Neutral Citation Number: [2025] EWHC 678 (Ch)

Case No: BL-2021-002293

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

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

Date: 28 March 2025

Before :

MASTER BRIGHTWELL

- -

Between :

FRONTIERS CAPITAL I LIMITED PARTNERSHIP (acting by Frontiers Capital General Partner Limited)	**Claimant**
- and -	
THOMAS FLOHR	**Defendant**

- -
- -

Sir Geoffrey Cox KC and Ben Walker-Nolan (instructed by **The Khan Partnership**) for the **Claimant**
Jonathan Cohen KC, Nicholas Goodfellow and Bláthnaid Breslin (instructed by **Grosvenor Law**) for the **Defendant**

Hearing dates: 11–13 December 2024

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 28 March 2025

Master Brightwell:

1. The defendant, Mr Thomas Flohr, applies for summary judgment on the claimant's claim, or for an order striking it out, principally on the ground that the events complained of took place in the period from 2002 to 2005, and the claimant's reliance on section 32 of the Limitation Act 1980 is unsustainable and/or has no real prospect of his success. The defendant also argues that other elements of the claim are unsustainable and should be struck out.

2. In response, the claimant has made a counter-application for permission to amend the claim to introduce a claim in fraudulent misrepresentation.

3. As part of the defendant's application, he also sought an order striking out the claim on the footing that the former general partner of the claimant ("FCILP", or "the Fund"), a dissolved limited partnership which was governed by the Limited Partnerships Act 1907, had no standing to pursue the claim on its behalf. I dismissed that part of the application in a judgment handed down on 6 November 2023: see [2023] EWHC 2723 (Ch) (and [2024] EWCA Civ 1385).

4. The effect of that judgment was to leave open that part of the defendant's argument on authority which contended that the claimant had not established that Frontiers Capital General Partner Limited ("FCGPL") had authority to pursue the claim under the agreement governing the partnership. It is now common ground that FCGPL does have that authority, its solicitors having produced evidence of the requisite consent having been given in accordance with the agreement, and I need say no more about that issue (although the costs of the earlier hearings on that issue remain to be determined).

5. As I explained in my November 2023 judgment, at the first hearing of the application in July 2023 where authority issues were considered, I made a confidentiality order in respect of a number of documents containing allegations made by the claimant, which Mr Flohr contends are both scandalous and irrelevant. The effect of that order was to restrict the access of non-parties to documents containing controversial allegations, the relevance of which was in issue, but ensuring that the hearing took place fully in public. At the hearing in December 2024, and ultimately without opposition, I made a further order on an application issued by the claimant. This order governed the way in which the parties would refer to the controversial allegations during the course of the hearing, again ensuring that the hearing took place entirely in public. The effect was that on a small number of occasions I was invited to read documents subject to the confidentiality order but their contents were not stated in open court.

6. As I explain below, I have been able to determine the applications before the court without taking those allegations into account. They have not been directly material to the points which I have determined in favour of the defendant, and accordingly do not need to be set out in this judgment.

Factual background

7. As will be seen to be relevant below, the claimant partnership was dissolved some years ago. The claim is pursued on its behalf by its former general partner, FCGPL, which was dissolved on 2 November 2010 and restored to the Guernsey register of companies on 4 February 2021. Immediately before FCGPL's dissolution, it had three directors, Mr Pascal Mahieux, Mr Richard Stapley and Mr Herman Spruit.

8. As I indicated in my November 2023 judgment, the claimant alleges in the particulars of claim that FCILP was a fund formed for the purpose of making venture capital investments in the technology sector, that its business ceased on 5 April 2010 and that it was dissolved without knowledge of the cause of action pleaded in this claim.

9. It is common ground that, on 27 March 2002, the claimant, the defendant and others entered into a Subscription and Shareholders' Agreement ("the SSA") relating to a company then known as Storageonline Holdings (UK) Ltd, which subsequently changed its name to Comprendium (UK) Ltd ("Comprendium UK"). The claimant claims that it invested substantial sums in the equity of Comprendium UK, was allotted preference shares worth around €7.5m, having acquired over 400,000 ordinary shares, and loaned significant sums in excess of €5m to the company.

10. It is pleaded that the defendant and Mr Timothy Horlick were introduced to one another in late 2001 as Mr Flohr was searching for investors to aid with the acquisition of software companies, with particular emphasis on the document management and archiving sectors, and that they became close friends and reposed and trust and confidence in one another. It is alleged that Mr Horlick made a personal loan to Mr Flohr of €500,000, which was not repaid.

11. At the time of entry into the SSA, Comprendium UK acquired the share capital of other companies. Mr Flohr became the Chairman of the company. It is pleaded that its subsidiaries' principal activity was that of enterprise software and document management. The primary objective of the SSA is said to have been to establish it as the leading provider of enterprise document management and storage solutions in Europe with an exit strategy by the third anniversary. In the event, it is common ground that Comprendium UK's financial position deteriorated rapidly from the time of the SSA, and it never

made a profit, before it was dissolved on 31 July 2007 (having again changed its name to Umbra Ventures Ltd).

12. The factual basis of the claim as currently pleaded is further explained in the second witness statement made by the claimant's solicitor, Ms Lucy Vials, in response to the defendant's application. She explains that Mr Horlick was introduced to Mr Flohr by a colleague of Mr Horlick's then wife (Mrs Nicola Horlick), and goes on:

> 'At the time, Mr Flohr and his business partner, Mr Roman Brunner, were seeking investment into a new venture to establish a group specialising in online document management, storage and archiving solutions for European businesses. The proposal was for the acquisition and unification of three existing companies: Micro-Image Business Solutions Limited (UK) ("MBS"), Solitas Informatik AG (Switzerland) ("Solitas") and Solsys Solution Systems GmbH (Austria) ("Solsys").'

13. A key premise of the claim is that Mr Flohr was to play a central role in the operation of Comprendium UK. The claimant relies on the Business Plan prepared before the entry into the SSA, which referred to the 'experienced and highly motivated management team' headed by Mr Flohr and Mr Brunner. Likewise the service agreements, and the correspondence surrounding them, are said to signal the importance of Mr Flohr's role and personal involvement to the Fund. Ms Vials explains that Mr Flohr assured Mr Horlick that he intended to play a full-time and hands-on role in the business and told Mr Horlick not to worry, as the use of a separate company, Executive Management Limited, to provide Mr Flohr's services was only for tax purposes. The Service Agreement as signed included non-compete provisions applicable to Mr Flohr.

14. Ms Vials says that 'Mr Flohr represented and maintained that he would be intrinsically involved with the running of Comprendium UK, as his expertise was of vital importance.' Furthermore, 'Remuneration for the Defendant's services was to be in excess of €200,000, a significant amount at that time, but reflective of the Fund's understanding of the essential "hands-on" role that Mr Flohr had represented he would play in Comprendium UK. …'

15. It is pleaded that Mr Flohr represented in an email dated 7 February 2002 to a prospective investor:

> 'My role: As Executive Chairman of StorageOnline, I will be responsible for the profitable growth path as outlined in the business plan. You stated correctly, that one of my strength is also on the sales side with high level corporate decision makers at large enterprises. I am therefore very comfortable to commit, that I will devote a substantial part of my efforts

> to not only make those executive relationships available to StorageOnline, but also be significantly involved in the sales cycle to ensure, that these relationships turn into accountable revenue.'

16. The gravamen of the claimant's complaint in the particulars of claim is summarised at paragraph 3:

> '3. Unbeknown to FCILP, Mr Flohr set up, controlled and kept hidden from FCILP a parallel structure of Comprendium companies in Switzerland and Germany. Those companies acquired European technology companies from Comdisco Global Holding Company Inc (USA), in one instance for a profit of EUR 93m or more at completion. That parallel structure of companies had no right to use the name "Comprendium", leveraged the existing company structure under Comprendium UK and used its resources and personnel.'

17. The claimant pleads that Mr Flohr owed a duty to act in good faith as an implied term of the SSA, and that he owed fiduciary duties to the claimant. It is alleged that Mr Flohr breached these duties in a number of ways. As far as what is pleaded as the 'Parallel Comprendium Company Group' is concerned, it is alleged that Mr Flohr caused the Comprendium UK company structure to be leveraged to set up Comprendium Investment SA in Switzerland, and that it purchased the share capital of Comdisco (Switzerland) SA (also, "Comdisco Switzerland") from Comdisco Global Holding Company Inc (USA) (Mr Flohr being a former employee of Comdisco in the USA). It is further alleged that Mr Flohr caused the incorporation in Germany of Comprendium Investment (Deutschland) GmbH, in order to acquire Comdisco Deutschland GmbH, being Comdisco's German operations (also referred to as "Comdisco Germany"). It is also pleaded that, in 2004, Comprendium Capital SA (Switzerland) was incorporated.

18. I will refer for ease of reference to these companies as the parallel structure of companies or as the Parallel Comprendium Company Group (as they are defined in the Particulars of Claim). I do so solely for the purposes of referencing the companies separately from Comprendium UK, and in doing so do not intend to express a view on the merits of the claimant's allegations.

19. The claimant further pleads that, in breach of the alleged duties of good faith and fiduciary duties:

    i) Comprendium UK was restructured in 2003 to 2004 on Mr Flohr's initiative, without disclosure of the Parallel Comprendium Company Group, and the parallel structure acquired the rights to European Union and German trade marks for "Comprendium".

ii) (The claimant believes that) funds were channelled through subsidiaries of Comprendium UK to pay for Comprendium Leasing (Deutschland) GmbH and Comprendium Finance SA.

iii) Mr Flohr caused himself to be removed as a registered director and company secretary of Comprendium UK, whilst continuing as chairman of the board of Comprendium UK.

iv) Mr Flohr exploited the assets and manpower of Comprendium UK and its subsidiaries for his benefit and for the benefit of the Parallel Comprendium Company Group.

v) Mr Flohr exploited the financial vulnerability of Comprendium UK for the benefit of the Parallel Comprendium Company Group in his dealings with its trade marks.

20. Ms Vials' second witness statement summarises at paragraph 72 the factual basis of these allegations of breach of duty in the following way:

> '72.1.During his tenure as Chairman of Comprendium UK, Mr Flohr caused to be incorporated a series of parallel Comprendium companies, including to the Fund's present knowledge, Comprendium Investment SA, Comprendium Finance SA, Comprendium Capital SA, Comprendium Investment (Deutschland) GmbH, and Comprendium Leasing (Deutschland) GmbH;
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> 72.2. In particular, Mr Flohr then utilised some of those companies within his Parallel Comprendium Structure to purchase the Swiss and German subsidiaries of his former employer, Comdisco Holdings Global Inc. In particular:
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> 72.2.1. On 10 October 2002, Mr Flohr caused Comprendium Investment SA to purchase the entire share capital of Comdisco (Switzerland) SA, which changed its name to Comprendium Finance SA;
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> 72.2.2. On 29 April 2003, Mr Flohr caused Comprendium Investment (Deutschland) GmbH, a subsidiary of Comprendium Investment SA to acquire the shares in Comdisco Deutschland GmbH, which, by that point, had already changed its name to Comprendium Leasing (Deutschland) GmbH;
>
> 72.3. It is the Claimant's case that by these transactions Mr Flohr made very significant profits for his personal benefit and built up a substantial collateral business empire to the detriment of the Claimant;

72.4. Contrary to his ongoing fiduciary duties and duties of good faith, Mr Flohr never told the Claimant (nor Mr Horlick) that he had used and was continuing to use Comprendium Investment SA and other Comprendium branded companies to acquire, run and manage the former assets and businesses of Comdisco Switzerland and Comdisco Germany;

72.5. Further, after his acquisition of the former businesses and assets of Comdisco Switzerland and Comdisco Germany, Mr Flohr prompted a process of corporate restructuring at Comprendium UK. During that process, Mr Flohr never referred to, nor mentioned, the Comdisco acquisitions. Nor during that process did Mr Flohr reference the parallel Comprendium companies (Comprendium Leasing (Deutschland) GmbH, Comprendium Investment (Deutschland) GmbH, Comprendium Finance SA and Comprendium Capital SA). This is surprising if, as Mr Flohr suggests, there was no concealment of his acquisitions of Comdisco entities and use of parallel Comprendium-named companies to effect and manage those acquisitions.

72.6. Mr Flohr had no right to use the Comprendium name and trademark in his Parallel Comprendium Structure;

72.7. Following the acquisitions, Mr Flohr unilaterally resigned from his position as a Director of Comprendium UK. The Claimant and Mr Horlick took this action to be a simple error at the material time. Mr Horlick was only notified by Mr Rinaldo on 27 November 2003 that Mr Flohr appeared to have removed himself from Comprendium UK's Board of Directors on 21 May 2003, according to the Annual Return filed on 2 June 2003, even though there was no proper notice filed alongside the Annual Return. Until Mr Rinaldo's email, it is clear that Mr Horlick was unaware that this had occurred, particularly since, upon becoming aware of this fact, Mr Horlick requested that Mr Flohr be reinstated to the Board, stating "Thomas should only have been replaced as Secretary, not as a Director. Carl should be removed and Thomas reinstated." Of course, with the benefit of hindsight and, in retrospect, it is clear that Mr Flohr's action was deliberate and undertaken with a view to avoiding his duties to Comprendium UK. However, Mr Flohr did not disclose the reasons for his actions at the time.

72.8. …

72.9. Further, the assets and manpower of Comprendium UK and its subsidiaries were exploited by Mr Flohr for his benefit or those of the Parallel Comprendium Structure, including by the use of shared offices and staff.

> 72.10. The above actions frustrated the purpose of Comprendium UK, which was to be the ultimate holding company for the whole of the Comprendium group.
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> 72.11. Once Comprendium UK was in considerable financial difficulty, Mr Flohr exploited its vulnerability by obtaining its registered trademark for the benefit of the Parallel Comprendium Structure. I address this point further below, but the Claimant's case is that Mr Flohr made various representations at this time to explain why he required the benefit of the trademarks, including by reference to his own business reputation and personal exposure on guarantees. Mr Flohr never disclosed, nor referred to the fact that he required the trademarks as a result of his acquisition and management of former Comdisco businesses under the Comprendium brand.
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> 72.12. Throughout the life of Comprendium UK, Mr Flohr was obliged to deal fairly and openly with the Fund, disclosing facts or circumstances likely to affect materially the business of Comprendium UK. His continuing failure to do so was an ongoing breach.'

21. It is also pleaded that, in breach of the same duties, Mr Flohr frustrated the business of Comprendium UK, which he knew to be experiencing serious financial difficulties, by failing to comply with an agreement he reached with Mr Horlick, part of which was that €10-€20m of annual business would be placed with Comprendium UK, and which would have ensured its profitability. I will return to this allegation further below.

22. The claimant seeks, in summary, the following relief:

    i) An account of profits made in breach of contractual and fiduciary duties, and/or disgorgement damages.

    ii) Damages or equitable compensation for Comprendium UK's inability to repay its loan, redeem its ordinary and/or preference shares and pay interest to the claimant.

    iii) The market value which the claimant's ordinary shares in Comprendium UK would have had if there had been no breach of duty as alleged.

    iv) The profit that the claimant would have made on its investment in Comprendium UK in the absence of the alleged breach of duty.

    v) Alternatively, damages or equitable compensation to restore the claimant to the position it would be in had it not made the loans to or investments in Comprendium UK which it did make.

The defendant's application

Challenges to the pleading of the claim

23. The defendant contends as part of his application to strike out the particulars of claim, or for summary judgment on them, that the particulars are deficient in the way that they allege both the existence of the pleaded duties, and the allegations of breach of those duties. Even though these points were argued by Mr Cohen after his limitation arguments, I consider that they should logically be considered first, as it is only those claims which survive a pleading challenge that need then to be considered separately from the perspective of limitation.

24. First, it is argued that there is no realistic prospect of a court at trial finding that a duty of good faith is to be implied into the SSA, or of it finding that Mr Flohr was a fiduciary who owed fiduciary duties to his fellow shareholders.

25. Secondly, the defendant submits that the plea that he breached his duties (if they existed) by competing with Comprendium UK is hopeless.

26. Thirdly, it is submitted that the claim that Mr Flohr "frustrated" the business of Comprendium UK by not placing business with it, or ensuring or using best endeavours to have business placed with it, is not coherently pleaded and discloses no reasonable grounds for bringing that part of the claim and should be struck out accordingly.

27. Fourthly, it is submitted that some of the losses claimed are demonstrably irrecoverable and, to the extent that the claimant claims by virtue of being the holder of preference shares in Comprendium UK, are barred by the rule against reflective loss.

Breach of duty

28. On the facts of this case, I consider it appropriate to consider the pleading relating to breach first (i.e. on the assumption that the breaches relate to an arguable duty owed by the defendant), and then to comment on the challenge to the pleaded duties.

29. Mr Cohen characterised the allegations of breach of duty at paragraph 35 of the particulars of claim as the 'Competition Claim'. Separately from the argument that the court could be satisfied that the pleaded duties did not exist, he submitted that this aspect of the claim was hopeless. The principal reason for this is that the companies operated by Mr Flohr in Switzerland and Germany, acquired from Comdisco, were demonstrably not in competition with Comprendium UK. That company was intended to become the 'leading provider of enterprise document management and storage solutions in

Europe', as described in the Business Plan created before the SSA was signed. The evidence, in the form of the companies' SEC 10-K filings in the USA shortly before their acquisition by Mr Flohr, suggests that Comdisco Germany and Comdisco Switzerland were leasing subsidiaries. Comdisco's website said in 2002 that it had (i.e. before its insolvency) 'provided equipment leasing and technology services' and 'provided equipment leasing and other financing and services to venture capital backed companies'.

30. Mr Cohen also pointed out that it is averred in the particulars of claim that Mr Horlick assisted Mr Flohr in the acquisition of Comprendium Germany. He submitted that it cannot be open to the claimant to plead also that it was in unauthorised competition with Comprendium UK. He also said that the use of the Comprendium name itself could not, absent a claim for trade mark infringement (of which there was none), constitute a breach of duty which had resulted in any financial loss to the claimant.

31. There is much force in Mr Cohen's argument that the claimant does not plead how Mr Flohr's companies were actually in competition with Comprendium UK. On this point, it not satisfactory for Ms Vials to say that the claimant cannot particularise the nature of Comdisco's former business, acquired by Mr Flohr, because of his alleged deliberate concealment. Comdisco's public filings disclose the nature of the business acquired. But, the allegations of breach of duty pleaded by the claimant are not predicated only upon the German and Swiss companies competing with Comprendium UK's business. There is a further allegation in paragraph 35 of the particulars of claim that the parallel structure of companies 'exploited the resources of Comprendium UK and its subsidiaries'.

32. The particulars that follow begin by setting out the claimant's case as to Mr Flohr's acquisition of interests in Comdisco entities with what is said to be a lack of knowledge or informed consent on the part of the claimant, either as to the acquisitions or as to the true activities of Comprendium Investment SA. The pleading of particulars then goes on to allege that Mr Flohr exploited the manpower and assets of Comprendium UK and/or its subsidiaries and, once it was in considerable financial difficulty, exploited its vulnerability for the benefit of the parallel structure of companies. This is said to have been achieved through the use of Comprendium UK's personnel and/or subsidiaries and through the acquisition by Mr Flohr of the trade marks of Comprendium UK. It may be said that further information about this allegation, in the form of further particulars, ought to be pleaded. But this does not seem to me be to an allegation in relation to which the particulars of claim disclose no reasonable grounds for bringing the claim, or where the pleading is susceptible to summary judgment independent of consideration of limitation issues. The allegations, certainly in relation to the claimed misuse of the company's

assets, do not depend upon the alleged parallel structure having competed directly with the intended business of Comprendium UK.

33. For this reason, I would not strike out the allegations in paragraph 35 of the particulars of claim on the ground put forward by the defendant, that the alleged parallel structure was not in competition with Comprendium UK.

34. The other complaint made by Mr Cohen concerns the "frustration" claim. As he pointed out, this is not an allegation by the claimant that the SSA was frustrated in the sense that its performance was rendered impossible as a result of an unforeseen event, but that the parallel structure and Mr Flohr's failure to support Comprendium UK as allegedly agreed 'frustrated [its] purpose'.

35. The pleading is not easy to follow. This bare assertion (of frustration of the purpose of Comprendium UK) is pleaded as one of the particulars of the alleged breach of the duty of good faith, fiduciary duty or of clause 10.1.1 of the SSA (which is a restrictive covenant). It is then further particularised at paragraphs 36 onwards in the particulars of claim. Paragraphs 37 and 38 then allege that:

> '37. In or around September 2002, Mr Flohr invited Mr Horlick to attend the Oktoberfest in Munich, Germany. After dinner in a VIP chalet, Mr Flohr took Mr Horlick to one side, informed him that he was considering bidding for the assets of an entity named Comdisco Deutschland and asked Mr Horlick for his assistance. Mr Horlick stated that this would not be possible as both men had just invested in Comprendium UK and Mr Flohr's obligation was to focus 100% of his time on that business. Mr Flohr stated that it would be for the benefit of Comprendium UK and FCILP as:
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> (i) The business to be acquired would need document management services; and
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> (ii) Mr Flohr would ensure that €10-20m of annual business would be placed with Comprendium UK, thus ensuring the profitability of that company.
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> 38. On the basis of these representations, Mr Horlick agreed to assist Mr Flohr and entered into an oral agreement with him including the following terms:
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> (i) By way of his contacts, Mr Horlick would introduce Mr Flohr to banks and investors in the City of London to fund the acquisition of Comdisco Deutschland ("Comdisco Germany Transaction");

(ii) In return for Mr Horlick making the necessary introductions, Mr Flohr would pay to Mr Horlick 20% of the profits earned on the Comdisco Germany Transaction ("20% Profit Agreement").'

36. After pleading that Mr Horlick complied with his obligations under this oral agreement, the particulars of claim continue:

'42. Paragraph 35(ii) above is repeated. Mr Flohr indirectly acquired Comdisco Deutschland GmbH under the name Comprendium Leasing (Deutschland) GmbH, ABN was the source of funding used and Mr Flohr made a profit of, or in excess of, EUR 93m. In the premises, Comprendium Leasing (Deutschland) GmbH would have been capable, had Mr Flohr so directed it, of satisfying the assurance given to Mr Horlick of €10-20m of annual business being placed with Comprendium UK.

43. In breach of the fiduciary duties owed by Mr Flohr, each of the minimum standards of the duty of good faith owed by Mr Flohr to FCILP, the implied terms and/or Clause 10.1.1 of the 27 March 2002 SSA as pleaded at paragraphs 27 - 31 above, Mr Flohr failed to follow through on his assurance that €10-20m of revenue would accrue to Comprendium UK. Mr Flohr thereby frustrated the continuing viability of Comprendium UK in breach of his fiduciary and contractual obligations.'

37. The following paragraphs then plead the deterioration in Comprendium UK's financial position rather than alleging further breaches of duty on the part of the defendant.

38. Mr Cohen was scathing in his description of this plea. He pointed to contradictions between the pleading and what Ms Vials says in paragraphs 82 and 83 of her second witness statement (which do not support the pleaded statement that, 'the business to be acquired would need document management services'). He also submitted that the pleading on its face makes no sense: the alleged agreement was that Mr Flohr would cause business to be placed with Comprendium UK. On that footing, the profits of the German company are irrelevant – it is not pleaded that *it* was going to provide anything to Comprendium UK.

39. There is then the further issue that the plea at paragraph 38 is that Mr Horlick and Mr Flohr entered into an oral agreement according to which the consideration to be paid by Mr Flohr (the 20% Profit Agreement) was to be paid to Mr Horlick. In this context, I note that Mr Horlick as claimant did earlier issue a personal claim against Mr Flohr (in claim no. BL-2019-001627), which was discontinued on 24 May 2022. That was the day in which a hearing in that claim was listed, and the day after the application presently

under consideration was issued. It is not pleaded that Mr Horlick entered into the alleged oral agreement with Mr Flohr on behalf of the claimant.

40. The other matter pleaded in paragraph 37 is that Mr Flohr represented that he would ensure that business would be placed with Comprendium UK. The particulars of claim do not seek to explain why the claimant has standing to sue under a contract to which it was not a party on which a benefit was to be conferred on a third party, Comprendium UK. The claimant acknowledges that the assurance as to future business is not pleaded to be a term of the contract made with Mr Horlick, but suggests that the particulars of claim could be amended to plead the representation pleaded at paragraph 37(ii) as a term of the oral contract made between Mr Horlick and Mr Flohr, on the footing either that Mr Flohr made an absolute promise as to the revenue that would pass to Comprendium, or that he would use his best endeavours to ensure that €10-20m of annual business would be placed with the company.

41. I do not consider that the pleading on this point can be saved in this way. The current plea is that there was a representation by Mr Flohr that he would ensure that €10-20m of annual business would be placed with Comprendium UK. The representation is not expressly pleaded as a ground for impugning the contract. Nor is it pleaded that the claimant relied to its detriment on the representation such that some form of estoppel arose in favour the claimant.

42. There is furthermore no plea that the oral contract between Mr Horlick and Mr Flohr was made for the benefit of the claimant. If the representation were pleaded by amendment as a term of that contract, it would be ostensibly for the benefit of Comprendium UK. That might give that company the right to apply to enforce the term, for the purposes of s.1(1) of the Contracts (Rights of Third Parties) Act 1999, if that Act were relied on (which it is not). It would not, however, explain without more how the claimant had the right to sue. Furthermore, and crucially, the particulars of claim do not rely on a breach of the alleged agreement between Mr Horlick and Mr Flohr. They rely on an alleged breach of what are pleaded to be Mr Flohr's duty of good faith and non-competition, and fiduciary duties. It is not obviously apparent, and not pleaded, how any of those duties could give rise to an obligation either to ensure or to use best endeavours to ensure that €10-20m of revenue would accrue to Comprendium UK, whether or not Mr Flohr had represented or contractually bound himself as against Mr Horlick to do that. Such duties impose negative obligations by virtue of the relationship between the parties. The duty of good faith was described by Fraser J in *Bates v Post Office Ltd* [2019] EWHC 606 (QB) at [711] as requiring the parties to 'refrain from conduct which in the relevant context would be commercially unacceptable to reasonable and honest people'. On the assumption the duty applied, it would be a far stretch from what is pleaded to argue that it imported a positive duty

of the kind alleged to arise in relation to the alleged Horlick-Flohr contract. Likewise, I do not consider it arguable that a fiduciary duty, being an obligation of single-minded loyalty, could impose an obligation to cause business to be placed with Comprendium UK. The position might be different if it were alleged that business had been diverted away from the company, but that is not the allegation.

43. No explanation was provided by Sir Geoffrey as to how any of these difficulties might be overcome. Merely pleading that Mr Flohr agreed to ensure or use his best endeavours to ensure that €10-20m of revenue would accrue to Comprendium UK would not suffice to do so. The claimant has had an ample opportunity to put forward an amended pleading and has not done so. Furthermore, and apart from that, it seems to me that any amendment might well raise its own limitation issues. If a new cause of action were raised, it may well not arise out of the same or substantially the same facts as those already pleaded (see the discussion below on this point in relation to the claimant's amendment application).

44. I would accordingly strike out the allegation of "frustration" of the business of Comprendium UK insofar as it relies on the alleged representation by Mr Flohr that he would ensure that €10-20m of revenue would accrue to Comprendium UK. I consider that it is probably only paragraphs 35(ix) and 43 which would fall to be struck out accordingly. It does not appear to me that there is any other way which the particulars of claim allege that the alleged parallel structure frustrated the purpose of Comprendium UK, which is the express allegation made at paragraph 35(ix).

Duty of good faith and fiduciary duty

45. On the first day of the hearing, when the defendant opened the summary judgment application, I heard submissions from Mr Goodfellow on the arguability of the plea that Mr Flohr owed the claimant an implied duty of good faith and fiduciary duties. Mr Goodfellow succinctly argued that such duties were not arguable. Sir Geoffrey responded on these points. Without formally conceding the issue, the defendant elected not to make a reply on them. In those circumstances, and where the application is to be disposed of on limitation grounds, I will explain my decision on the point more concisely than I would if it were to be the basis of determination of the application.

46. In the *Bates* decision, Fraser J set out at [725] a non-exhaustive list of characteristics relevant to the question whether a contract is relational such that a duty of good faith can be implied, entailing that the parties must refrain from conduct which would be regarded as commercially unacceptable by reasonable and honest people:

> '1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
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> 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
>
> 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
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> 4. The parties will be committed to collaborating with one another in the performance of the contract.
>
> 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
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> 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
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> 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
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> 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
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> 9. Exclusivity of the relationship may also be present.'

47. A summary of the factors governing the existence of a fiduciary duty in a commercial relationship was set out by Nugee J in *Glenn v Watson* [2018] EWHC 2016 (Ch) at [131]. He said that it is difficult to identify the circumstances justifying the imposition of a fiduciary duty because the courts have declined to provide a definition or uniform description, and that 'joint venture' is not a term of art. Such duties will not readily be found in commercial settings. Factors (7) and (9) may be material here:

> '(7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all [the above] citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act

> for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to *"the single-minded loyalty of his fiduciary"* ….: someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.
>
> (9) So far as joint ventures are concerned, fiduciary duties may in particular be found to arise where one party has control of assets which are to be exploited for the joint benefit of both.'

48. Mr Goodfellow argued that on analysis of the documentation and, in particular, the consultancy agreement made with Mr Flohr's services company, there is no room for the implication of a requirement of good faith. That, he said, is the prism through which the question should be asked, and not whether there was a 'relational' contract. Mr Flohr's role was as a non-executive director, and was only strategic. The duty must be assessed as at the date of the agreement, and not in reliance on subsequent events. Mr Goodfellow also submitted that the terms of the SSA, the consultancy agreement and Mr Flohr's statutory duties as a director provided adequate protection, and left no room for the implication of a term, on established principles, of good faith. By reference to the terms of the SSA, he submitted that there were a whole range of contractual provisions to ensure that the investors and the claimant would participate in how the business was to be operated. Going through them, he submitted that they provided for a high level of governance to ensure that matters were operated appropriately. Similar considerations are then said, on analysis, to be inconsistent with an objective intention for there to be an implied duty of good faith, especially when there are references in the schedules to the SSA to the good faith determinations of the board.

49. As far as fiduciary duties are concerned, Mr Goodfellow submitted that this is not a case like *Glenn v Watson*, where a fiduciary duty was held to exist in certain respects where the defendant controlled a relationship with a third party, and was intended by the parties to use that relationship for the benefit of the joint venture (see, e.g., at [439]). The core need for the fiduciary to be acting on behalf of the other party, in what may be akin to an agency relationship, does not arise on these facts. Mr Flohr was also not in control of Comprendium UK. The existence of trust and confidence was not enough, and it was submitted that Mr Horlick can ultimately be seen to be relying on his subjective trust in Mr Flohr at the material times.

50. Mr Goodfellow also submitted that a fiduciary duty would be inconsistent with the express contractual terms agreed. He cited *Ross River Ltd v*

Cambridge City Football Club Ltd [2008] 1 All ER 1004 at [197], Briggs J, citing *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at 454–455, Mason J:

> 'The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'

51. It is clear that duties of good faith and fiduciary duties are not the same thing, and Fraser J recognised in *Bates* that the trust and confidence leading to the former will not be the same as that involved in fiduciary relationships. There is, however, a clear overlap in the factual enquiry which results from the allegation that either type of duty has arisen. It is unlikely that it would be appropriate to grant summary judgment in relation to one set of alleged duties if it were not appropriate to grant it in relation to both.

52. I can see that the claimant might have some real difficulty in establishing that a fiduciary duty had arisen. It is generally difficult to incorporate fiduciary duties into commercial relationships, outside their settled categories. It is pleaded that Mr Flohr and/or his agents were in operational control of Comprendium UK, but he was a non-executive director only, and the complaints about his conduct seem to be that he failed to exercise operational control. He does not appear to have been intended to have sole control of Comprendium UK; detailed duties of co-operation are included in the SSA. It is not clearly pleaded that he was contractually intended to have control over Comprendium UK, or that he was intended to have control over assets intended to be exploited for the benefit of others.

53. Nonetheless, it is pleaded that Mr Flohr used the control that he had to enable Comprendium UK's assets and resources to benefit the former Comdisco companies which he had acquired, rather than to further the business of Comprendium UK. Whilst the case law shows that a fiduciary duty may not be superimposed on a contract to alter the operation of a contract, I consider that I was taken to a few snapshots of the contractual documentation rather than being presented with the entirety of the evidence which might be available at a trial. Furthermore, the case law suggests that when considering whether a fiduciary relationship came into existence the court looks outside the contractual documentation to the nature of the relationship between the parties and to the representations made between the parties whilst the relationship was being forged.

54. As far as the alleged duty of good faith is concerned, similar considerations apply on the question whether the matter can be dealt with summarily, even

though the factors tending towards the existence of the duty are different. I do not doubt that the points identified by Mr Goodfellow would not be easily surmounted at trial, but I am not persuaded that this prospect is only fanciful.

55. Sir Geoffrey submitted that each of the factors identified by Fraser J in *Bates* at [725] are present. Emphasis could be placed on the long-term nature of the contract, the requirement in the SSA for loyalty and integrity, the degree of collaboration and co-operation required and the significant financial investment made by both sides. Furthermore, it might be said (contrary to the defendant's submission) that the overriding question to be asked when it is said that a duty of good faith has arisen is whether the contract is relational. The factors identified by the case law go to that issue, and it cannot simply be said that it is the wrong question.

56. The pleaded breaches also go beyond the allegation of Mr Flohr having competed impermissibly with Comprendium UK and the failure to procure business for Comprendium UK (the problems with which allegations go beyond those presently under discussion). Such substantive obligations would not easily be capable of incorporation through an implied obligation of good faith: see *Quantum Advisory Ltd v Quantum Actuarial LLP* [2023] EWCA Civ 12 at [48], Falk LJ. Again, however, there are pleaded breaches going beyond these duties as I have noted in relation to the pleaded breaches at paragraph 35 of the particulars of claim. These breaches relate to the alleged misuse of the assets of Comprendum UK in a way which I consider might arguably be the subject of an implied duty of good faith.

57. For these briefly stated reasons, I do not consider that it can be determined summarily that there would be no real prospect of a court determining at trial that there were duties of good faith and/or fiduciary duties arising in relation to the parties' relationship. The comments I make below as to why I would not determine the limitation question summarily in relation to matters pre-dating 2013 are also material in this context. There is a wide factual canvas involved and only certain points have been identified. Both disclosure and witness evidence of fact might very conceivably be relevant to an identification of the representations made between the parties when the contractual relationship was being negotiated, and in assessing the nature of the trust and confidence reposed by or on behalf of the claimant in Mr Flohr.

Loss

58. Mr Cohen raised a number of further arguments as to why the loss pleaded by the claimant was not recoverable. I decline to express a view on these arguments for four reasons: (a) in light of my decision on other points, they do not arise, (b) the arguments made orally did not mirror those made in the skeleton argument, (c) they would in any event not dispose of the claim but

only of elements of the particulars of loss, and (d) the submissions on the points were very brief indeed. This is particularly so in relation to the submission that the loss claimed in relation to preference shares in Comprendium UK was irrecoverable in principle by virtue of the rule against reflective loss (unlike loss claimed by the claimant in its capacity as loan creditor). The claimant contends that the nature of the rights under the preference shares issued to it are more akin to those of a creditor than those of a shareholder. I consider that the question whether a holder of preference shares is precluded from suing by the general rule that a shareholder cannot bring an action against a wrongdoer to secure relief for an injury to the company falls within a still-developing area of law and in any event would justify far more detailed submissions than those I received in order to be properly determined.

Limitation

59. An issue concerning limitation arises because the events relied upon by claimant in support of the claim occurred around 20 years ago. The claimant accepts that the primary limitation period had expired pre-issue of the claim form in relation to each of the claims pursued in the particulars of claim and pleads reliance on section 32 of the Limitation Act 1980, which provides as material as follows:

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

60. The question whether a fact has been concealed is a matter of ordinary English, and there is no requirement of a duty to reveal that information, and for the concealment to be deliberate the fact must be intentionally hidden or withheld: see *Potter v Canada Square Operations Ltd* [2024] AC 679 at [98]–[99], Lord Reed PSC. The focus in the parties' submissions was on the claimant's knowledge, although Mr Flohr did not accept that he had deliberately concealed any material facts from the claimant or from Mr Horlick.

61. The test as to when time starts to run in a case where deliberate concealment is alleged against the defendant has been set out by the Court of Appeal in *Gemalto Holding BV v Infineon Technologies AG* [2023] Ch 169, following the decision of the Supreme Court in *FII Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2022] AC 1. Although the *FII* case was about a mistake of law, it was made clear that section 32(1)(b) was to be treated consistently with section 32(1)(c): see at [44] and [47].

62. Before this decision, the test as to the knowledge which the claimant must possess before time will run in a case where there has been deliberate concealment was known as the 'statement of claim' test. This meant that time would not run until the claimant had discovered every essential element of the claim which had been concealed: see *Gemalto* at [49], where Sir Geoffrey Vos MR said this could no longer be so in a concealment case. Then, at [50], (and bearing in mind that *Gemalto* concerned an allegation of an unlawful cartel):

> '50. It makes no sense to say that the test for whether the limitation period has begun to run is when the claimant recognises that it has a worthwhile claim, and then to say that it does not have a worthwhile claim when it knows there may have been a cartel, but did not know, for example, the period during which the cartel operated. The formulation for the necessary knowledge is "knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ". One can embark on the preliminaries to the issue of a writ once one knows that there may have been a cartel without knowing chapter and verse about the details. That is what one either finds out when making investigations or will only find out upon disclosure within the eventual proceedings.'

63. The Master of the Rolls then summarised the position in this way, at [53]:

> '53. To summarise, therefore, the position after *FII* is that the proviso to section 32(1) has to be construed consistently as between mistake and deliberate concealment cases. Time begins to run in a deliberate concealment case when the claimant recognises that it has a worthwhile claim. In a case of this kind, a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel. The

> claimant can embark on the preliminaries to the issue of a writ (and therefore the limitation has begun) once it knows that there may have been a cartel and the identity of the participants, without knowing chapter and verse about the details. It would not, however, know that it had a worthwhile claim if a claim pleaded on the basis of the details it knew would be struck out.'

64. Because of the correspondence that passed in 2013 between lawyers acting for Mr Horlick and Mr Flohr, a question also arises as to whether time stopped running for the purposes of FCGPL's pursuit of the claim during the time when it was struck off the Guernsey Register of Companies.

65. In English law, the effect of a company being restored to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register: Companies Act 2006, s.1032(1). Mr Cohen points out that Companies (Guernsey) Law 2008, s.371(7) is to similar effect. In his skeleton argument, Sir Geoffrey intimated an argument that in the absence of expert evidence, the court could not be satisfied that this provision falls to be interpreted in the same way as English Law, but this argument was not pursued at the hearing. The claimant thus accepts the application to FCGPL of the principle that, once restored to the Guernsey register, it was deemed to have remained in existence throughout the relevant period. The parties also agreed that I should proceed on the basis that the application of Guernsey law as to the effect of the restoration of a company to the register is the same as English law on that question.

66. The interaction between section 32 of the Limitation Act 1980 and the restoration of the company, and the question how knowledge is to be attributed to the company, was considered by the Court of Appeal in *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2023] 2 WLR 1160. An appeal against that decision has been heard by the Supreme Court (and, indeed, was heard at the same time as the hearing of the present application), but judgment has not yet been handed down.

67. In *Bilta*, the liquidators of the claimant companies alleged that the defendant had dishonestly assisted in breaches of fiduciary duty by the directors of the companies, those directors having been apparently involved in missing trader intra-community VAT fraud. Two of the companies had been dissolved and later restored to the register after the alleged fraud had occurred. As the primary limitation period had expired when the claims of those companies were issued, a question arose whether the knowledge of the (allegedly fraudulent) directors of those companies could be attributed to it during the period between the dissolution of the companies and their restoration to the register. Albeit with somewhat different reasoning, the Court of Appeal upheld the decision of Marcus Smith J that it would be contrary to the scheme of the

Limitation Act for the time that a restored company spends in enforced non-existence not to count towards the running of time for limitation purposes. On the basis of an assumption (not shared by the Court of Appeal) that the claimant companies had the minimum number of ordinarily competent directors in place at all times, he concluded that they could with reasonable diligence have discovered the alleged fraud, and so held the claims to be statute barred.

68. Lewison LJ set out at [125]ff, by reference to the development of the authorities, the effect of the restoration of a company. First, the deeming provision in s.1032(1), that the general effect of an order for restoration is that the company has continued in existence as if it had not been dissolved or struck off, is aimed only at the inevitable consequences of restoration. Secondly, it does not follow from the restoration of the company that the directors in post at the date of dissolution are assumed to have remained in office throughout. So, at [131] he said:

> '131. … It is not an inevitable consequence of the deeming provision that the directors in office at the date of the dissolution would have remained in office during the whole of the period of what the judge called the companies' enforced period of non-existence if no dissolution had taken place. It is no more than a possible one. In any given case the relevant directors might have died, or become bankrupt, or might have been disqualified from acting as directors. Or, if the companies had remained in existence, HMRC might have presented winding up petitions and appointed liquidators earlier than they did. Nor is it an inevitable consequence of the companies' deemed existence that the wrongdoing directors would have persisted in their wrongdoing. Again, it is no more than a possible one. In my judgment, therefore, the conclusion that (irrespective of the facts of any particular case) section 1032(1) requires the assumption that the directors in office at the date of dissolution remained in office throughout the period of enforced non-existence is wrong.'

69. Lewison LJ went on to discuss the power of the court to make a direction under s.1032(3) of the Companies Act 2006, making such provision as seems just for placing a restored company and others in the same position (as nearly may be) as if the company had not been dissolved or struck off the register. That power is not directly relevant to the present case, as FCGPL was restored in Guernsey such that the power does not apply (and it was not suggested to me that a direction might be sought in Guernsey under the parallel local legislation or that, if such a direction were to be obtained, it would have extra-territorial effect). What I do consider to be relevant to the present case is that the power to give a direction is exercisable only when the court finds that the

company would probably have failed to pursue its claim in time anyway (see at [145]). In any event, 'fairness will generally require that the company, like any other claimant faced with a limitation defence, should be left to meet that defence by recourse to the Limitation Act 1980, rather than by a direction under section 1032(3)': see at [147], citing *Regent Leisuretime v National Westminster Bank plc* [2003] EWCA Civ 391 at [90], Jonathan Parker LJ.

70. Where a s.1032(3) direction is sought, it is a question of asking what would have happened after the date of dissolution, if dissolution had not occurred: citing *Hawkes v County Leasing Asset Management Ltd* [2016] 2 BCLC 427 at [33] (Briggs LJ). Lewison LJ then said that the answer to the question is a matter not of speculation or assertion, but of evidence, to be decided by the court on the balance of probabilities, citing *Davy v Pickering* [2017] Bus LR 1239 at [60], [71] (David Richards LJ). The conclusion in the Court of Appeal in *Bilta* was stated this way, bearing in mind that this was an appeal following trial, not after an application for summary determination:

> '150. The alternative way of putting the case is that there were no directors during the period of the company's non-existence. But this, too, seems to me to require a positive assumption to be made which the section does not require. The section requires an assumption to be made about the company, not about the absence or presence of directors. In addition, it must be firmly borne in mind that the context in which the question arises is the postponement of the limitation period under section 32 of the Limitation Act 1980. Where the claimant relies on that section, the burden lies on him to prove on the facts that he could not with reasonable diligence have discovered the fraud. That is a question of fact. The claimants failed to discharge that burden.
>
> 151. In my judgment, the approach of the court in relation to the making of a direction under section 1032(3) should also inform the approach to the interpretation and consequences of section 1032(1). The three particular points are: first the company's dissolution must have been the real cause of the company being unable to pursue its claim (*County Leasing*); second, the company should not be in a better position under section 1032 than it would have been if it had not been dissolved; and third what would have happened if the company had remained in existence is a question of fact (*Davy v Pickering*). These are all questions to be decided on the evidence, and not on legal assumptions.'

The defendant's factual case on limitation

71. Putting aside for the time being the fact that FCGPL did not exist for much of the period since the events put in issue by this claim, two separate questions fall to be considered. The first is whether the defendant deliberately concealed

a fact relevant to the right of action pursued by the claimant. Then the second is whether the claimant discovered the concealment, or could with reasonable diligence have discovered it, more than six years before the claim was issued. The defendant's application seeks the determination of these issues by way of summary judgment. The focus of the submissions was almost entirely on Mr Horlick's (and, by extension, the claimant's) knowledge and, thus, on the second of those questions.

72. The points relied on by the defendant are the following.

73. First, the defendant makes reference to the way in which Ms Vials explains the case on limitation in her second witness statement. She says this:

> '109. The essential facts concealed by Mr Flohr may be summarised as being his use of Parallel Comprendium Structure to acquire and, thereafter, manage former Comdisco entities to his considerable personal profit. In this regard, the Claimant alleges that the acquisition of Comdisco Germany was particularly profitable for Mr Flohr (the profit being €93-131 million, see Paragraph 35(ii)(e) of the PoC). This is expressed in the PoC as follows:
>
> 109.1. By Paragraph 67 of the PoC, the Claimant refers to the facts and matters set out at Paragraphs 35 and 41 of the PoC (i.e. the breaches of duty and the failure to inform Mr Horlick of the completion of the Comdisco Germany acquisition, whether ABN provided funding and the profit made on acquisition) and alleges that Mr Flohr failed to disclose to the Claimant the fact and true operations of the Parallel Comprendium Structure, the source of the funds used to complete the Comdisco Germany transaction and the profits that he made from the transactions.'
>
> 109.2. Further, by Paragraph 69 of the PoC, the Claimant avers that each of the breaches of contractual and fiduciary were deliberate and committed in circumstances where they were unlikely to be discovered for some time. As such, each breach of duty is alleged to be a concealment of the facts involved in that breach of duty (pursuant to Section 32(2) of the Act).
>
> 110. By reason of his duties to the Fund, Mr Flohr was bound to disclose (at least) the essential facts identified above and the Fund alleges his continuing failures so to do were deliberate concealments.
>
> 111. As I have referred to above, by Paragraph 63 of the PoC, the Fund also alleges that Mr Flohr utilised his position to cause the exit of staff and individuals from Comprendium UK and its subsidiaries. The effect of their removal was to delay the exposure of Mr Flohr's breaches. …

> 112. Subsequently, the Fund alleges Mr Flohr continued to conceal the facts relevant to its rights of action when enquiries were made of him in May 2010 by Mr Horlick (see Paragraph 64 of the PoC) and in 2013 during a course of correspondence between lawyers for Mr Horlick and Mr Flohr (see Paragraphs 65-66 of the PoC ("the 2013 Correspondence")). …
>
> 114. Further, the Claimant also alleges an additional act of concealment as follows. On or around 30 November 2005 (which was the date Mr Flohr and Mr Horlick had signed an agreement for Umbra and Equity Management to declare all their mutual receivables and payables forgiven) during a meeting at Mr Flohr's house in Walton Road, Mr Horlick asked Mr Flohr what happened with his potential Comdisco Germany acquisition. Mr Flohr had replied to Mr Horlick stating that the deal never got off the ground as planned, which Mr Horlick took to mean that Mr Flohr did not acquire Comdisco Germany as expected. Given their relationship of trust and confidence, as well as Mr Horlick's lack of knowledge as to the true purpose of the Parallel Comprendium Structure, Mr Horlick had no reason to probe Mr Flohr further on an issue that was clearly sensitive to him.'

74. I have explained above that I would strike out some of the allegations which are referred to above (in relation to the claim that Mr Flohr frustrated the business of Comprendium UK in not complying with a representation he made to Mr Horlick), but I will consider the limitation arguments on the footing that I may be wrong in what I have said in that regard.

75. As far as the allegation mentioned by Ms Vials at paragraph 114 of her second witness statement is concerned, the claimant seeks by its amendment application to introduce this point by a new paragraph 63A. I will mention this further below.

76. The defendant's contention is that the facts relied on by the claimant in support of the claim set out in the particulars of claim were known to it, or could have been discovered by it with reasonable diligence, at all material times. Furthermore, he contends that this can be demonstrated at this juncture, before a defence is filed, on an application for summary judgment.

77. The knowledge relied on by the defendant for these purposes is that of Mr Horlick. Mr Horlick was a director of the Fund's investment manager, among other roles, in the period up until 2008. In relation to these questions in the period up until then, it was not suggested that any question of attribution arises, as both the claimant partnership itself and its general partner, FCGPL, were in existence. The question whether the knowledge of Mr Horlick is relevant to the question of limitation in the period after 2010 and, if so, how,

arises in relation to his knowledge after he had ceased to be involved with the Fund, and after both the claimant and FCGPL had been wound up.

78. Mr Cohen went through the documents relied on by the defendant in regard to limitation in essentially chronological order. He based his submissions on the statement of the claimant's case on limitation as set out in Ms Vials' evidence, as I have summarised above. He submitted that the particulars of claim themselves contain an admission that Mr Horlick knew of what is described as the Parallel Comprendium Company Group. For instance, the case on the agreement allegedly reached in Munich in 2002 relies on Mr Flohr having told Mr Horlick that he intended to make a bid for Comdisco Germany.

79. Mr Cohen then relied on a series of documentary evidence concerning Mr Horlick's knowledge of the alleged parallel structure:

i) Mr Flohr sent emails to Mr Horlick on 5 and 14 November 2002, attaching a draft confidentiality agreement in relation to the acquisition of Comdisco Germany, copying ABN Amro, and thus consistent with the claimant's pleading of the two men's alleged Munich agreement but showing that Mr Horlick was kept informed of the progress of the deal. The attached draft agreement refers to Comprendium Investment SA. Ms Vials gives evidence that Mr Horlick did not read the emails or the attachment, evidence which Mr Cohen describes as unsatisfactory. Not only is it the evidence of a solicitor rather than the person with contemporaneous knowledge himself, but it is inherently incredible that Mr Horlick could remember whether he opened and read an attachment to an email received two decades ago.

ii) On 3 June 2003, Mr Horlick was sent an internal Comprendium UK document on the 'new Comprendium structure'. This referred to the holding company of the 'Comprendium Leasing Group', being a company in the Swiss canton of Zug. Mr Cohen submits that this document shows that those involved with Comprendium UK knew that Mr Flohr's other business activity was in leasing activity, unlike Comprendium UK which was in the business of document management systems. Ms Vials in response says (other than that Mr Horlick looked at the document only cursorily) that, 'the precise scope of Comprendium UK's business will require extensive analysis and evidential explanation', saying that Mr Astaire (for the defendant) had provided no evidence to support the contention that Comprendium UK was not involved in leasing activity. Mr Cohen suggested that it is incredible that Mr Horlick is unable to explain why Comprendium UK might have been involved in computer leasing.

iii) A further document in evidence and which was possibly attached to the internal document sent to Mr Horlick above is headed 'Comprendium Restructuring', and 'Final Heads of Agreement – Confidential', unsigned but with provision for both Mr Flohr and Mr Horlick to sign it. This states that the preference shares are to be restructured as between nCoTec ventures Ltd (the original name of the Fund's investment manager, later called Frontiers Capital Ltd) and EGE, being Mr Flohr's service company. This was said to be 'partly in consideration for hosting revenues etc payable to Comprendium Software from Comprendium Finance' and thus, submits Mr Cohen, shows that the Swiss company was in fact a customer of Comprendium UK. This is also shown in a spreadsheet attached to a financial report to the board dated 13 October 2004.

iv) Mr Cohen then pointed out that Ms Vials accepts that Mr Horlick knew of the acquisition of Comprendium Finance SA. It is also pleaded that he knew of the existence of that company and (in a proposed amendment to the particulars of claim) of Comprendium Finance SA, but also pleaded that Mr Horlick believed they were for the limited purpose of helping Mr Flohr or his service company to make investments into Comprendium UK. Mr Cohen submits that this is inconsistent with the confidentiality agreement mentioned above, which was sent to Mr Horlick.

v) There was then a board meeting for Comprendium UK held in Munich on 25 August 2004, at the offices of Comprendium Financial Services, at which Mr Flohr and Mr Horlick were present together with the UK company's CEO, Giovanni Bindoni. It is submitted that Mr Horlick has given no explanation of what he understood the German Comprendium company to be.

vi) Mr Horlick sent Mr Flohr an email dated 15 October 2004, saying:

'I have spent a lot of my time on this fucking company Comprendium over the last 24 months and if I'm totally honest I think it has not had enough of your attention since you did your deal with Comdisco.

I am trying to come up with a way of saving this business but I need TOTAL COMMITMENT FROM SOMEONE ON YOUR SIDE or FROM YOU if we are going to save this thing. I had long conversations with Bing and Hans yesterday, we agree to find an insolvency practitioner and when I call Hans today at 2pm German time he says "Oh I was busy in a meeting" and "Anyway Thomas thinks this could damage the Comprendium name".

THIS PISSES ME OFF.

If we save the Comprendium business the way I am suggesting then the Comprendium name will be a lot less damaged than if a quite large business goes down the pan completely along with 120 people.'

Mr Cohen submitted that this shows Mr Horlick knew the Comprendium name was being used by Mr Flohr, and that he was interested in that name, and that a deal with Comdisco had been done.

vii) An investment approval paper dated 25 October 2004 was apparently written by Mr Horlick, making the case for an additional secured loan facility to be granted by the fund to Comprendium UK. This shows that Mr Bindoni had departed the company and been replaced by Mr Jürgen Bremer, said to be a veteran of Siemens, 'now employed by Comprendium Investments, Flohr's leasing subsidiary'. Ms Vials suggests that the paper was written by a more junior team member, and that this meant 'no more than the fact that Comprendium Investments was Mr Flohr's personal company and that Mr Flohr was known to have a background interest in leasing'.

viii) In an email to Mr Flohr on 2 December 2004, when Mr Flohr had expressed a wish to be released from a guarantee to Credit Suisse in relation to Comprendium UK, Mr Horlick suggested the guarantee might be able to be 'transferred back to your finance company in 2005'. Mr Cohen suggested that this must be a knowing reference to what was formerly Comdisco Switzerland.

ix) Mr Cohen relied on the trade mark purchase agreement, where the company name, 'Comprendium' was sold together with the trade mark registrations (and applications for registration) for the sign, 'Comprendium' in Germany, the EU and the USA. A recital to this document states in terms that the Swiss-based purchaser (i.e. Comprendium Investment SA) has been using the trade marks without consent. There is an email from Mr Horlick dated 23 February 2005 acknowledging this agreement.

80. Mr Cohen referred also to information in the public domain, which it is said Mr Horlick would have been capable of easily discovering. These include information about the acquisition of Comdisco Switzerland by Comprendium Investment SA which is (or was at the material times) available on the SEC website, with links to Comdisco's 10K filings available also on the Comdisco website. Then, there was a press release from ABN Amro on 1 May 2003 about the acquisition by Comprendium Investment SA of Comdisco Germany. I was also referred to an article in the Chicago Daily Herald on the same date referring to a sale of Comdisco's German leasing unit to 'Munich-based

Comprendium Investment GmbH'. There were other documents to similar effect.

81. The claimant also seeks to introduce by amendment a new paragraph 63A into the particulars of claim. The draft provides as follows:

> '63A. On or around 30 November 2005, during a meeting between Mr Flohr and Mr Horlick at Mr Flohr's house at Walton Place, Knightsbridge, Mr Horlick asked Mr Flohr what happened with the Comdisco Germany transaction. Mr Flohr stated that the deal never got off the ground.'

82. Mr Cohen was scathing of this proposed amendment, seeking as it does to add for the first time a further act of alleged deliberate concealment later than those currently pleaded, and within six years of the winding up of the claimant and the general partner. He submitted that it was inherently incredible that Mr Horlick could have remembered such a statement by Mr Flohr for the first time now after so many years have passed, and that it has been pleaded only because the claimant perceives that it has a limitation problem, and no plausible explanation is provided by Ms Vials as to why it has now emerged. This is especially so as Mr Horlick appears to admit that he knew as at May 2010 that Mr Flohr had acquired Comdisco Germany, yet does not indicate how and when he found this out. Mr Cohen also suggested that the allegation was irrelevant as it did not suggest that Mr Horlick did not know of the use by Mr Flohr of the use of the Comprendium name to run a leasing business. Furthermore, the allegation would have been relevant on limitation purposes to the personal claim issued by Mr Horlick and based on the agreement allegedly made with Mr Flohr in Munich in October 2002, which was discontinued in 2022.

83. There was then contact between Mr Horlick and Mr Flohr in 2010, after the claimant Fund had ceased business, when Mr Horlick asked whether his alleged €500,000 personal loan might be repaid, indicating that he would take half up front together with an investment in VistaJet (in which Mr Flohr was by then invested). Mr Flohr then asked for assistance in dealing with a claim brought against him in the Swiss Arbitral Courts by Mr Erwin Stern, former CEO of Solsys. Mr Horlick complains that Mr Flohr told him he was unable to repay the loan because he was at the time illiquid, and later denied that he had ever agreed to repay it. The claimant alleges that this constituted further concealment on Mr Flohr's part. Mr Cohen submitted that Mr Flohr's written responses to Mr Horlick's requests for payment were not concealing anything.

84. Ms Vials then says this at paragraphs 179 to 180 of her second witness statement:

> '179. In May 2013, three years after the Stern Proceedings, Mr Horlick had a conversation with Mr Stern, in which Mr Stern made various allegations against Mr Flohr, including that Mr Flohr may have made a profit of circa of €300m on the Comdisco Germany Acquisition and used Comprendium companies to do so. Mr Horlick was sceptical as to that allegation, being mindful that Mr Stern had been unsuccessful in pursuing his own claim against Mr Flohr at the Arbitral Proceedings. As a result, Mr Horlick viewed Mr Stern's allegations with caution.
>
> 180. Mr Horlick was, nevertheless, motivated to query the position with Mr Flohr because, at the time, he believed that money was due to him personally, including, at least, the repayment of the €500K Personal Loan. Mr Horlick, therefore, instructed Dr Geza Toth-Feher, a former German lawyer, friend and business partner of Mr Horlick's, to correspond with the Defendant's legal representative, Dr Luka Müller-Studer of MME Partners in Switzerland.'

85. The first letter from Dr Toth-Feher is dated 9 September 2013. In that letter, he indicates that Mr Horlick has asked his investment advisory company, CBE, to review a number of transactions, including the acquisitions of Comdisco Switzerland and Deutschland by Comprendium Investment SA. It requests a meeting with Mr Flohr, saying 'the circumstances surrounding these various related transactions may give rise to certain compensation and damage claims that Mr Horlick has against yourself'.

86. A further letter was then sent on 21 October 2013. This refers to the discussion between the men in 2010 about repayment of the personal loan, and goes on:

> '5. You will also recall that you made an agreement with Mr. Horlick at the Oktoberfest in 2002 for him to assist you in raising funds for the acquisition of Comdisco Germany. You will recall that you offered him 20% of the profits on the deal. While this agreement was never documented Mr. Horlick (misguidedly as it turns out) proceeded on the basis that you were a man of your word. Mr. Horlick expressed his concerns that you were supposed to be running Comprendium, which Mr. Horlick had financed ultimately in an amount of nearly €8m; to alleviate his concerns you promised that if the transaction was successful, Comdisco Germany could become a customer of Comprendium and you would ensure that at least €10m of business was contracted with Comprendium. …
>
> 7. You will be aware that the acquisitions of Comdisco Switzerland and Comdisco Germany were structured using the name, trademarks and intellectual property of the Comprendium Group without the agreement of Mr. Horlick or his funds or the Board of Comprendium. You will also

> know that you falsely misrepresented to Mr. Horlick the reasons why Mr. Horlick should agree to transfer the names and IP of Comprendium to you for effectively zero consideration when the core business of Comprendium failed, which he blames largely on your responsibility for the lack of any management oversight whatsoever of the business.
>
> It is clear that in your personal dealings with Mr. Horlick and in your dealings with Mr. Horlick in his capacity as a Director of Frontiers Capital regarding the Comprendium Group, and your related dealings with [others] regarding Comprendium and Comdisco, you have demonstrated a repeated pattern of deliberately deceptive behaviour which in the case of the allegations surrounding the auction of Comdisco Germany amount, if proven, may very well amount to criminal offences.'

87. A further, more detailed, letter was then sent by Dr Toth-Fether on 5 November 2013. It is necessary to set it out in some detail. After referring to Mr Stern's claim, he says:

> '…Mr Horlick's claims are of an entirely different nature, namely the provision of many millions of Euros of capital to Mr Flohr and his companies. It is this capital and Mr Horlick's provision of financial advice and assistance that provided Mr Flohr with the platform with which he has been able to enrich himself.'

88. The letter goes on to refer to the €500,000 personal loan and says:

> 'Mr Daniel Quarcoopome, an old friend and "fixer" of Mr Flohr's, has provided extensive background regarding Mr Horlick's claims. It is interesting that, according to Mr. Quarcoopome, at the time that Mr Flohr asked for the loan from Mr Horlick he was basically out of cash and was being sued by Comdisco Inc, his former employer.
>
> It is Mr Horlick's loan, and his company's investments in Comprendium, that provided Mr Flohr the breathing space to continue his business activities at all and to settle his dispute with Comdisco.'

89. Dr Toth-Feher states that Mr Flohr had agreed to act as executive chairman of Comprendium UK and devote substantially all his time to the business but did no such thing. There is a complaint that Comdisco Switzerland was acquired through Comprendium Investment SA without any information being given to the board of Comprendium UK. After referring to the October 2002 Munich agreement and to the serious financial difficulty subsequently experienced by Comprendium UK, the letter continues:

> 'Mr Horlick had wanted to go for an immediate winding up of the business not knowing that in fact the Comprendium business was now

> closely intertwined with the business of Comdisco Switzerland and Comdisco Deutschland. In effect Mr Flohr completely breached his fiduciary duties towards Comprendium and its lead investor, Mr Horlick, fraudulently misrepresented the state of affairs of the Comprendium group of companies and failed to fulfil his promise to fund the ongoing Comprendium business despite being in a position to do so. These actions and misrepresentations by Mr Flohr led to a total loss of investment in the amount of €7.5m.'

90. The letter continues by asserting that Mr Flohr had entered into other agreements similar to the Munich agreement with others (an allegation also made at paragraph 39 of the particulars of claim). It then continues before its conclusion requesting settlement discussions by saying that:

> '…it is clear to Mr. Horlick that your client has demonstrated a repeated pattern of deliberately deceptive behaviour which would weigh heavily with a court. This is before consideration of the other very serious allegations which have been made by Mr Horlick's witnesses against Mr Flohr with respective [*sic*] to the acquisition of Comdisco Deutschland in particular.'

91. The particulars of claim state, at paragraph 66(iv) that, 'Dr Luka Muller-Studer made clear in correspondence dated 18 October 2013, 21 October 2013 and 29 November 2013 that there was no basis to the claims advanced by Mr Horlick'. Ms Vials suggests in her second witness statement that Dr Muller-Studer's responses are a further act of deliberate concealment on Mr Flohr's part. She says, 'Plainly, these later concealments [i.e. referring also what was said by Mr Flohr in 2010] are particularly relevant if the Court determines that Mr Horlick's knowledge at the time of the concealments is capable of being attributed to the Fund.'

Discussion

92. I will consider next the case on the position of FCGPL in the period between its winding up and its restoration. In the present case, the court is asked to approach this question as one of reverse summary judgment. The issue therefore is whether there is any realistic prospect of the claimant establishing at trial that it, acting by FCGPL, could not with reasonable diligence have discovered the facts relied on by the claimant. I reiterate that I am considering at this point whether the claimant could have discovered the facts pleaded in the particulars of claim as they currently stand.

93. The case on behalf of the defendant that was set out in the first witness statement of his solicitor, Mr Daniel Astaire, is that the claimant was aware of what is said to be the parallel Comprendium structure by 2013, by way of

attribution to Mr Horlick (see paragraph 40). That statement refers back to the lengthy paragraph 27, which recited the reference to documents up to 2003, with the Toth-Feher correspondence mentioned in subsequent paragraphs. That was followed in Mr Astaire's second witness statement with the statement (at paragraph 11(c)) that, 'on the Claimant's own case, Mr Horlick knew all that he needed to know to bring the present claim more than six years prior to its issue. That knowledge is properly attributable to FCGP and FCILP'. The claimant's evidence in response, in the form of the fourth witness statement of Ms Vials dated 27 March 2023, responds in detail to much of what was said by Mr Astaire about the pre-2010 period, but does not respond directly to what was said about attribution.

94. Because I consider that it is determinative of the defendant's application, I will set out first my decision in relation to the 2013 correspondence. I bear in mind that the defendant seeks summary judgment on limitation issues, i.e. he must establish that the claimant has no real prospect of succeeding on limitation at trial and that there is no other compelling reason why the issue should be disposed of at a trial: see CPR r 24.3.

95. The test to be applied by the court when a party applies for summary judgment under CPR r 24.3 was set out in the following terms by Lewison J in *Easyair (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 at [15]:

> '15. i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.'

96. The starting point for the analysis of the position regarding the 2013 correspondence is what is said in that correspondence itself. I agree with Mr Cohen that all of the key elements pleaded in the particulars of claim are set out in the letters sent by Dr Toth-Feher on behalf of Mr Horlick. They allege that Mr Flohr promised to devote substantially all his time to the business of Comprendium UK and that the Fund made substantial investments as a result. The letters also refer to the (what is said to be) secret acquisition of Comdisco Switzerland and the acquisition of Comdisco Germany. It is said that the intertwining of the businesses by Mr Flohr was a breach of fiduciary duty, and that this led to a total loss of investment in the amount of €7.5m, which would include investment by the claimant. There is also reference to dealings with others mentioned in the particulars of claim, which are said to evince 'a

repeated pattern of deliberately deceptive behaviour'. The alleged breach of the Munich agreement is also mentioned.

97. I consider that Mr Horlick demonstrably knew in 2013 all of the key facts relevant to the claims pleaded in the particulars of claim. When considering his knowledge, therefore, it does not matter whether any of the relevant facts relied on had previously been deliberately concealed by Mr Flohr (see *Sheldon v Outhwaite* [1996] 1 AC 102 at 144A, Lord Browne-Wilkinson). Even though he may not have known all the details, he 'knew with sufficient confidence to justify embarking on the preliminaries to the issue of a writ', being the formulation of the worthwhile claim test approved by the Master of the Rolls in *Gemalto*. Given that the key details in fact pleaded were known in 2013, it must follow that Mr Horlick at least cannot be heard to say that a claim pleaded on the basis of the facts then known to him could not have been made without being susceptible to strike out.

98. I do not consider that it avails the claimant to contend, as far as Mr Horlick's knowledge is concerned, that the responses sent to Dr Toth-Feher on behalf of Mr Flohr were further acts of concealment by Mr Flohr. Where all the relevant facts are known to a person, the fact that the defendant continues to seek to conceal them cannot prevent time running. That is because the claimant 'has discovered' the concealment by discovering the underlying facts.

99. Sir Geoffrey contends that Mr Horlick remained in a state of doubt until 2017, and that this is the only plausible explanation why he did not in 2013 take any action to bring forward any claims. Ms Vials says in her second witness statement at paragraphs 185 to 189 that Mr Horlick received information in 2017, following enquiries by a debt recovery agent instructed to recover the personal loan to Mr Flohr, that the Comdisco Germany transaction had been financially successful. She says at paragraph 189:

> '189. This information established that Mr Flohr had made a considerable profit from the Comdisco Germany transaction and had always been in a position to place considerable business with Comprendium UK but, in breach of his duties to Comprendium UK and the Fund, had not done so. Prior to this point, Mr Horlick had neither tangible knowledge of the profit made (beyond rumour), nor proof that any profit had been made at all. Indeed, Mr Flohr had falsely claimed there had been no profit, thereby taking further and positive steps to conceal that fact.'

100. It is thus the claimant's position that Mr Horlick did not know of the ability of Mr Flohr, through the acquisition of Comdisco Germany to place business with Comprendium UK. For four connected reasons, I do not consider that this avails the claimant, and that it does not demonstrate that Mr Horlick did not satisfy the worthwhile claim test in 2013:

i) This point goes only to what the claimant characterises as the claim that Mr Flohr 'frustrated' Comprendium UK's business in breach of duty. As I have indicated above, I consider that this part of the claim is not properly pleaded and is liable to be struck out regardless of limitation issues.

ii) The evidence before the court, in the form of a witness statement from Ms Vials, is that Mr Horlick did not know before 2017 that Mr Flohr 'had always been in a position to place considerable business with Comprendium UK but, in breach of his duties to Comprendium UK and the Fund, had not done so'. I do not consider it to be properly arguable that the duties pleaded by the claimant to be owed to it encompassed a duty on the part of Mr Flohr to place business himself with Comprendium UK. That is not what is sought to be alleged. It is not open to the claimant to say that Mr Horlick did not know as of 2013 of Mr Flohr's inability to comply with some separate and unpleaded duty as an explanation why he did not know of the allegations that are pleaded.

iii) I also agree with Mr Cohen that the claims pleaded by the claimant in the particulars of claim do not depend at all on the profitability of the Comdisco Germany acquisition in Mr Flohr's hands (and that is so even of the parts of the claim which I consider should be struck out in any event). It is therefore not an element required to be known by Mr Horlick in order for him to satisfy the worthwhile claim test.

iv) In any event, the 5 November 2013 letter from Dr Toth-Feher says in terms under the heading 'Oral Agreement to assist Mr Flohr in fundraising for the acquisition of Comdisco Deutschland' that 'Mr Horlick is advised that the profit on the transaction by now exceeds €300m'.

101. The points I have made above do not depend on an assessment of what more could have been discovered with reasonable diligence. But there is a further point which does. The information which Ms Vials says that Mr Horlick became aware of in 2017 was an extract from the Comdisco Germany due diligence prepared in 2002, which showed extensive existing debt owing to the company from its customers, which led to a heavy discount to value based on the anticipated purchase price for the company. Even if, contrary to my view as stated above, this was information which Mr Horlick needed to know, I consider that he could have discovered it with reasonable diligence. To the extent that Mr Horlick's own position is relevant (a point to which I will turn next), the claimant must establish 'that [he] could not have discovered the [facts] without exceptional measures which [he] could not reasonably have been expected to take': *Paragon Finance plc v D B Thakerar & Co* [1999] 1

All ER 400 at 418, Millett LJ. There must also be an 'trigger' which puts the claimant on notice of the need to investigate: *OT Computers Ltd (in liq) v Infineon Technologies AG* [2021] QB 1183 at [35], Males LJ. As far as Mr Horlick is concerned, I consider that it is fanciful to suggest that he was not on notice of the need to investigate the profitability of the acquisition of Comdisco Germany (if, contrary to my view, it was material). As the 5 November 2013 letter states, Mr Horlick had in fact already made enquiries and been given information which appears from the due diligence document referred to by Ms Vials to be far from inaccurate, even if Mr Horlick regarded the source of the information (Mr Stern) as questionable.

102. That leaves the separate question of whether Mr Horlick's knowledge as at 2013 should be attributed to the claimant. As Lewison LJ said in *Bilta* at [150]–[151], it is a question of fact whether the claimant could not with reasonable diligence have discovered the relevant facts, and the burden of showing that is on the claimant. That, of course, entails an assessment of what would have happened if FCGPL had continued in existence throughout the relevant period than being dissolved and then later restored to the Guernsey register of companies.

103. The claimant's argument as far as the hypothetical ability of FCGPL to discover the facts relevant to the pleaded claim and thus (on the assumption there was concealment), any deliberate concealment in the period after its dissolution is as follows:

i) The first witness statement of Nigel Spray, former director of the Fund's investment manager, Frontiers Capital Ltd, explains that Mr Horlick resigned as a director of FCGPL on 19 May 2009, his relationship with other executives and investors having become difficult. He had effectively been on gardening leave since June 2008. The claimant ceased business on 5 April 2010 and was wound up. FCGPL was wound up by special resolution on 30 July 2010.

ii) The question of what assumptions should be made about what would have happened during the period during which FCGPL was wound up are highly fact specific and suitable for resolution only at trial. As the Court of Appeal decision in *Bilta* demonstrates, there is no presumption that the company would have continued with the minimum number of competent directors in place. There is no assumption that there would have been any directors in place, or that FCGPL would have continued to actively trade: see *OT Computers* at [54] and [57] (noting that was not a case where the company had ceased to exist but, rather, had been in administration).

iii) The mostly likely scenario is that FCGPL would have continued with no board under the supervision of a professional insolvency practitioner as liquidator. The court is not obliged to find that Mr Horlick's knowledge must be attributed to FCGPL during the course of its dissolution. Alternatively, it is highly improbable that Mr Horlick would have been a director from 2010 onwards, given the circumstances in which he parted ways with the claimant. Accordingly, it is unlikely that FCGPL would have become aware of the claim.

iv) In any event, Mr Horlick did not have knowledge of the claims in 2013.

104. In response, Mr Cohen submitted that FCGPL should be treated as having had Mr Horlick as its sole director during the relevant period. Mr Horlick had ceased to be a director of FCGPL before 2010, and instigated the restoration of FCGPL at or after the end of 2018. It is obvious from the correspondence and from the evidence that Mr Horlick is the sole driving force behind the restoration of FCGPL and the pursuit of this claim. I have already indicated that I consider that Mr Horlick knew by November 2013 everything he needed to know in order to bring the claim. Mr Cohen submitted that this knowledge should be attributed to FCGPL.

105. Applying the test as summarised by Lewison LJ in *Bilta* at [150]–[151], the question for the court at trial, in the event that it was held that Mr Flohr had deliberately concealed any facts relevant to the claimant's causes of action, would be whether the claimant could not with reasonable diligence have discovered those facts. The assessment would take place on the assumption that the claimant had continued in existence at all material times since 2010, and the burden of proof on that question would lie with the claimant.

106. As Lewison LJ said, what would have happened if the company had remained in existence is a question of fact. The Court of Appeal in *Bilta* did not approach that question as a matter of the attribution of knowledge by an individual to the company. The question posed was simply that of, what would have happened if the company had continued in existence?

107. Mr Cohen submitted with some force that it is incumbent on the claimant to put forward some evidential response on this point, in light of the 2013 correspondence and the degree of knowledge clearly held by Mr Horlick shown at the time of the Toth-Feher correspondence. I agree with this submission. It is not sufficient for the respondent to a summary judgment application to rely on the fact that a question of fact is involved and to submit that it is appropriate only for trial. The respondent must put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial:

Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066 at [14], Moore-Bick LJ.

108. I agree that the claimant has put forward no basis in evidence as to what would have happened during the interregnum. Sir Geoffrey submitted that I find that evidence in the first witness statement of Mr Spray, but Mr Spray does not expressly address the question under consideration. Ms Vials says in her second witness statement that, 'As a matter of common sense if the Fund did not know and could not with reasonable diligence have discovered the concealment before its dissolution in April 2010 (or of its General Partner in July 2010), it certainly could not have discovered the concealment with reasonable diligence thereafter.' As I have indicated, what Sir Geoffrey said as a matter of submission was that the most likely state of affairs during the period from 2010 onwards is that it would have continued with no active board or directors and under the supervision of an insolvency practitioner acting as liquidator.

109. The two options posited by the parties, therefore, are (a) that there would have been no directors and the company would have been subject to the supervision of an office holder, or (b) that Mr Horlick would have been the sole director. As the Court of Appeal made clear in *Bilta*, on the point on which they disagreed with the trial judge, there is no presumption that a company remains in existence with a functioning board of directors. As Mr Cohen said, those who remained involved in the last stages of the claimant's existence after Mr Horlick's departure in 2008 had no particular interest in or experience of the investment in Comprendium UK. There is no reason to suppose that they would have continued as directors of the general partner if it had not been wound up (and, importantly, the claimant did not suggest that they would have done).

110. The claimant does not suggest that the company would have been left with no directors and under no supervision at all. This must be correct. The evidence given by Mr Spray in the witness statements I considered at the hearing in July 2023 was at pains to explain how all steps were properly carried out on the basis of the advice of experienced professional advisers. A suggestion that in those circumstances the company would have been left with no directors and under no supervision would be fanciful.

111. I proceed to consider the position on the basis that what would have happened if FCGPL had remained in existence after 2010 would have been one of the states of affairs put forward by the parties. If the claim were to go to trial on this point, they would be the options available to the court, it being unrealistic to suppose that the court may make a finding of fact on this point not contended for by either party.

112. There are sound reasons for supposing that Mr Horlick may have been the sole director. In practice, an office-holder's role may well not have lasted years, and it is far from clear to me that the deemed continuation in existence of the company provided for in s.1032(1) is consistent with it having been placed into winding up (even if into voluntary liquidation). As subsequent events have borne out, Mr Horlick had an economic interest in the Fund, which was not shared by those who were involved in the management of the claimant and associated vehicles in the final months before it was dissolved. He has a carried interest right in respect of the claimant partnership. Mr Spray's first witness statement explains that it was Mr Horlick who contacted Mr Spray at the end of 2018, requesting his assistance in the restoration of the general partner. Mr Horlick first sought in September 2019 (and just within six years from the 2013 correspondence) to bring a claim on behalf of both himself personally and the claimant. FCGPL had, however, not yet been restored to the Guernsey register at that point.

113. I have explained above why I consider that Mr Horlick knew the relevant facts pleaded in the particulars of claim as at November 2013. Clearly, if he had been a director of FCGPL in the period after 2010 in its hypothetical continuation in existence, his knowledge would be attributed to the company.

114. What if the position had been as if the claimant now contends, with there being no directors in office, but with FCGPL under the supervision of an office holder in the form of a liquidator? This should be treated as a realistic possibility as the point is being considered on an application for summary judgment. Would the company in those circumstances have had a trigger to discover the facts which constitute the pleaded cause of action, and the means of discovering them with reasonable diligence? I consider that I can be satisfied on a summary judgment basis that it would. The 2013 correspondence sent on behalf of Mr Horlick expressly contemplated claims by both him and by the claimant. For the reasons I have just mentioned, the evidence clearly demonstrates that Mr Horlick had an interest in the claims pursued by FCGPL on behalf of the Fund and the evidence of neither side suggests that any other person might have had any continuing interest whatsoever in FCGPL's assets or its affairs more generally. Mr Horlick was also plainly aware in 2013 that he was the person who would have to take the running to enable the claimant's claim to be pursued. I do not consider it to be a realistic proposition that in the event of the company continuing in existence under the supervision of a liquidator, Mr Horlick would have refrained from communicating his concerns to such an office holder. This would have been not least because he would not have wanted the claim intimated in 2013 to have been prejudiced by the company ceasing to have any existence through the conclusion of the winding up which he contends would have commenced. Such communication from Mr Horlick would have been a trigger to

investigate and, in practice, Mr Horlick would have communicated the very points made by Dr Toth-Feher in his correspondence.

115. In those circumstances, and whether or not Mr Horlick himself would have been a director of FCGPL in November 2013, I consider that there is no realistic prospect of the claimant establishing at a trial that FCGPL could not then with reasonable diligence have discovered the facts pleaded in the particulars of claim. This is all on the assumption that there had until November 2013 been a deliberate concealment by Mr Flohr of one or more facts crucial to the causes of action pleaded. Accordingly, and with reference to *Bilta* at [151], the company's dissolution is not the real cause of it being unable to pursue its claim in time. Furthermore, I consider that the court can be satisfied now that if the claimant were permitted to pursue the claim, it would be in a better position than it would have been if FCGPL had not been dissolved.

116. The only real argument that has been made against this conclusion is that there was a continuing act of concealment by Mr Flohr in 2013 such that Mr Horlick remained in doubt until 2017. In circumstances where I have concluded that Mr Horlick had the requisite knowledge to bring the claim in 2013 and/or had in fact then made the enquiries reasonable diligence would require him to make, I do not consider that this could assist in showing that the company would not have known nor been able with reasonable diligence to discover the facts necessary to plead the claim. What it might mean is that FCGPL might not have brought the claim in any event, which would not assist the claimant, or might have left it right until nearly six years from the November 2013 correspondence, as occurred with the claim prematurely issued in September 2019. If that were so, the company's dissolution would not be the real cause of it being unable to pursue its claim – the real cause would be Mr Horlick's delay in causing it to pursue matters despite having the knowledge to do so.

117. Furthermore, I am of the view that the court can be satisfied without a trial on the matters that I have set out above. I do so on the footing that the factual premise put forward by the claimant on what would have happened if FCGPL had continued in existence after 2010 is accepted. The evidence does not raise any other factual dispute which can only properly be determined at trial after disclosure and with the benefit of cross-examination. I consider that the 2013 correspondence is telling in the detail which it conveys of matters pleaded in the particulars of claim, and that Mr Horlick had made the very enquiries of a third party which he says (through his solicitor) he did not believe. It is perhaps unusual to have such a detailed record of the state of a person's knowledge at a certain date and I do not consider that the assessment I have carried out has required any sort of mini-trial.

118. As I have said, the Court of Appeal did not decide the appeal in *Bilta* on the basis of the attribution of knowledge to the companies in that case. Mr Cohen submitted that this is another way in which the issue can be addressed, i.e. by asking whether Mr Horlick's knowledge should be attributed to FCGPL during the period when it is now deemed to have continued in existence. I have explained above why I consider that Mr Horlick had the requisite knowledge to enable the claimant's claim (in addition to his own personal claim) to be brought, more than six years before the claim form was issued. I consider that the question is best addressed by being approached in the manner explained by Lewison LJ, rather than by asking whether a special rule of attribution should be fashioned in order to take account of the policy of the Limitation Act (i.e. as suggested by Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507). Such an exercise would run the risk of diverting attention from the key question, which is whether the claimant can prove that it could not, if it had continued in existence, with reasonable diligence have discovered the relevant facts (*Bilta* at [150]).

119. Accordingly, I consider that reverse summary judgment should be granted to the defendant on the question of limitation, on the footing that as from November 2013 onwards the claimant should be considered either to have sufficient knowledge to pursue the claim pleaded in the particulars of claim, or to have been able with reasonable diligence to have discovered any relevant fact which had been concealed from it. The claimant is of course acting by its former general partner, FCGPL. The Court of Appeal has confirmed in these proceedings that the general partner is the correct legal person to pursue any claim on behalf of the claimant. It was not suggested to me that the knowledge or means of knowledge of any person other than FCGPL was the determining factor when reaching conclusions about the claimant's ability to pursue the claim after 2010. Mr Horlick's knowledge is indirectly relevant to that question for the reasons I have explained.

120. I would not have granted summary judgment in relation to the period before 2013. In light of my decision above concerning the period post-2013, I will state my reasons concisely.

121. Mr Cohen submitted that the matters set out in paragraphs 79 to 83 above show that Mr Horlick knew that Mr Flohr was operating a leasing business in Germany and Switzerland, using the name Comprendium. Mr Horlick, it is said, therefore knew by 2005 everything that was necessary to bring the claim based on breaches of duty said to have been committed through acts of wrongful competition with Comprendium UK. There is no suggestion that, in this period, there was any impediment to the attribution of Mr Horlick's knowledge to the claimant.

122. The key facts which it is said the documents to which Mr Cohen took me go are that Mr Flohr had acquired Comdisco Switzerland and, particularly, Comdisco Germany and was operating them. Sir Geoffrey accepted that it is plain from the particulars of claim that, by 2010, Mr Horlick knew that the German business had been acquired, but not that it had been profitable to Mr Flohr. What needs to be assessed, if there was arguably any deliberate concealment on his part, is whether Mr Horlick had a trigger to investigate the breaches of duty which are now pleaded.

123. It seems tolerably clear that Mr Horlick was informed in the period up to 2004 that Comdisco Germany had been, or was in the process of being, obtained. It was Mr Cohen's submission that this was the trigger for further enquiries to be carried out. If they had been, it is said that Mr Horlick would have discovered, before the claimant had been wound up in 2010, the matters which are now pleaded. I accept that Mr Cohen has presented strong arguments in favour of this proposition.

124. Nonetheless, I would not have granted summary judgment on this issue, based only on the documents I have been shown in relation to that earlier period. I have, as Sir Geoffrey pointed out, been shown only a small number of what are plainly a vast number of documents. There is also the realistic prospect of full disclosure, which Mr Flohr has not been required yet to give, casting a different complexion on matters as, of course, cross-examination might well do. Sir Geoffrey has raised an arguable (i.e. pleadable) case that Mr Flohr acted dishonestly in relation to several individuals concerning his acquisition of the Comdisco European business after Comdisco's insolvency. I explain below why that case cannot now be pursued in the present proceedings. However, the credibility and honesty of both parties (upon which each openly wishes to attack the other) would be a key factor in determining both whether Mr Flohr had deliberately concealed material facts and whether Mr Horlick became aware of such matters so as to trigger the reasonable requirement of carrying out investigations into whether the claimant may have a worthwhile claim. In that context, it is particularly relevant that the evidence suggests that Mr Horlick and Mr Flohr were at the time close friends and that Mr Horlick therefore implicitly trusted him, not least in making a substantial unsecured loan to him. The question when that trust dissipated or ought to have dissipated is not something that can sensibly be determined on the basis of the evidence as it stands. I see the force in Sir Geoffrey's submission that, so long as Mr Flohr denied that the acquisitions had been profitable, Mr Horlick may not have had cause to investigate the possibility that Mr Flohr was profiting at the expense of Comprendium UK. I have explained above why this consideration does not apply in relation to the period from November 2013 – Mr Horlick had by then in fact carried out enquiries into the profitability of the

acquisitions, thus showing that the trigger for such enquiries must by then have existed.

125. Even though I accept that it is quite unsatisfactory that the evidence on behalf of the claimant has been given by a solicitor with no contemporaneous knowledge of the facts to which she speaks, on this point I consider it sufficient, read together with the particulars of claim, to show that there is a real issue as to whether the friendship between the two men affected the questions raised on the issue of limitation. For instance, the issue may not be so much whether Mr Horlick now recalls whether he opened the attachment to an email two decades ago but whether, even if he might have done, would it have put him on notice of the pleaded claims. That would in my assessment likely require a more nuanced assessment than is possible with only the small number of landmarks in the parties' relationship which have been identified on the present application. I also agree with Sir Geoffrey that I should be cautious about finding at this stage that Mr Horlick saw or ought reasonably to have seen the Comdisco filings and media statements about the acquisition of Comdisco Germany.

126. Finally, and as I have noted in relation to the pleading of what has been called the competition claim, the breaches identified are not merely in allegedly operating the German and Swiss companies in competition with Comprendium UK, but also in misusing or misappropriating (to use that word in a broad sense) its resources. Mere knowledge of the acquisition of Comdisco Germany would not necessarily have been a sufficient trigger for enquiry about those other matters.

127. In light of what I have said above, I will comment briefly about the proposed paragraph 63A to the particulars of claim, where the claimant seeks to allege that Mr Flohr represented on 30 November 2005 that the Comdisco Germany transaction never got off the ground. It may have been anticipated that this allegation might have been determinative, if time had otherwise stopped running for limitation purposes in 2010 with the claimant's demise. That, however, is not so. Because of my decision on other grounds, the issue does not arise. I would, however, have permitted this amendment if I had not been prepared to give summary judgment on other grounds. Mr Cohen's criticisms of this lateness of the recollection, and of the way it has been evidenced, are well made. However, my reasons as to why I would not have granted summary judgment on the basis of Mr Horlick's knowledge up to 2010 would have militated in favour of my not precluding this argument from being made. In particular, I agree with Sir Geoffrey that I cannot speculate as to why the 2019 claim was withdrawn; it seems to me it likely suffered from quite a number of flaws (some of which have been identified by the defendant on this

application) and would not necessarily have been saved by what is alleged to have been said by Mr Flohr at a meeting on 30 November 2005.

The claimant's application

128. In response to the defendant's summary judgment application, the claimant issued its application for permission to amend the particulars of claim, to introduce a number of new factual aversions in support of an allegation of fraudulent misrepresentation.

129. The claimant wishes to plead that it would not have entered into the SSA at all, or have made the pleaded investments in Comprendium UK, were it not for the alleged misrepresentations. The proposed paragraph 3A of the draft amended particulars of claim provides:

> '3A. The case for FCILP is that Mr Flohr's real intention in instigating and participating in the joint venture of Comprendium UK was to support the advancement of his personal interests by facilitating his acquisitions of former European subsidiaries of Comdisco Inc. In securing investments from FCILP, Mr Flohr fraudulently misrepresented his intention, and hid from FCILP his true purpose.'

130. This allegation is developed by reference to Mr Flohr's prior employment by Comdisco Inc as its President of European Sales, which gave him the opportunity to bid for its European assets when they were sold off during its US Chapter 11 bankruptcy. It is alleged that he did this having filed a claim in the bankruptcy alleging among other things that he had been wrongfully discharged from his employment with the company.

131. The claimant then seeks to allege that in oral discussions with Mr Horlick and others Mr Flohr set out a vision for what was to become the Comprendium investment, with its business aim that of being a leading provider of enterprise software, document management and storage solutions, with him carrying out an essential role by acting as chairman and promoting and advancing the interests of the business. This led to the signing of a consultancy agreement on 27 March 2002 (i.e. the same date as the SSA), with Mr Flohr providing Mr Horlick with an assurance that he intended to play a full-time and hands-on role at Comprendium UK.

132. The claimant then seeks to plead that Mr Flohr's representations to such effect were fraudulent as his intentions were not as he represented.

133. The draft amendments to the particulars of claim begin, at paragraphs 12A to 12C, by giving details of Mr Flohr's employment with Comdisco, its insolvency and Mr Flohr's claim against it in bankruptcy. They also allege that the prospective sales of its European subsidiaries provided a hugely lucrative

investment opportunity. At paragraphs 16A to 17, and 21A to 21D, are further details of the discussions between Mr Horlick and Mr Flohr leading to the joint venture and the Fund's decision to invest in Comprendium UK and the negotiation of the consultancy agreement to be entered into by or on behalf of Mr Flohr. At least much of what is said in these paragraphs adds factual background to what is in the particulars of claim as they stand and, were it not for the decision I have reached above on limitation, I would for that reason have given permission for such matters to be introduced by amendment. They would be material to the existing claim and be unobjectionable from a limitation perspective as they do not in themselves add or substitute a new cause of action.

134. The key paragraphs sought to be introduced are those found at paragraphs 22A to 22E. The claimant wishes to allege that Mr Flohr falsely and fraudulently represented that:

> '(i) Mr Flohr's intention in initiating the joint venture of Comprendium UK was none other than to found, launch and grow the leading enterprise software, document management and storage solutions company in Europe; and
>
> (ii) Mr Flohr's intention in acting as Chairman of Comprendium UK and in participating in its business was none other than to execute the purported vision he had set out orally and in the Business Plan, and to promote the interests of the Company and its shareholders.'

135. It is then sought to be alleged that Mr Flohr hid his real intention, which was to leverage and use Comprendium UK and his position as Chairman of Comprendium UK to support his bids for, and acquisitions of, the European subsidiaries of Comdisco Inc, and thereby advance his own interests. Further particulars are then provided. In particular, it is alleged that Mr Flohr did not disclose the fact or circumstances of his dismissal from Comdisco. It is said that the way in which Mr Flohr pushed ahead with the acquisition by Comprendium UK of Sail Labs, a German software translation business, shows that he had no real intention to develop Comprendium UK as an independent business, but only to use it to support his acquisition of the European subsidiaries of Comdisco. He failed to attend a Comprendium UK board meeting in April 2003, showing that his priority and focus was on the acquisition of Comdisco Germany, which completed simultaneously with the board meeting.

136. Particulars are then given of what is alleged to be a pattern of unscrupulous and dishonest conduct in relation to the acquisition of both Comdisco Switzerland and Comdisco Germany. It is alleged that Mr Flohr impeded, manipulated and sabotaged other prospective bids for those companies, with

the intention of advancing his personal interests, by entering into agreements or understandings with others in relation to other bids, and then breaching those agreements. These particulars are supplemented by further allegations, supported by the evidence contained in the third witness statement of Ms Vials and in two witness summaries. The documents containing these further allegations are covered by the confidentiality order I made in July 2023 and continued at the start of the hearing to which this judgment relates. The decision I have reached on limitation grounds does not depend on those allegations, nor is it affected by them. In those circumstances, I do not consider there to be any need to mention the details of those allegations in this judgment, and as that evidence will not form part of ongoing proceedings I consider that the confidentiality order ought to remain in place.

137. In favour of the claimant, it must be said that the arguments put forward by the claimant in support of the proposed new claim are prima facie substantial. If the question for the court were merely one of whether they were coherent and properly particularised, that question would be answered in the affirmative. Many of the allegations of primary fact made by the claimant (as opposed to the inferences which are sought to be drawn from those facts) are supported by contemporaneous documentation. I also take the view that if all the primary facts pleaded under the heading of particulars of fraud were proven, a trial judge could conclude that they were more consistent with an inference of fraud than with honest conduct and that, at the least, the question whether the plea of fraud is justified is evenly balanced in that respect: see *Jinxin Inc v Aser Media Pte Ltd* [2022] EWHC 2988 (Comm) at [41]. I also consider it to be properly arguable that similar fact evidence of Mr Flohr's dealings with others (as pleaded in draft in paragraph 22(c)(xii)) would be admissible at trial in carrying out this assessment. Whilst I agree with Mr Cohen that the allegations surrounding the acquisition of the Comdisco companies are not by themselves inconsistent with an intention to attempt to make a success of Comprendium UK, there are also enough factual allegations (if they were established at trial) to support the inference that Mr Flohr did not intend to make a success of Comprendium UK. Again, I express this view of the adequacy of the pleading of dishonesty without regard to the allegations covered by the confidentiality order, but if taken into account they only strengthen that view.

138. In his submissions on the amendment application, both oral and written, however, Sir Geoffrey did not clearly distinguish between his response to the defendant's application, and the arguments in favour of the claimant's. Much of his oral submissions were taken up with an exposition of how the evidence before the court supports the new case in fraud which is sought to be introduced by way of amendment. Mr Cohen observed that the submissions on behalf of the claimant were a form of jury speech rather than a response to the

defendant's application (and to the defendant's arguments why the claimant's proposed amendments ought not to be permitted). There is force in what Mr Cohen said. The question whether to permit the amendments is, a matter of logic and analysis, quite separate from the question whether the limitation arguments on the claim as currently pleaded are susceptible to summary judgment. That is because of the authorities on the question whether an amendment should be permitted when it is arguable that a relevant limitation period has ended.

139. The relevant provisions and considerations for the court when an application is made for permission to amend a claim after the end of a relevant limitation period were summarised by Coulson LJ in *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 in the following way at [36]–[38]:

> '36. Section 35 of the Limitation Act 1980 provides, at sub-section (1), that "any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced …on the same date as the original action." Sub-section (3) provides that a new claim will not be allowed after the expiry of any time limit, save as provided for in sub-section (4) and (5). Sub-section (5) permits the addition of a claim involving a new cause of action "if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made."
>
> 37. These provisions are given effect by CPR 17.4, which provides:
>
> "(1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> (ii) the Foreign Limitation Periods Act 1984; or
>
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

> 38. It is conventional to say that four questions need to be answered when considering r.17.4 (see *Ballinger v Mercer Limited* [2014] EWCA Civ 996; [2014] 1 WLR 3597 and *Hyde v Nygate* [2019] EWHC 1516 (Ch)). They are:
>
> i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
>
> ii) Did the proposed amendments seek to add or substitute a new cause of action?
>
> iii) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
>
> iv) Should the Court exercise its discretion to allow the amendment?'

140. It is common ground that it is arguable that the limitation period for bringing a claim in fraudulent misrepresentation has passed. Such a claim constitutes a claim based upon the fraud of the defendant (i.e. within the Limitation Act 1980, s.32(1)(a); see *Regent Leisuretime v National Westminster Bank plc* [2003] EWCA Civ 391 at [100]). The effect of this is that time starts to run, as in a case of deliberate concealment within s.32(1)(b), once the claimant has discovered the fraud or could with reasonable diligence have discovered it. There is therefore a question whether the claimant in the present case could so have discovered the facts alleged within the six-year period applicable to claims in tort by virtue of s.2 of the 1980 Act.

141. It is the claimant's evidence, in the form of the third witness statement of Ms Vials, that the 'requirement to amend' the particulars of claim became apparent from the further investigations carried out by the claimant's solicitors between 23 May 2022 and 15 November 2022. The contention set out there is that the need to conduct those further investigations was prompted by the defendant's summary judgment application, issued in May 2022. The evidence does not explain why the application prompted those investigations, nor does it positively assert that the claimant (or Mr Horlick) had no reason to carry them out sooner.

142. The claim in fraudulent misrepresentation plainly constitutes a new cause of action from that which is currently pleaded.

143. The claimant's contention is that the deceit claim arises out of the same or substantially the same facts as those which are already in issue. Sir Geoffrey submitted that the new facts sought to be introduced in the amended particulars of claim drew out what was already there, and that there is a substantial overlap. He said that it was not sufficient that there were new facts or facts relevant only to the deceit claim for the court to come to the

conclusion that the amendments did not arise out of the same or substantially the same facts as those already pleaded.

144. He relied on the judgment of Millett LJ in *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, who at 404 said this:

> 'Among the new causes of action which the plaintiffs seek leave to introduce are (i) fraudulent breach of trust, and (ii) intentional breach of fiduciary duty. They submit that no period of limitation applies to either cause of action. I shall deal with the two claims separately. Before doing so, however, I should express my opinion that the solution to the problem lies in the fact that the new claims are based on the same factual allegations as the common law claims for fraud and conspiracy to defraud. The equitable jurisdiction which the plaintiffs invoke is thus the concurrent jurisdiction. The new claims are not different causes of action (which is historically a common law concept) but merely the equitable counterparts of the claims at common law.'

145. The claimant contends that, in the same way, the claim in fraudulent misrepresentation is the equitable counterpart of the existing claims for breach of a duty of good faith and breach of fiduciary duty.

146. As Mr Cohen points out, Millett LJ was not, at this point in his judgment, dealing with the argument that new claims arose out of the same or substantially the same facts as those already in issue. He was addressing the plaintiffs' argument that, by virtue of Limitation Act 1980, s.21, there was no period of limitation at all. The question was whether the defendants were (if liable as accessories as alleged) trustees for the purposes of that section, or whether the language of constructive trusteeship was merely a 'formula for equitable relief'.

147. In *Paragon*, so far as material to the passage under discussion, the plaintiffs sought to rely on exactly the same facts as those already pleaded, but to add a claim in equity to the already pleaded claim, in the (in the event, forlorn) hope that such amendment might provide a better position on limitation. That is a world away from the position in the present application, where the claimant seeks to introduce a plethora of new facts in support of a claim in deceit where none is already pleaded. Sir Geoffrey did not contend in this case that fraudulent misrepresentation is the same cause of action as breach of fiduciary duty or breach of a duty of good faith.

148. Both parties then referred me to the following comment of Millett LJ in *Paragon* at 418, where he directly addressed the question whether some of the proposed amendments arose out of the same or substantially the same facts as

those already pleaded. The following paragraph contains the entirety of his reasoning in rejecting that part of the application:

> 'Whether one cause of action arises out of the same or substantially the same facts as another was held by this court in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10 to be essentially a matter of impression. In borderline cases this may be so. In others it must be a question of analysis. In the *Thakerar* case Chadwick J observed that it would be "contrary to common sense" to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree. In all our jurisprudence there is no sharper dividing line than that which separates cases of fraud and dishonesty from cases of negligence and incompetence.'

149. At 420, Pill LJ concurred in these terms:

> 'Where it is sought to add allegations of wrongdoing which is intentional, the position is in my judgment different. The change cannot be categorised as a technicality. I accept the submission made on behalf of the plaintiffs that the critical question is the extent to which the facts on which the new cause of action is based depart from those already pleaded (and not the seriousness of the new allegation). However, to allege that an injury is caused intentionally is to add a new allegation of fact which gives the allegations of fact as a whole a substantially different character. In *Letang v Cooper* [1964] 2 All ER 929, this court recognised the division in actions for personal injuries "according as the defendant did the injury intentionally or unintentionally" (Lord Denning MR (with whom Danckwerts LJ agreed) [1964] 2 All ER 929 at 932). Moreover as Bowen LJ stated in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, "the state of a man's mind is as much a fact as the state of his digestion … it is as much a fact as anything else". The addition of allegations of intentional wrongdoing take these cases beyond the power conferred by s 35(4) because the claims do not arise "out of the same facts or substantially the same facts".
>
> Upon the section as enacted, the reasoning is in a sense self-justifying because it is the allegation of intentional wrongdoing which makes the cause of action new for the purposes of s 35(5)(a) and it is the allegation of intentional wrongdoing which also prevents the claim arising out of the same or substantially the same facts for the purposes of the section. Upon analysis, however, reinforced by the common sense referred to by Chadwick J, the power in s 35(4) cannot be exercised in the plaintiffs' favour in these cases.'

150. I consider this reasoning to be binding on me (and to be self-evidently correct), and to be determinative of the present application. While the point was not developed in oral submissions, the claimants' skeleton argument suggested that the authorities on the interpretation of s.35(4) may have to be regarded with some circumspection because of the failure in some of them to take account of the decision of the Court of Appeal in *Brickfield Properties v Newton* [1971] 1 WLR 862 (see *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 at [50], Coulson LJ).

151. In *Mulalley* at [47], *Brickfield* was described as 'the leading case on this aspect of r 17.4, particularly in a construction context' (it being relevant that *Mulalley* was a construction dispute). The key passage from *Brickfield* cited in *Mulalley* was from Sachs LJ at 873:

> 'Where there are found in completed buildings serious defects of the type here under review, the facts relating to design, execution and superintendence are inextricably entangled until such time as the court succeeds in elucidating the position through evidence. The design has inevitably to be closely examined even if the only claim relates to superintendence – and all the more so if the designs are, as is alleged, experimental or such as need amplification as the construction progresses. The architect is under a continuing duty to check that his design will work in practice and to correct any errors that may emerge. It savours of the ridiculous for the architect to be able to say – as was here suggested – "True my design was faulty, but of course I saw to it that the contractors followed it faithfully" – and be enabled on that ground to succeed in the action.'

152. It may thus not be surprising that, in a construction dispute, a case based on an architect's negligent design can be said to arise out of the same or substantially the same facts as a claim based on the same architect's inadequate supervision of the contractor (see *Mulalley* at [87]), and the overlap does not need to be complete. It is, as Coulson LJ said, a question of fact and degree. The point I understand Coulson LJ to have made at [50] (and relied on in this case by the claimant) is that observations about the way in which judges have reached their conclusions in other cases may be of limited utility and that such observations could not be a substitute for the court simply applying the wording of Limitation Act 1980 s.35 and of CPR r.17.4(2). That would seem to include the observations in *Goode v Martin* [2001] 3 All ER 562, that there should be a focus on the extent of the investigations which may need to be carried out by the defendant in response to the amendment, if it is permitted.

153. I have indicated above that many of the draft amendments to the particulars of claim up to paragraph 22 may be unobjectionable in so far as they relate to the existing claim. Sir Geoffrey indicated that it was possible to consider each of

the particulars of fraud in paragraphs 22A to 22C and to see that they overlapped with existing particulars. I do not agree. My principal reason for doing so is that articulated above with reference to the comments of Millett LJ and Pill LJ in *Paragon*: a new allegation of fraud when none is currently pleaded is conceptually incapable of being substantially the same as any pleaded fact. This point impacts the analysis of all the facts sought to be introduced. Even where there is an overlap to what is currently pleaded, it is now alleged that the relevant facts are overlaid with an allegation that they were motivated by an underlying dishonest intent which predated the relevant actions and permeated them all.

154. There are also a number of factual allegations contained within the draft amendments which do not appear in the current particulars of claim, especially concerning Mr Flohr's (allegedly dishonest) dealings with third parties. To the extent material, these would plainly open up the need for significant further investigation. Ms Vials in her third witness statement explains in a lengthy further passage the 'significant further investigations' undertaken on behalf of the claimant in response to the defendant's application. This includes new and further searches of material previously provided by Mr Horlick. This itself suggests that the amendments arise out of facts other than those substantially the same as those already in issue and that significant further investigations would be required by the defendant if the amendments were allowed. I do not agree with Sir Geoffrey that I can take account in relation to this issue of the fact it is alleged that Mr Flohr was acting fraudulently such that Mr Horlick had difficulty in establishing what he contends required to be pleaded. That is a different point and even if it were correct (a point on which I do not express a view) it would not follow that the new facts were substantially the same as those already pleaded.

155. Accordingly, I do not consider that the proposed amendments arise out of the same or substantially the same facts as those which are already in issue in the existing claim. The claimant, therefore, is not entitled to amend the particulars of claim so as to introduce the plea in fraud. The general position in such a case, where there is an arguable limitation defence to the proposed claim, is to leave the claimant to issue a new claim so that the defendant can respond accordingly as he sees fit. While the point had not been canvassed in his skeleton argument, Sir Geoffrey suggested that, in such an event, I should instead make an order giving permission to amend, but directing that the date of the new claim for limitation purposes be not the date of the claim form (as the relation back provided for by s.35(1)(b) of the 1980 Act would involve), but some later date.

156. The jurisdiction to make such an order, and the types of order which can be made, was discussed in some detail in the recent decision of Fancourt J in

Duke of Sussex v News Group Newspapers Ltd [2024] EWHC 1208 (Ch). At [71], he said this:

> '71. An apparent gloss on the requirement for a new claim to be issued where there is an arguable limitation defence has emerged in recent years. Mr Sherborne submits that the Court can, instead of requiring a new claim to be issued in which the defendant can raise its limitation defence, give permission to amend but specify that the relevant date of the new claim for limitation purposes is not the date of issue of the claim form but a later date (the authorities seem to favour the date of the application for permission to amend under rule 17.4, but it could be the date of the amendment itself if no such application was made). That approach is known as the *Mastercard* approach, following a decision of Field J in *WM Morrison Supermarkets plc v Mastercard Inc* [2013] EWHC 3271 (Comm) ("*Mastercard*")."

157. He also said, at [73], that, '[i]t is notable however that there was no issue of suspension of the primary limitation period under s.32 Limitation Act 1980 in that case and no remaining question of the validity of the limitation defence.' Furthermore, at [74]:

> 'What was conceded by Counsel for the defendant and agreed by the Judge was that the new claim could be brought by amendment in relation to only that part of the new claim that was not statute-barred. It was not therefore a case in which there was an arguable limitation defence to the whole claim, where s.35 mandates a refusal to grant permission to amend.'.

158. After mentioning the decision of the Court of Appeal in *Mastercard Inc v Deutsche Bahn AG* [2017] EWCA Civ 272, Fancourt J went on to summarise the more recent authorities in this way:

> '77. In *Libyan Investment Authority v King* [2021] EWCA Civ 1600 at [22] ("*Libyan*"), Nugee LJ commented that in a case he had heard as a puisne judge he persuaded the parties to agree to permission to amend being granted on the basis that the question of whether the amended material fell within rule 17.4(2) would be decided at trial. The indication in his judgment is that there was particular complexity about whether the new claims arose out of substantially the same facts as existing claims, which the trial judge would be better placed to decide, following which the matter of relation back or not would be determined accordingly.
>
> 78. In all these cases except *Libyan*, the parties were agreed about how the valid part of the claim could be pleaded by way of amendment. In *Libyan* on the other hand, the parties were persuaded to agree, in effect, to

defer to trial the determination of the application under rule 17.4 for permission to amend.

79. The question of whether the Court had power to impose a *Libyan*-style solution against the will of one of the parties was considered in *Advanced Control Systems, Inc v Efacec Engenharia e Sistemas S.A.* [2021] EWHC 914 (TCC) ("ACS"). In *ACS*, it was common ground that *some* of the amendments pleaded *might be* statute-barred but others were valid, but there was no concession by the claimant that any claims were statute-barred. There was therefore a limitation issue about all the claims sought to be pleaded. The claimant proposed to side-step the immediate issue about whether permission to amend could be granted by having the order state: "The amendments permitted by paragraph 1 above are to take effect from 1 March 2021" (the date of the application to amend).

80. That was therefore a case where there was a live dispute about barred claims, but the claimant was willing to have the court make an order that negated what would otherwise have been the effect of allowing a new claim to be made by amendment. It would have the effect of deferring to trial the question of which claims were statute-barred.

81. The defendant contended that the court had no power to take that approach. Mr Ter Haar QC, sitting as a Deputy High Court Judge, held that if the parties could agree to such a course (as he considered that previous decisions confirmed) the court must be able to impose it, since the parties could not agree to do something that s.35 Limitation Act 1980 did not allow. He accordingly gave permission to amend on the basis suggested. The effect of that was to leave to trial the question of which new causes of action were statute-barred. The decision therefore went further than the *Mastercard* or *Deutsche Bahn* cases because it allowed potentially statute-barred claims to proceed by way of amendment, with the limitation defence being determined later, but protecting the defendant from the new claims automatically relating back to the date of the claim form.

….

83. … However, where there is an issue about whether the running of the primary limitation period is deferred by s.32, a *Mastercard* approach of excluding claims arising more than 6 years before the date of the application to amend will not be effective. The only order that would work, in such a case, is the equivalent of the order made in *ACS*, specifying that any "new claims" later identified as not falling within s.35 are deemed to be brought on the date of the application to amend (or a suitable later date).'

159. Fancourt J then set out the considerations to apply when the court determines whether or not to make what he termed an *ACS* order:

> '87. Where an *ACS* order is made, the purpose underlying s.35 can be achieved, in that the defendant is not deprived of its ability to rely on limitation as fully as if a new claim form had been issued, but the determination of that issue is deferred. S.35 itself is concerned only with preserving the ability of a defendant to rely on a limitation defence; it is not concerned with protecting the parties from having to investigate the facts relating to the new claim, as they may have to do to some extent if a new claim form is issued instead. On the other hand, the issue of a new claim would provide the defendant with the opportunity to seek to strike it out summarily on limitation grounds, or have a trial of a preliminary issue, without the need to prepare for a full trial on the merits. Early determination of a limitation issue is usually desirable because, if the defence succeeds, it saves the parties from the costs of investigating the merits of a stale claim.
>
> 88. It therefore seems to me that the court ought to have power to permit an amendment in *ACS* form where (but only where) that is just and convenient, even if a relevant party does not consent, because it gives effect to the purpose of s.35 and may be more convenient than requiring a new claim to be issued. Mr Hudson did not argue that the Court could not do it, only that it should not do so on the facts of this case. It is, in my view, nevertheless a power that should be exercised with caution, given its potential to subvert the purpose underlying the Limitation Act.
>
> 89. The discretion to permit an amendment in *ACS* form must be exercised with regard to any prejudice likely to be caused to the defendant, the extent to which in a particular case the purposes of the Limitation Act would be undermined by it, and the consequences for the future management of the trial, both as regards the existing claims and the new claims. If the defendant might be prejudiced by such a course, as compared with its position if a new claim has to be issued, or if it will encumber or possibly delay the trial or add to the burdens of case management, it is unlikely to be appropriate to make such an order. Whether it is appropriate to make an *ACS* order is likely to depend on the stage that the unamended proceedings have reached, when the trial is due, the nature of the issues for trial as matters stand, the impact of the new limitation issues on the trial, including what further disclosure or evidence might be required, and whether the respondent has a strong case for summary (or prior) determination of the limitation issue.

> 90. If, having considered those matters, it is more convenient to deal with a limitation issue within the existing proceedings, the court can make an *ACS*-type order, even if one party unreasonably objects.'

160. In the *Duke of Sussex* case, some amendments were permitted to be made on an *ACS* basis, but not others: see at [182]–[190]. Where they were refused, one of the reasons was that all the existing claims were subject to limitation defences concerning s.32 of the Limitation Act 1980. If the amendments were permitted, the defendant would either lose the opportunity to apply for summary judgment (on limitation) on the new claims, or would have to make the application within the existing claim, which would prejudice it from a case management perspective.

161. Sir Geoffrey did not expressly mention this point in his skeleton argument, but I indicated in the course of argument (and in favour of the claimant) that the suggestion that paragraph 64 of his skeleton argument might be said to be an argument in favour of a *Mastercard*(-type) order. In that paragraph, the claimant pointed out that similar limitation arguments arose in relation to the proposed new claim as in relation to the original claim, that there would in such circumstances be little utility in requiring the claimant to issue separate claims, the amendment would cause little practical inconvenience and the claims should be case managed and considered together. These seem to me to be precisely the sort of considerations which Fancourt J took into account in the *Duke of Sussex* case in determining whether to allow disputed amendments. For that reason, and because I consider that it would be wrong in principle to permit an amendment on this basis where I have granted summary judgment to the defendant on the existing claim, I have not sought further submissions on the *Duke of Sussex* case, which was not cited at the hearing.

162. In his submissions in reply to the amendment application, Mr Cohen strongly made the point that the claimant had not led any submissions in favour of a *Mastercard*-type order and had not put before the court any of the relevant authorities. He submitted that it would not be appropriate to make a *Mastercard*-type order for a number of reasons. First, he said it would obviate the need to make an application for permission out, and the applicability of foreign law would have to be considered, given where many of the events took place. As he said, not of the relevant events are said to have taken place in England.

163. Mr Cohen also submitted that the defendant's limitation defence was prejudiced by the adoption of what would be an *ACS* form of order, and the issues in relation to the proposed new claim in deceit should be treated separately. The limitation issues are different. The first witness statement of Mr Spray says that Mr Horlick contacted him at 'the end of 2018', and 'explained the investigations he had undertaken and the discoveries that he

had made about the Defendant's conduct during Comprendium UK's life'. Mr Spray goes on to say that Mr Horlick requested that he assist in the restoration of the general partner. Mr Spray's evidence was considered in greater detail at the July 2023 hearing, when the court was concerned with the general partner's continuing authority to act on behalf of the claimant.

164. Sir Geoffrey responded that the question of whether to permit the amendments on terms that the question of relation back would be determined at trial was a question of prejudice. He submitted that the purport of *Mastercard* orders was to avoid unnecessary expense and cost and to do justice, and that the time, cost and expense of commencing a new claim would not be justified.

165. In most of the cases concerning *Mastercard* orders they have been made by consent. By reference to the comments of Fancourt J in the *Duke of Sussex* case, the key issues seem to me to be the prejudice likely to be caused to the defendant, and whether the defendant has a strong case for summary or prior determination of the limitation issue in relation to the proposed new claim. In light of those factors, the question is whether the defendant is unreasonably objecting to a *Mastercard*/*ACS* order.

166. I do not consider that the claimant should be permitted to pursue the claim in fraudulent misrepresentation within the existing proceedings.

i) Primarily, this would not be the appropriate course where the existing claim is suitable for summary judgment in favour of the defendant on limitation grounds. It would not be expedient to permit the claimant to introduce a new claim, relying on different facts (as well as many of the facts already pleaded) within proceedings that should be dismissed.

ii) I consider the first point above to be correct as a general proposition, but in addition to allow the new claim to proceed in the existing proceedings would risk particular unfairness to the defendant in the circumstances of the case. As Fancourt J said in the *Duke of Sussex* case, a *Mastercard*/*ACS* order is generally not the correct approach where the defendant has a strong case for summary determination of the limitation issue.

iii) I consider that the conclusion would be the same even if the existing claim was not susceptible to summary judgment on limitation now (or, if I am wrong in my conclusion on that point). Some of the allegations in the existing claim would be struck out if summary judgment had not been granted. There would be a likelihood of further amendments being made and limitation then having to be determined on different points by reference to claims deemed to be brought on different dates. In any event, it seems to me almost inevitable that the limitation issues

> in respect of the two claims (i.e., the existing claim and the claim in fraudulent misrepresentation) are in material respects different. That is so because they were first pursued at different times and the claimant contends that it both did and could with reasonable diligence have discovered the facts relevant to the deceit claim later than the existing claim. The acts of alleged deliberate concealment are also likely not to be identical as additional facts are relied on in support of the deceit claim. Differentiating between the limitation arguments in respect of both claims is likely to be vastly simpler if those arguments are determined separately. It is also possible that the 2018 date mentioned in Mr Spray's first witness statement is something of a red herring. What he said was with reference to the restoration of the general partner to the Guernsey register in order to pursue the existing claim. The claimant in fact contends that it could not with reasonable diligence have known of the facts required to plead the fraudulent misrepresentation claim until later, or those facts might be expected to have been pleaded in the original claim.

167. For those reasons, I do not consider that the defendant is unreasonable in objecting to the making of a *Mastercard*/*ACS* order. The general rule, that a claimant should be required to commence a new claim where there is an arguable limitation defence to a claim sought to be introduced by amendment, should be followed in this case.

168. Accordingly, the claimant's amendment application will be dismissed.

Conclusion

169. For the reasons I have given above, the defendant's application succeeds and I will make an order dismissing the claim. The claimant's counter-application is dismissed.