Neutral Citation Number: [2020] EWHC 3141 (Comm)

Case No: CL-2019-000599

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

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

Date: 23 November 2020

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

CHRISTOPHER NIGEL ROBERTS	**Claimant**
- and –	
THE ROYAL BANK OF SCOTLAND PLC	**Defendant**

- -
- -

The Claimant is unrepresented
Christopher Langley (instructed by **DMH Stallard**) for the **Defendant**

Scheduled hearing date: 21 October 2020
Application determined on paper

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 23 November 2020 at 10:30am

Mrs Justice Cockerill:

Introduction

1. In June 2006 a company called Vision TV Limited ("VTV"), whose business was in advertising via multiple screens to a captive audience, hired a temporary accounts clerk, Ms Fox, to assist during the maternity leave of its finance director Ms Turner.

2. Shortly after her arrival, a form which appeared to authorise her to be a full signatory of VTV's accounts was sent to the Defendant ("the Bank"). In the months which followed between 13 October 2006 and 4 May 2007 the Bank paid cheques presented to it in the total amount of £265,000. Those cheques bore Ms Fox's signature and were in favour of VTV's majority shareholder Mr Graeme Ross.

3. VTV was placed into administration on 15 February 2008, and subsequently into compulsory liquidation on 12 February 2009. In these proceedings the Claimant, Mr Roberts, says that the administration and compulsory liquidation were caused by the honouring of these cheques, though it is fair to say that he contends that the cheques were part of a much larger sum appropriated by Mr Ross.

4. Mr Roberts is the assignee of VTV's rights. In this action he makes two claims. The first is that the Bank lacked "*care and attention regarding the supervision of payments made out of the company bank accounts*" and that the "*size, the timeframe in which the payments were paid and the fact that all cheque payments were to the majority shareholder of VTV exceeded the reasonable and honest banker test in Lipkin Gorman*" ("the First Claim"). Mr Roberts says that if the Bank had followed normal banking procedure it would have inquired of VTV's CEO and been told that the cheques were not authorised. Mr Roberts says that this claim has evolved into a claim of Dishonest Assistance. That evolved claim ("the Fourth Claim") is not pleaded and I shall deal with it separately.

5. Secondly it is said that the payments were made in breach of mandate, in that the cheques were co-signed by Ms Fox when she was not an authorised signatory on VTV's account and/or in that the Bank breached its duty of care in failing to verify the mandate form and the signature was therefore not a valid authority ("the Second Claim"). This argument has changed somewhat in reply, where Mr Roberts contends that the gist of the claim is that the Bank did not comply with its own procedures when adding an individual to the list, that consequently Ms Fox was not a properly authorised signatory and as a result all of the cheques she co-signed were only signed by one authorised signatory and not two, and were breaches of the bank mandate.

6. Mr Roberts seeks significant damages on the basis that VTV's insolvency was caused by these breaches, and that the value of VTV at the time it went into administration was £19,040,000.

7. The Bank seeks summary judgment and/or strike out of the claims made against it by Mr Roberts. It contends that the claims are time-barred and that Mr Roberts has no realistic prospect of establishing that the limitation period has been extended under section 32 of the Limitation Act.

8. This application has rather unusually been determined on the papers with the consent of the parties. That situation arises out of the Covid pandemic. In summary Mr Roberts and his McKenzie friend are not in a position to attend court physically for health reasons while the pandemic subsists (as it is still likely to do for some time). Nor however are they in a position to attend a remote hearing; essentially the requisite technology is not available to them. Mr Roberts was not content with a telephone hearing, because of the difficulties of communicating during it with his litigation friend. Both he and the Bank were however content for me to receive written submissions and decide the matter on that basis.

9. Since Mr Roberts is a litigant in person, I am producing two versions of this judgment. The first, designed essentially for Mr Roberts' consumption, makes use of cross references, so that he can understand clearly to what I am referring. The second will lack such cross references and be for general release.

10. I should also make clear the materials with which I have been provided. Those are:

    i) Bundle A: this contains the conventional materials for the summary judgment application – the pleadings, the Application Notice, the witness statement of Mr Woolf in support and the first and second statements of Mr Roberts responding to the application, as well as the reply statement of Mr Woolf.

    ii) Bundle B: This contains notes from what is known as "the RMP File" (either Relationship Management Plan or Risk Management Plan), and Mr Roberts later witness statements (third to eleventh, plus addenda) and correspondence wherein Mr Roberts sought to amend his claim;

    iii) Bundle C: *Inter partes* correspondence and other documents whose inclusion was requested by Mr Roberts, including witness statements of Ms Turner and Mr Hanka;

    iv) Skeleton arguments from both sides, plus a paragraph by paragraph rebuttal of the Bank's skeleton produced by Mr Roberts, which interpolates his comments on the Bank's case, and thus approximates to the oral submissions he would have given.

    v) Two letters of complaint from Mr Roberts to the Bank's solicitors.

Limitation – the backdrop

11. Given that the payments were made more than 12 years prior to the date of the Claim Form (which was issued on 26 September 2019), the obvious problem – anticipated by Mr Roberts in his Particulars of Claim - is limitation. It is common ground that the claims are time-barred, unless Mr Roberts can demonstrate a sufficiently arguable case that the limitation period has been extended.

12. Mr Roberts meets this problem with the argument that the limitation period should not commence to run until November or December 2017 because it was only then that "the Relevant Facts" were discovered, having been deliberately concealed by the Bank until then. The Relevant Facts relied on are:

i) In respect of the First Claim "*the knowledge whether the Defendant conducted an inquiry on any of the cheque payments and if it did not why*".

ii) In respect of the Second Claim: "*the combination of the signed and complete Mandate; the contents of the Form and the RH 10th of January 2006 email plus attachments.*"

13. The Bank contends that the argument is devoid of any substance and has no real prospect of success in that:

i) None of the facts in question are relevant to Mr Roberts' rights of action within the meaning of section 32(1)(b). Both claims could be pleaded without them. Indeed, before the Bank had provided any of the allegedly concealed material, VTV was able to make detailed allegations and threaten to issue proceedings against the Bank.

ii) Mr Roberts' argument on "deliberate concealment" rests on a wild conspiracy theory that the Bank deliberately failed to respond to letters from VTV's liquidators in 2013 and, further, that the Bank and its lawyers deliberately withheld documents from the Claimant until the limitation period had expired. Those serious allegations are not sufficiently pleaded and there is no arguable basis to make them.

Background

14. VTV was a customer of the Bank between 5 April 2006 and around 31 May 2011, when the last of VTV's accounts were closed. One of those accounts was a business current account with account number 10230194 ("the Account").

15. As part of the account opening process, various documents were submitted to the Bank, including a document headed "Company Mandate", which took the form of a certified excerpt from a meeting of the directors of VTV on 24 March 2006 ("the Original Mandate"). The Original Mandate authorised the Bank to accept instructions from "any two signatories" as set out on the "Authorised Signatories Sheet" attached to the Original Mandate. When the Account was opened, there were three authorised signatories: Ms Turner (VTV's Finance Director), Mr Corcoran (a director of VTV), and Mr Ross.

16. On or around 25 July 2006, the Bank received a document headed "*Change in constitution of Board or terms of signing authority for a Company Account*" ("the Additional Signatory Form"). Section 2 stated that Ms Fox had been appointed to the position of Finance Manager and that she was to be added to the existing authorised signatories. The Additional Signatory Form contained the (apparent) signature of Ms Turner and was certified as a true excerpt from the minutes of the meeting of directors of VTV. Ms Fox was thereafter added as an authorised signatory on the Account. The point which Mr Roberts makes is that this document did not have two signatures of VTV Directors, and that this decision, made on the basis of the single signature, enabled what happened next.

17. I have referred to Ms Turner's "apparent" signature. Mr Roberts alleges that Ms Turner's signature was forged and that the Board of VTV had never authorised Ms

Fox to be added as a signatory to the Account. The Bank was not aware that the signature was forged (and nor is that alleged). The question of whether the signature was or was not a forgery, or when Mr Roberts could have or did discover this, is not relevant to the issues I have to decide however. I therefore do not need to consider the evidence on this in detail.

18. Ms Fox subsequently co-authorised the four cheques made payable to Mr Ross:

    i) A cheque dated 13 October 2006 for £15,000 that was co- signed by Mr Ross and Ms Fox;

    ii) A cheque dated 13 October 2006 for £25,000 that was co- signed by Mr Corcoran and Ms Fox;

    iii) A cheque dated 12 December 2006 for £25,000 that was co-signed by Mr Corcoran and Ms Fox; and

    iv) A cheque dated 4 May 2007 for £200,000 that was co- signed by Mr Corcoran and Ms Fox.

    At this point the VTV account had been moved out of the Bank's Commercial Banking Portfolio into its Low-Quality Exposure ("LQE") Portfolio.

19. VTV was placed into administration on 15 February 2008 and entered into compulsory liquidation on 12 February 2009.

20. On 3 September 2013 VTV's liquidators wrote to the Bank's Cavendish Square branch. The letter referred to a shareholders' agreement between VTV, Mr Ross and Mr Hanka ("the Shareholders' Agreement"), and a restriction contained therein that transactions over £10,000 had to be authorised by any two directors. The Bank was asked to confirm whether the mandate reflected those restrictions. The letter also pointed out that the cheques to Mr Ross were co-signed by Ms Fox, who was not a director at the time the cheques were drawn. The liquidators had also identified withdrawals exceeding £10,000 between 1 June 2006 and 21 May 2008 totalling £1,135,573.76, which the liquidators were concerned had also been co-authorised by Ms Fox contrary to the terms of the Shareholders' Agreement.

21. Mr Roberts points out that the Bank should have been able to respond to this letter, not least because at this point there was still four years to go before the Bank could destroy VTV's customer records. However, it did not respond. Having received no response from the Bank, on 26 September 2013, VTV's liquidators wrote to the Bank's Cavendish Square branch to ask for confirmation whether the account mandate reflected the limitations in the Shareholders Agreement; for confirmation as to why the cheque for £200,000 to Mr Ross was cleared without being put on inquiry; and for confirmation of who authorised the other withdrawals exceeding £10,000.

22. On 9 October 2013, the Bank's Credit Management Services office in Rotherham wrote to the liquidators stating that, unfortunately, with the information provided, the Bank was unable to locate further details to assist with the liquidators' requests. The Bank asked if it could be provided with the sort code and account number or a reference number for VTV so that the Bank could locate the relevant account. No

written response was sent to the Bank's Credit Management Services office, but Mr Roberts says that he spoke to the author of the letter, and was informed that the files had been destroyed.

23. The liquidators then wrote to the Cavendish Square branch as follows:

    i) On 23 October 2013, the liquidators expressed disappointment that they had not received a response from the Bank and asked again for the information previously requested.

    ii) On 14 November 2013, the liquidators wrote again expressing the same disappointment and asked for a response.

24. On 2 December 2013, Andy Tither (a relationship manager at the Bank) sent a fax to the Bank's Divested Customer Service Team at Great Tower Street, London, enclosing copies of the liquidators' letters of 3 September, 26 September, 23 October and 14 November 2013. The covering fax stated:

> "Please find attached letters requesting historic information on liquidated account. It seems these have been to different offices ahead of arriving with me. As such, please would you arrange for necessary actions to be completed as a matter of priority."

25. By a letter dated 15 August 2013, but probably sent on 15 December 2013, the liquidators stated that if no substantive response was received within a further 21 days, "*we will presume that you accept liability for the £1.4 million quantum amount stated in our original letter and commence recovery proceedings without further communication with RBS*". Mr Roberts says that this letter was a bluff to try to provoke the disclosure sought. If so, it did not succeed. The Bank made no response.

26. On 23 November 2015, VTV's liquidators assigned VTV's claims to Mr Roberts. Mr Roberts had no direct interest in the subject matter of these proceedings (having not been a shareholder, director or employee of VTV). He had however been appointed banking expert to the estate around July 2013 on a CFA basis. On that basis he had an interest in the claim and a detailed knowledge of the history of the claims.

27. The Claim Form was issued on 26 September 2019. The critical point for current purposes is that that date was more than 12 years after the fourth cheque was paid.

The Law

28. The relevant principles were not in issue and were summarised at length in the Bank's skeleton. For present purposes I highlight only those points which are critical to the decision which I will make below, and those which it is important that I explain to Mr Roberts. The relevant law covers four areas:

    i) The test for strike out/summary judgment;

    ii) Section 32 of the Limitation Act 1980;

    iii) "Deliberate concealment";

iv) Whose knowledge?

The Test for Strike Out/Summary Judgment

29. The test, as set out in *The LCD Appeals* [2018] EWCA Civ 220 at [38] and *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), is essentially that of whether the claim has a realistic, as opposed to a fanciful prospect of success – the claim must be more than merely arguable. It must carry a degree of conviction.

30. Summary judgment/strike-out applications are not (or should not) be the place for disputes of fact. They are however often well suited to determination of points of law or construction: the court must be satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument. If that is the case, it is considered right that the court should "*grasp the nettle*".

31. Such applications are thus not infrequently brought in cases such as the present where there is an obvious limitation issue.

Section 32 Limitation Act

32. Section 32(1)(b) of the Act postpones the commencement of the relevant period of limitation where "*any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant*". The postponement is until the time when "*the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it*".

33. The question of what is a relevant fact for this purpose was considered by Simon J in *Arcadia Group Brands Limited and others v Visa Inc and others* [2014] EWHC 3561 (Comm) at [23]–[24] (affirmed in all essentials by Etherton C (with whom Richards and Patten LJJ agreed) [2015] EWCA Civ 883 at [48]–[49]).

34. As can be seen from the passage quoted below it is not every broadly relevant fact which qualifies. The only facts which "count" for this purpose are facts which "*found the cause of action*". That has been equated to the facts which a claimant would need to plead in a statement of case to plead a *prima facie* case.

35. The quotation runs as follows:

> "23. There are a number of cases which throw light on the proper interpretation of s.32(1) of the 1980 Act: *Johnson v. Chief Constable of Surrey* (CA, unreported, 23 November 1992); *C v. Mirror Group Newspapers Ltd* [1997] 1 WLR 131 (CA); *Gold v. Mincoff, Science & Gold* [2001] Lloyd's Rep PN 423 (Neuberger J); *AIC Ltd v. ITS Testing Services (UK) Ltd, The 'Kriti Palm'* [2006] EWCA Civ 1601 and *Williams v. Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418.
>
> 24. These cases establish a number of principles which are relevant to the present applications.

(1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in Johnson. In this context Neill LJ referred to '*the public interest in finality and the importance of certainty in the law of limitation*,' in *C v. MGN* at p.139A.

(2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in *Johnson*.

(3) The section is to be interpreted as referring to '*any fact which the [claimant] has to prove to establish a prima facie case*', see Neill LJ in Johnson and in *C v. MGN* at p.138H, and Rix LJ in The *'Kriti Palm'* at [323].

(4) The claimant must satisfy '*a statement of claim test'*: in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a *prima facie* case, see Rose and Russell LJJ in Johnson, and Neill LJ in *C v. MGN* at 137B-C. As Buxton LJ expressed it in *'Kriti Palm'* at [453]:

…what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it.

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, …

Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the *'Kriti Palm'* at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in *C v. MGN* at 139A.

(6) As expressed by Rix LJ in The *'Kriti Palm'* at [307], the purpose of s.32(1)(b) is intended to cover the case,

where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called 'statement of claim' test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis a vis a claimant's pleaded case.

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see

> for example Neuberger J in *Gold v Mincoff* at [75] in the different context of s.14A of the 1980 Act, but referring to *Johnson and C v. MGN*."

36. A critical point for present purposes is what the pleading requirements are for statements of case. CPR 16.4 requires the pleading of "*a concise statement of the facts on which the claimant relies*". The authorities make clear that this means the facts which go to make up that cause of action – the existence of a contract, breach and damage for example (see for example *Cooke v Gill* (1873) LR 3 CP 107, 116, *Smith v Henniker-Major* [2002] EWCA Civ 762, *Roberts v Gill* [2010] UKSC 22).

37. Nor is it necessary in a Particulars of Claim to deal with defences which it is anticipated that a defendant may raise (though in some cases a claimant may choose to do so for one reason or another).

38. So what needs to be pleaded, and the only facts which matter for the purposes of a defence of deliberate concealment, are the bare facts which go to make up a pleading which outlines a *prima facie* cause of action without missing out any essential element of the cause of action. Evidence and reply points are not necessary to this exercise and they do not attract the protection of section 32.

"Deliberate concealment"

39. Deliberate concealment is a fairly high hurdle – because it is akin to fraud. For there to be deliberate concealment within section 32(1)(b) the defendant must have considered whether to inform the claimant of the relevant fact and decided not to do so. In addition (though this is not relevant for present purposes) the fact which the defendant decides not to disclose must be one which it was his duty to disclose or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant.

40. This is apparent from the judgment of Lord Scott in *Cave v Robinson Jarvis & Rolf (A Firm)* [2003] 1 AC 384 at [60]:

> "I agree that … the concealment, must be an intended result. … 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."

Whose knowledge?

41. A final point which is highly relevant here is the question of whose knowledge counts. On this, a company's knowledge remains relevant even where the company enters administration or liquidation. Mr Roberts is therefore fixed with the knowledge of VTV and the liquidators of VTV.

42. This is apparent from the judgment of Foxton J stated in *Granville Technology Group Limited (in liquidation) v Infineon Technologies AG* [2020] EWHC 415 (Comm) at [83]:

> "For limitation purposes, a matter which is once known remains known, even if forgotten (*Ezekiel v. Lehrer* [2002] EWCA Civ 16), a proposition which must be as true for institutional memory as it is for human memory. …. It was not seriously argued before me that, if the administrators had personally been on enquiry of the matters which the Granville Companies are taken to have known upon entering into administration, the administrators would have been in any different position from the pre-administration management of the Granville Companies when it came to investigating those matters."

The First Claim

43. The First Claim is described in the Particulars of Claim as "*Lack of care and attention regarding the supervision of payments made out of the company bank accounts specifically to GR*". It is pleaded as follows:

> "The contractual Duty of Care with regards to the First Claim was emphasised by the Court of Appeal in Lipkin Gorman when it ruled that it was an implied term in the contract between a bank and its customer that it owed a Duty of Care which required it not to pay a cheque without inquiry when it knew facts which would have led a reasonable and honest banker to consider that there was a serious or real possibility that the customer might be being defrauded by the drawing of a cheque."

44. This appears to be a reference to the *Quincecare* duty of care that was first formulated by Steyn J in the case of that name (*Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363) as follows:

> "In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company … And, the external standard of the likely perception of an ordinary prudent banker is the governing one."

45. The *Quincecare* line of authorities (including *Lipkin Gorman*) was reviewed by Professor Andrew Burrows QC (as he then was, sitting as a Judge of the High Court) in *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) and summed up at [28] as follows:

> "These three cases make clear that the core of the *Quincecare* duty of care is the negative duty on a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that that payment is part of a scheme to defraud the customer."

46. The Bank contends, and it seems to me is correct to contend, that as regards the First Claim the essential matters which Mr Roberts needed to be in a position to plead are:

    i) VTV was a customer of the defendant bank;

    ii) Ms Fox instructed the Bank to make a payment;

    iii) The Bank had reasonable grounds for believing that the payment was part of a scheme to defraud VTV such that the bank came under a duty to refrain from making the payment;

    iv) The Bank was in breach of that duty by permitting the payment to be made; and

    v) The Claimant suffered loss and damage as a result.

47. Of these essential ingredients, only the reasonable grounds element is contentious.

48. It cannot be controversial that VTV (and even Mr Roberts himself) knew of the uncontentious parts of the cause of action more than six years ago.

49. What really matters therefore is whether VTV had knowledge sufficient to plead that the Bank had reasonable grounds for believing that the payment was part of a scheme to defraud VTV such that the Bank came under a duty to refrain from making the payment. As to this I conclude without hesitation that a *prima facie* case of breach can be pleaded from inference from the fact of payment if the prior steps can be pleaded.

50. This is also in truth the way that Mr Roberts has pleaded the case. In the Particulars of Claim he has specifically alleged that the payments exceeded the "*reasonable and honest banker test in Lipkin Gorman*" because of:

    i) The "size" of the cheques;

    ii) The "*timeframe in which the payments were paid*"; and

    iii) The "*fact that all the cheque payments were to the majority shareholder of VTV*".

51. This must be right – it reflects the fact that as a matter of law the *Quincecare* duty only arises when a bank has reasonable grounds for believing that the payment instruction is being used in an attempt to misappropriate the funds of its customer. What matters therefore is the ability to say that the bank had such reasonable grounds in relation to particular payments.

52. As for these relevant facts VTV's knowledge - both itself and later via the liquidators - is clear. There is a letter from the liquidators dated 3 September 2013. That demonstrates that the following matters were known to VTV via the liquidators – and the matters in question are ones which would equally have been known to VTV before its liquidation:

    i) VTV was aware that the cheques had been paid to Mr Ross and that they had been co-signed by Ms Fox (copies were enclosed). Mr Roberts accepts this.

    ii) VTV was a party to the Shareholders' Agreement (along with Mr Ross and Mr Hanka) which expressly provided that any cheque or bank transfer exceeding £10,000 needed to be authorised by two directors (and Mr Roberts points out that any change to the Bank Mandate required the authority of 85% of the VTV shareholders or Robert Hanka).

    iii) VTV knew (both at the time and by this time, i.e. 2013) that Ms Fox had not been appointed as a director at the time that the cheques were signed and paid.

    iv) VTV's liquidators had conducted a "recent review" of the transactions on the bank account, which enabled them to state that the cheque for £200,000 was "*a significant amount which exceeded the average transactions withdrawn from the account by many times*".

    v) The liquidators at that date specifically asked the Bank why the cheque had been cleared without placing it "on inquiry".

    vi) VTV's liquidators had also identified withdrawals exceeding £10,000 between 1 June 2006 and 21 May 2007 in the total sum of £1,135,573.76.

53. Thus VTV's concerns in relation to the cheques were raised in the liquidators' letter of 3 September 2013. While Mr Roberts asserts that VTV did not know who had signed the cheques, this cannot be right. This is because this letter specifically referred to (and enclosed copies of) the four cheques made payable to Mr Ross in apparent breach of the Shareholders' Agreement.

54. The letter also stated that the £200,000 cheque "*was a significant amount which exceeded the average transactions withdrawn from the account by many times*". The liquidators thus knew the size of the cheques, the timeframe of the payments and the fact that the cheques were made payable to Mr Roberts', and therefore knew all three matters which, on Mr Ross's case, rendered the payments suspicious.

55. The facts giving rise to this plea were therefore plainly within the company's knowledge at a very early stage – far earlier than six years ago.

56. It follows that as regards the First Claim, there can be no case of deliberate concealment which has a real as opposed to a fanciful prospect of success.

57. I should deal specifically with the points raised by Mr Roberts as regards this claim, and why they have no substance sufficient to prevent this conclusion.

58. The Particulars of Claim pleads that the fact which "*goes to the heart*" of the First Claim is "*knowledge whether the Defendant conducted an inquiry on any of the*

cheque payments to [Mr Ross] and if it did not why". In the Reply, reliance is placed on an alleged need for "*documentary evidence or confirmation*" from the Bank that it had not placed the cheques "on inquiry".

59. The problem with this is that it confuses the steps necessary for Mr Roberts as claimant to plead a *prima facie* positive case of breach of duty, and the evidence needed to deal with any (potential) defence by the Bank. So it was open to Mr Roberts to plead his case on the basis of no more than the information set out. It would then have been "up to" the Bank to plead a defence. One defence it might have made is to say that it made inquiries (and then evidence of whether it did or not would be necessary), or it might say that it was not under a duty to inquire – in which case any evidence as to inquiries would have been irrelevant. Essentially Mr Roberts' case therefore assumes the burden of pleading a claim is much higher than it is.

60. This is effectively reflected in Mr Roberts' argument which is that a claim could not be brought without the evidence or confirmation from the Bank that it had not placed the cheques "on inquiry" because, if such evidence was later produced, the claim "*would collapse and the entire bringing of the claim would be a waste of considerable time and money*". He therefore assumes (wrongly) that it is necessary to anticipate a future contingency. In a sense, at the stage of making the claim, an allegation as to what the Bank did (or did not do) would be neither here nor there.

61. Mr Roberts makes much of the fact that the QC retained to advise the liquidators in 2013 required more information. However, this is to confuse two separate – and very different - things. The first is the requirement for pleading a *prima facie* case for the purposes of section 32 of the Limitation Act. As I have outlined above, those requirements are very minimal.

62. The second is the entirely different exercise that QC was engaged in; which was an exercise pursuant to the Insolvency Act 1986. By virtue of Section 167, Appendix 4 the right to bring any proceedings on behalf of a company in Liquidation rested with the Official Receiver through to May 2015. To bring a claim prior to this date the Liquidator had to obtain sanction from the Official Receiver and to obtain sanction required "*a positive independent legal opinion on the merits of the claim*". This is also put at paragraph 38 of Roberts 3 thus: "*no barrister could have possibly provide a positive opinion on this Claim, because if the Defendant had responded to the Liquidators' letter and as requested provided an acceptable explanation why the cheque had cleared in the normal way, then there would have been no claim to bring.*"

63. What the Liquidators therefore required was not evidence that there was a "pleadable" case; they required evidence that there was a good case on the merits, such that it was worth the risk of the liquidation's time and money. They required to know more than the facts which could stop time running, for entirely understandable reasons. But that has no impact on the facts which were relevant for the purposes of stopping time.

64. The same points apply to Mr Roberts' subsequent reliance on the RMP File, which was only recently disclosed. He submits that the additional supervisory requirements when an account is transferred out of the mainstream arm of the bank and into the LQE Portfolio *"would have been a cornerstone of the First Claim"*. Again, however this goes to pleading evidence, or material which strengthens the merits of the claim.

The RMP file is not a fact which is necessary to plead to make a complete cause of action. The essentials of the claim remain those which I have set out above; all were known at a very early stage.

65. It follows that the First Claim fails.

66. I note that Mr Roberts indicates that he takes the view that the Bank's defence as advanced before me was a new one. I do not accept this submission; the position on knowledge was clearly pleaded at paragraphs 53 and following of the Defence. It is a point which is based on law and facts within VTV's knowledge. The witness statement of Mr Woolf dealt with the facts which were within the Bank's knowledge and as such did not need to deal with matters which were not facts within the Bank's knowledge.

"Spoliation of records"

67. Mr Roberts' case as now advanced is that the requirements of deliberate concealment are satisfied in that the Bank deliberately failed to respond to letters from VTV's liquidators in 2013 and, further, that the Bank and its lawyers deliberately withheld documents from the Claimant until the limitation period had expired.

68. The latter point can be seen at paragraph 16 of the Skeleton Argument where it is said that the Defendant cannot rely on limitation as a defence because it was required to have retained the VTV Files at least until 31 May 2017 and in practice to 31 May 2018.

69. This timing point reflects the fact that the Defendant closed the VTV account on the 31 May 2011 and that pursuant to; (i) the law (the Money Laundering Act 2007 and the Banking Act 2009); (ii) The UK Banking Regulators' Rules and; (iii) its own inhouse customer retention policies and procedures, the Defendant was required to have retained its VTV records for a minimum of six years from this date, so as to comply with the six-year limitation rule. Mr Roberts' evidence (uncontradicted for the purposes of this application) is that "*the standard banking and general finance and professional industry practice was and remains to retain customer records under a '6 plus one year' rule*".

70. As to the other part, at paragraph 18 of the skeleton argument Mr Roberts explains: "*No weight can be given to the contents of paragraph 26.4 in the Defence because it was the above falsehood regarding the Liquidators' letters [the indication that the failure to respond was an oversight], together with the Defendant's finally confirming that it had not placed the payments to Ross 'on inquiry' and the absurd reasons why, given in the Defendant's 28 November 2017 Detailed Response Letter, that caused the Claimant to reconsider his view regarding the application of section 32 (1) (b) of the 1980 Act to both claims after November 2017.*"

71. This is said to be "*a sophistic and flimsy made up story by the Defence to mislead the Claimant and the Court into believing that no deliberate concealment occurred as the ignoring of the Liquidators' five letters from September to December 2013 was entirely down to the premise that such was an innocent clerical error which the above paragraphs prove to be sophistic and disingenuous.*"

72. In other words, Mr Roberts says that deliberate concealment can be inferred because the responses in relation to failure to respond have, in the light of later knowledge, started to look very suspicious to him. He has reiterated this point in subsequent correspondence – the point he makes is that it is impossible to lose such a volume of electronically filed documents.

73. The Bank describes this as "a wild conspiracy theory". I can entirely understand why it does so, because the logic in parts of the argument as set out is often not readily apparent.

74. The point which I need to make clear for the purposes of this judgment is that I do not need to engage with the merits of the point, because it is of no service to Mr Roberts in any event. This is because, even viewed with the most charitable of eyes, there is simply no connection between the argument and the necessary facts which underpin the actual claims as outlined above (and as dealt with below in relation to Claim 2). The critical point is that all of those critical facts were known before the period of time which he focusses on. As such even if Mr Roberts is right about the records, even if he is right about deliberate concealment (and I make no findings on wither of these points because I do not have to do so), those facts could not enable him to extend the time for bringing the claims which he brings.

75. Further even if there were a connection such that the facts could be engaged, what has been pleaded does not amount in law to deliberate concealment, which (as I have explained above) would require it to be asserted that the Bank intended to conceal a fact or facts, or that it considered whether to inform VTV of the facts in question but decided not to do so. The Particulars of Claim asserts that there was "no reason whatsoever" why the Defendant could not have responded to the liquidators' letters. That does not suffice. Thus the claim of deliberate concealment would fall to be struck out in any event.

76. Further I would add that (while I make no finding on the merits of these points for the reasons explained above) having read the materials in this case, while the Bank's responses were plainly sub-optimal, I see nothing at all implausible in the Bank's account of the facts surrounding the emergence of the documents, which is briefly as follows:

    i) Mr Roberts places much weight on the letter from the Bank's Credit Management Services Office on 9 October 2013 which stated that the Bank was unable to locate further details to assist the liquidators' requests, and asked if it could be provided with the sort code and account number. While the sort code and account number had already been provided in the liquidators' letter of 3 September 2013, it had been provided to a different part of the Bank – the Cavendish Square Office. There seems to be no basis for saying that the author of that letter was aware that the account details had already been provided and deliberately chose to ignore those details and to write a letter on a false basis.

    ii) That letter was not responded to in writing. The liquidators continued to write to the Bank's Cavendish Square branch.

iii) The liquidators' letters were sent over 2 years after VTV's account had been closed and were being dealt with by individuals in the Bank's processing service centres without any knowledge of VTV as a customer. This explains, if it does not justify, the sub-standard response to correspondence. But there would seem to be no reason why such operatives would take the step of deliberately concealing information.

iv) There is at least some evidence which suggests that the Bank was seeking to provide the relevant information: there is Mr Tither's fax on 2 December 2013, which requested the necessary actions to be completed "as a matter of priority".

v) On the basis of the materials currently in play (and at this stage there has of course been no disclosure, as there would have be if the matter proceeded to trial) it does appear that despite this "behind the scenes" activity there was no response. That is unfortunate, but not unheard of and not necessarily indicative of any wrongdoing, particularly when the Bank was undergoing a significant restructuring including a transfer of the Bank's processing facilities to a different location.

vi) While Mr Roberts makes much of what he calls the late disclosure of the RMP File, given the fact that it has relevance only to the detailed merits if time bar could be overcome, this is again not entirely surprising.

The Second Claim

77. The Second Claim is described in the Particulars of Claim as "*Lack of duty of care in the verification of the Form that led to breaches of the Mandate and the Agreement both held by the Defendant*".

78. It is a somewhat confused plea. While Mr Roberts says, "*The core allegation (cause) of the Second Claim stands as is written in the Claimants Reply at paragraph 18 and needs no paraphrasing*", that paragraph is diffuse and not easy to follow and Mr Roberts has subsequently directed my attention to paragraph 24 of that document.

79. Having carefully considered the various formulations of the claim advanced in the pleadings and the Claimant's Skeleton Argument, it appears to me to combine elements of an allegation of breach of a duty of care with a case about the status of Ms Fox's signature.

80. The allegation of breach can be seen, for example in:

i) Paragraph 18(i) of the Reply:

> "(i) it was the overriding duty of the Defendant to protect and safeguard the funds entrusted to its safekeeping by its customer, the legal entity VTV; (ii) the Defendant breached this duty as its conduct as bankers to VTV lacked the proper care and attention required and expected in a normal Customer/ Bank relationship; and (iii) VTV suffered harm because its funds were not safeguarded and protected by the Defendant".

ii) Paragraph 18(iii)(b) of the Reply asserting the Bank's duty to:

> "Ensur[e] it complied with its own inhouse verification controls and the relevant Clause 7.1.20 of the Agreement when adding JF to the List. Such to prevent what happened to VTV, the fraudulent appointment of JF as a full signatory to its bank accounts, by way of forgery."

To similar effect paragraph 24(ii) of the Reply.

81. It seems to me that the argument regarding breach of duty of care could not, as a matter of law, reach the conclusion that the signature of Ms Fox was "*invalid and of no effect*" – which definitely is a part of Mr Roberts' case; it is a claim which would sound in damages – which it could do without the need to demonstrate that the signature was invalid and of no effect.

82. The second argument, and it appears the main one (relying on Companies Act s 44(2)), is that the addition of Ms Fox as a signatory to the account was "*invalid and of no effect*" such that each payment made on the basis of Ms Fox's signatory was a breach of mandate. This is put on two related bases arising out of the absence of Ms Turner's signature:

i) That Ms Turner did not sign the Additional Signatory Form, such that it was a "forgery";

ii) That it was necessary for the Bank to be instructed by two authorised signatories before adding a new signatory to the Account, but the Additional Signatory Form only contained the purported signature of Ms Turner.

83. It therefore follows that the essence of this part of the Second Claim is that Ms Fox was not an authorised signatory on the account.

84. Mr Roberts calls these two arguments "strands" of the same claim, with the second argument, as to validity being his "first strand" and the argument as to breach of duty being his "second strand". (There are also other "strands of this claim", with which I shall deal briefly below). However, while that may seem a logical approach to a layman, they are not, as a matter of law, related arguments, but distinct ones. They stand or fall separately. I shall therefore deal with them separately, considering what would be required to plead each of them, and when VTV knew those critical facts for the purposes of limitation.

85. I deal first with the "first strand", invalidity – this being the argument with which the Bank has grappled. The essential ingredients of that claim are that:

i) Ms Fox co-authorised the cheques;

ii) Ms Fox was not an authorised signatory on the Account and;

iii) The Bank allowed the cheques to be paid.

86. All of these facts were plainly known to VTV or the liquidators by (and for at least (ii) and (iii) well before) 2013. As for the cheques, the Liquidators received these. The claim encapsulated in the "first strand" must therefore be time barred.

87. That leaves "the second strand" or breach of duty – that the Bank failed to verify the form which purported to authorise Ms Fox.

88. For this claim what needed to be known? The claim is in essence that the Bank failed to check properly before adding Ms Fox to the mandate – and that if any proper check had been done it would not have authorised her because in fact the Board had not authorised Ms Fox to becomes a director or to sign cheques.

89. That is not however what needed to be known in order to plead the case. All that needed to be known to plead the case was:

    i) The fact of the banking relationship (not contentious);

    ii) The fact of payment of the cheques signed by Ms Fox (not contentious);

    iii) The fact that Ms Fox was not in fact authorised.

90. To reiterate, it seems to me quite clear that all these relevant facts were known to VTV via the liquidators. So the liquidators' letter dated 3 September 2013 demonstrates that VTV knew that, at the time that the cheques were signed and paid, Ms Fox had not been appointed as a director and therefore that the payments had been made contrary to the terms of the Shareholders' Agreement.

91. Further VTV's directors (or the liquidators exercising reasonable diligence) either knew or should have known that:

    i) Ms Fox was not a director. Mr Roberts accepts this, advancing a positive case that Ms Fox was "incorrectly" appointed as a director at a later date.

    ii) There was not a board resolution to authorise Ms Fox as an additional signatory and hence knew whether or not Ms Fox had been appointed by VTV as a signatory on the account.

    iii) To authorise the addition of Ms Fox would have needed the approval of two existing signatories to the account (i.e. two out of Mr Ross, Ms Turner, Mr Corcoran). Ms Turner and Mr Corcoran (and through them, VTV) would have known that they had not authorised the addition of Ms Fox as a signatory. The liquidators of VTV could also easily have made enquiries of the current and former directors and asked that very question.

92. It is salient to note that the Letter Before Action dated 16 September 2016, sent prior to any substantive response from the Bank stated in terms that at "*no material time was Julie Fox ever an authorised signatory nor was she authorised by the board of [VTV] to be placed on the roll of directors at Companies House*" and that the 4 cheques were paid "*in breach of the bank's mandate and its duties of care*". That letter also referred to the transactions identified by the liquidators in their letter of 3 September 2003 and asserted that "*some or all of those cheques were very probably*

also honoured and/or some or all of those transfers were also actioned by the bank in breach of its mandate".

93. Thus VTV considered it was in a position to allege breach of duty in 2016, and based on facts which it knew considerably earlier.

94. I therefore conclude that everything which was necessary to plead the Second Claim was available to VTV/the liquidators by 2013.

95. Again, it is appropriate to consider specifically what it is Mr Roberts says that he needed to commence this case.

96. I will deal first with what Mr Roberts would say about the analysis above of the "second strand", and in particular the inference of breach of duty from those minimal known facts. Mr Roberts says that it was necessary to know much more. However as a matter of law all that was needed was to know enough to say (putting it colloquially): "*I don't know quite what you did, but logically you must have been in breach of duty, because Ms Fox was not a director and if you have taken the slightest trouble to check (as you should have done) you would have discovered that*". In short VTV knew both ends of the equation (that Ms Fox was not authorised and that the Bank had paid cheques signed by her). That gave them enough to say that the Bank had breached its duty for the purposes of pleading a case. More information was not necessary for that purpose. It gave more evidence. But it did not fill any essential gap.

97. I turn now for completeness to what Mr Roberts specifically says he needed to know. The Particulars of Claim identifies three matters:

    i) The "*signed and complete Mandate*";

    ii) The "*contents of the [Additional Signatory] Form*"; and

    iii) An email sent by Mr Hanka to the Bank on 10 January 2006, attaching a copy of the Shareholders Agreement.

98. This appears to be another manifestation of the approach discussed above – namely an argument that because the Liquidators' counsel was unwilling to give a positive opinion on the merits the case was not capable of being advanced. That is misconceived for the reasons I have already given.

99. As regards the "*signed and complete Mandate*", again this is not a document which was required to plead that Ms Fox was not authorised and that her signature was therefore "invalid". The reference to the "signed and complete mandate" appears to be reference to a copy of the document with the completed section marked "*For Bank/Mandate Centre use only*" (completed by Ian Mason of the Bank on 5 April 2006. The reference to "*signed and completed*" appears to be to anticipate a defence which the Bank might advance (namely that the mandate which it received looked perfectly in order). As to the detail of the point, namely that the document as only forthcoming in 2018, this appears to be inaccurate in that VTV certainly had a copy of the mandate and the original list of authorised signatories by 2016 when a copy was sent with the Letter before Action. But (again) it was not necessary for the Claimant to plead that the Bank had signed and completed that document (not least because the

relevant section was for internal use only); it need only have been alleged that Ms Fox was not a director and not an authorised signatory.

100. As regards the Additional Signatory Form the position is similar – this is all about pursuing a defence which has been raised by the Bank, and not about the original ability to plead the point. The Additional Signatory Form was received on 30 September 2016. Before that date, VTV / the Claimant had already alleged that Ms Fox was not an authorised signatory and that the payments should not have been made (for example in the Letter Before Action). The Bank by way of response (and hence by way of defence) argued that Ms Fox had been duly added as a signatory and that there was no breach of mandate. It is only in response to that defence that Mr Roberts has taken issue with the validity of the Additional Signatory Form.

101. Yet further the same point arises in relation to the Hanka email, attaching a copy of the Shareholders Agreement. The actual Shareholders Agreement adds nothing to what VTV knew, namely that at the time that the cheques were signed and paid, Ms Fox had not been appointed as a director and therefore that the payments had been made contrary to the terms of the Shareholders Agreement. That is also consistent with the fact that a copy of that email was in fact provided by the Claimant to the Bank on 14 July 2017 (attached as appendix 1 to the Second Letter Before Action). And of course, the terms of the Shareholder Agreement must have been known to VTV – as is apparent from the fact that the "Hanka" of the Hanka email was VTV's CEO/Managing Director.

102. In reality what all of this goes to is the merits of a negligence claim. But that this not the issue at the point of pleading a claim. The fact that Mr Roberts' arguments engage with the merits is illustrated by considering how they interrelate with the Bank's position on the substance of the claim.

103. So the Bank contends that even on the merits such a claim is hopeless and has no real prospects of success. It says that:

i) The requirements for adding signatories to VTV's account were set out in Clause 3 of the mandate, which provided: "*The Bank will be advised of additions to the list [of authorised signatories] by way of certified Resolutions of the Directors of the Company*".

ii) As to the form such a notification must take: "*All lists, notifications and resolutions provided to the Bank from time to time shall be certified as correct by the Company Secretary or a Director*".

iii) The Additional Signatory Form which added Ms Fox to the list of authorised signatories pursuant to a form headed "*Change in constitution of Board or terms of signing authority for a Company Account*", and provided that, by a resolution of VTV dated 24 July 2006, it was resolved and agreed that Ms Fox had been appointed as Finance Manager of VTV and that she was to be added to the existing signatories authorised to give instructions to the Bank in relation to the Account.

iv) A specimen signature of Ms Fox was also provided in the appropriate signature box. The instruction to add Ms Fox as an authorised signatory was

certified as correct and was (on its face) advised to the Bank by Ms Turner signing as a director of VTV.

v) Ms Turner expressly certified that the Additional Signatory Form was a true excerpt from the Minutes of the Meeting of Directors of the VTV at which the *quorum* required by the Articles of Association of the Company was present and that the specimen signatures provided were genuine.

104. On this basis the Bank contends that there is therefore no basis to allege that the Bank was negligent. What Mr Roberts claims VTV needed to know – for it would seem the same reasons as he relies on in relation to the First Claim was effectively the reply which he would wish to make to this namely: no, it was not good enough to take this on trust; you breached your own rules; that is a good indication that you breached your duty.

105. A similar point arises in relation to "Strand iv" which relates to the Bank's knowledge of the Shareholders Agreement. If true, this provides a further basis for riposte to the Bank's defence that it was entitled to rely on the document it was sent. The same is also true of "Strand iii" – a similar point to "Strand ii" but relating to checking of signatures. And here the Reply says in terms that "the "checking back "*procedure is central to the Defence rebuttal of both claims set out in the Particulars of Claim.*" This makes it particularly clear that the developed "four strands" are genuinely Reply points, and as such not susceptible of attracting the protection of section 32(1)(b).

106. It is quite clear as a matter of law that the critical points which need to be concealed are points for pleading the original claim – not those one would wish to know the answers to before pleading a reply. It follows that the Second Claim is also one which must fail on the issue of limitation.

107. Accordingly the Bank is entitled to the relief which it seeks, namely that the Claim be struck out pursuant to CPR 3.4 as disclosing no reasonable grounds for bringing the claim and that there be judgment for the Bank on the claim.

The Unpleaded Claims

108. In his Reply and evidence Mr Roberts outlines two more claims. Those are not pleaded claims, and strictly speaking they do not arise for decision. Mr Roberts has advanced two claims in the formally served Particulars of Claim. Those Particulars have not been amended. It is on the basis of these claims that summary judgment/strike out has been sought.

109. However given (i) the fact that were these new claims compelling I might be induced to adopt an unorthodox approach and refuse judgment, ordering wholesale amendment and (ii) Mr Roberts' position as a litigant in person (who may be assisted by the Court's views), I will deal with them very briefly here.

The Third Claim

110. The Third Claim is described as another claim in negligence. Mr Roberts says that the Bank owed a duty of care to VTV to ensure that all cheques that it honoured were signed by two authorised signatures in accordance with the Mandate that it held; and

that the Defendant breached this duty by honouring 4477 cheques that totalled £5,452,662 that were co-signed by Ms Fox which were not checked back to the List that was in force throughout.

111. Those are different cheques to those which are relied on in relation to the First and Second Claims. Mr Roberts says that it was only on 26 February 2020 that VTV gained enough knowledge to advance this claim, namely the fact that the Bank did not check these signatures back to the List of authorised signatures.

112. This however suffers from exactly the same problems which afflict the other aspects of the breach of duty case: for pleading purposes it hinges not on the knowledge alleged by Mr Roberts to be critical, but on the knowledge which VTV had of the honouring of the cheques and the absence of authority of Ms Fox.

The Fourth Claim

113. This is a claim in dishonest assistance. It is said that two of the Bank's employees dishonestly assisted Mr Ross in his breach of fiduciary duties by failing to question and intervene with regard to certain other cheques in 2007 when VTV was under the LQE Special Measures regime.

114. That claim has not been dealt with by the Bank because it is not in issue for the purposes of this application. I need only say for the present that this presents a number of not inconsiderable hurdles, none of which have been pleaded to a standard which would enable me to conclude that there was a realistic prospect of success. Those hurdles include the following (based on the draft amended Particulars of Claim):

i) Assuming Mr Ross was a fiduciary (which certainly seems likely) were his actions in breach of such duties? That may be the case, but is certainly not properly pleaded.

ii) Did the Bank's employees assist in the breach? Again, while Mr Roberts asserts that this is clear, I am not persuaded that this is pleaded.

iii) If they did so assist, did they act dishonestly in doing so? Dishonesty must be proved, and while "blind eye" knowledge can suffice, a defendant does not have the requisite dishonest state of mind if he merely suspects what is going on: *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511. This would be a formidable hurdle for Mr Roberts to clear and the pleading of this is currently not sufficient.

iv) Even if Mr Roberts could establish the requisite degree of knowledge for the tort of dishonest assistance, it is not at all clear to me how the defaults alleged are said to be attributable as a matter of law to the Bank itself, as opposed to the individuals identified.

115. In all the circumstances there is nothing in these late unpleaded claims which suggest to me that it would be appropriate to do anything other than I have indicated above, and give judgment for the Bank.