusions. There is no reason why he could not have conducted that exercise in 2010.

98. If I assume, in the Claimant's favour, that in 2009 he knew only of some "unspecified deception" or only of "fraud in a more general sense", by 2010 he could, as explained above, have discovered with reasonable diligence the precise alleged fraud or deceit, namely, the under-invoicing and retention of CID monies by, respectively, the Third Defendant and the Bank. Whatever it was that persuaded the Claimant that the other directors knew of both frauds and that the Bank knew of the under-invoicing fraud that further fact or matter must have been known to the Claimant by May 2011. For in his statement of that month he alleged that the Directors and the Bank were guilty of a "pre-pack" fraud. It is unclear what it was that persuaded the Claimant that EY had also made misrepresentations in the IBR concerning under-invoicing and CID retentions. But if he had the means to discover the alleged under-invoicing and CID retention in 2010 then, since he had had the IBR in 2009, he is unable to say that he could not have discovered, by the exercise of reasonable diligence, EY's alleged misrepresentations in 2010 also.

99. The Claimant relies upon other matters in support of his case but he cannot show that he could not with reasonable diligence have discovered them earlier than 6 years before issuing the proceedings in this court.

100. EY's referral of the Directors to Sterling and the Directors' Offer: The Claimant alleges in paragraph 54 of the Particulars of Claim that he only discovered the fact of the introduction around 5 November 2013. This cannot be so because he mentioned the referral as part of his allegation on 22 July 2013 that EY was at the "epicentre of the conspiracy". In his oral submissions the Claimant accepted that he must have been told about the referral by then. He said that he could not see that he would have known about it any sooner than that. However, the burden lies on the Claimant to show that the claim is not time barred; see *Paragon Finance v DB Thakerar* [1999] 1 AER 400 at p. 418. In circumstances where he is unable to establish when he first learnt of the referral by EY and where his pleaded case is demonstrably wrong (as he accepts) there does not appear to be a real prospect of the Claimant establishing at trial that he only learnt of the referral within 6 years of the commencement of proceedings.

101. As to the offer, he knew of that in April 2009 (though he did not obtain of a copy of its terms until November 2013). Mr. Kilner was aware that the offer was being considered on 13 April 2009 (see his message of that date to EY) and by 16 April 2009 the Claimant was complaining of the proposed management buy-out (see his letter of that date to the Bank). The lack of a copy of the terms had not prevented him from maintaining that the offer was part of an unlawful "pre-pack fraud" in 2011. In these circumstances there does not appear to be a real prospect of the Claimant establishing at trial that the offer was not discovered until less than 6 years before these proceedings were issued.

102. The Board Minutes: The Claimant has said that the discovery of the "fraudulent" board minutes was not made until 24 November 2017 (see paragraph 14 (c) of the Further Information). However, the board minutes were provided to the Claimant on 6 May 2009 by Walker Morris and were exhibited to Mr. Sumpton's witness statement of 14 May 2009 in the matter of the administration of AGL. An order dated

19 May 2009 recorded that the Claimant had been served with the application. By letter dated 6 May 2009 to Walker Morris the Claimant described the minutes as "incomplete, inaccurate and defective" and by letter dated 24 April 2009 he referred to advice that the resolution of the board appointing the administrators was unlawful. In these circumstances there does not appear to be a real prospect of the Claimant establishing that his complaints about the board minutes were not discovered until less than 6 years before these proceedings were issued.

103. The forecasts and order book: The Claimant's complaints about these matters stem from the IBR and the administrators' public announcement in April 2009 that AGL was for sale. The Claimant knew of these documents in 2009.

104. I have therefore concluded that the Claimant is not able to show that the limitation period of 6 years only began to run less than 6 years before the commencement of these proceedings pursuant to s.32(1)(a).

105. For the same reasons the Claimant is not assisted by s.32(1)(b). He is unable to establish that any fact relevant to his right of action, in the sense of an essential element of his cause of action, has been deliberately concealed from him. He relies upon the same facts to establish deliberate concealment as he does to establish fraud; see paragraph 4 of his Skeleton Argument.

106. Lastly, the Claimant relies upon a breach of fiduciary duty and suggests that such a claim is not subject to a time bar. This submission is advanced in his witness statement dated 6 July 2018. It is presumably based upon section 36 of the Limitation Act 1980 which provides that various time limits in respect of common-law causes of action do not apply to claims for equitable relief. However section 36 provides that the time limits do not apply to claims for equitable relief "except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1940." The manner in which this section should be understood and applied is apparent from *Cia de Seuros Imperio v Heath (REBX)* [2000] 1 WLR 112 at p.121. Where the facts upon which a claim for damages for a dishonest breach of a fiduciary duty are grounded are identical with those which founded the otherwise time-barred claims in tort and contract, the time limits appropriate for the common law claims are applied by analogy. Thus, formulating the claims for breach of fiduciary duty does not assist the Claimant to avoid the 6 year time limit.

107. Reference should also be made to section 21 of the 1980 Act which provides that no period of limitation shall apply to an action in respect of a fraudulent breach of trust. It was held by the Court of Appeal in *First Subsea Limited v Balltech Limited* [2017] EWCA Civ 186 that a fraudulent breach of fiduciary duty by a company director constitutes 'an action "..." in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy' for the purposes of section 21(1)(a), such that no time bar is applicable to such a claim. Section 21 therefore has the effect that no limitation defence applies to a claim alleging a fraudulent breach of fiduciary duty by the First to Third Defendants. But given my conclusion that the allegations against the Defendants should be struck out, section 21 cannot assist the Claimant.

REFLECTIVE LOSS

108. In the light of my conclusions so far it is unnecessary to lengthen this judgment by considering the argument that the loss claimed by the Claimant as a shareholder, being reflective of the loss suffered by AGL, is not recoverable by the Claimant in his capacity as a shareholder.

CONCLUSION

109. The claims against all Defendants should be struck out on the grounds that they have been inadequately pleaded. In any event they are time barred, save for the claim against the Directors for a fraudulent breach of fiduciary duty.

POSTSCRIPT

110. After this judgment was provided to counsel in draft Mr. Brocklebank suggested that I had not dealt with limitation in the context of the claims for breach of duty not based upon conspiracy or fraud. However, in paragraph 80 I said that the allegations of breach of duty added nothing to the allegations of conspiracy and fraud. That was based upon my reading of the Particulars of Claim. If my understanding is wrong then the bare allegations of breach of duty (absent conspiracy and fraud) fall to be struck out on the basis that they are time barred for the reasons which I have already given.