THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC(COM) 2024/0106

BETWEEN:

[1] ROSE FINANCIAL LIMITED PARTNERSHIP

[2] SILESIA LIMITED PARTNERSHIP

[3] CLODI HOLDINGS LIMITED

[4] RADO LIMITED PARTNERSHIP

Claimants / Respondents

-and-

[1] AMICORP (BVI) TRUSTEES LIMITED

[2] AMICORP (BARBADOS) LIMITED

[3] AMICORP CURAÇAO LIMITED

[4] AMICORP MANAGEMENT LIMITED

[5] AMICORP MÉXICO S.A. DE C.V. SOFOM ENR.

[6] AMICORP NEW ZEALAND LIMITED

[7] AMICORP TRUSTEES (NEW ZEALAND) LIMITED

Defendants / Amicorp Applicants

[8] SGG MANAGEMENT (BVI) LTD

[9] IQ EQ MANAGEMENT (CURAÇAO) N.V. (formerly known as SGG Management (Curaçao) N.V.)

Defendants / SGG Applicants

Appearances:

Mr. Michael Gibbon KC, with him, Mr. Edward Armitage (instructed by Mourant Ozannes (BVI)), and Ms. Jennifer Jenkins and Ms. Sophie Christodoulou, both of Mourant Ozannes (BVI), for the Claimants

Ms. Laura John KC, (instructed by Conyers Dill and Pearman), and with her Mr. Charles Goldblatt of Conyers Dill and Pearman, for the 1st to 7th Defendants

Mr. Tom Lowe KC, (instructed by Harney Westwood & Riegels (BVI) LP), and with him Mr. Jonathan Addo, Mr. James Petkovic, and Mr. James Wilton, all of Harney Westwood & Riegels (BVI) LP, for the 8th and 9th Defendants

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2026: June 23; 24;
July 9.

JUDGMENT

Introduction

[1] **MITHANI, J KC (Ag.):** Before the Court are applications by the First to Seventh Defendants (the "Amicorp Defendants") and the Eighth and Ninth Defendants (the "SGG Defendants") for summary judgment pursuant to rule 15.2 of the Civil Procedure Rules (Revised Edition) 2023 ("CPR") and/or a strike out pursuant to CPR 26.3.

[2] Unless otherwise stated, or the context otherwise requires, the expressions:

(a) "the Claim" or "the Claims" shall mean the various heads of claim made by the Claimants against the Defendants by way of the claim form dated 7th March 2024 and the amended Statement of Claim dated 4th April 2025 by the Claimants against the Defendants;

(b) “the Claimant” or “the Claimants” shall mean any one or more of the claimants in the Claim;

(c) “the Defendants” shall mean any one or more of the Defendants (whether the SGG or the Amicorp Defendants) in the Claim;

(d) “the Applications” or “these Applications” shall mean the application dated 6th November 2025 made by the SGG Defendants (to include the amended application dated 24th June 2026, for which permission was granted to them on 24th June 2026), and the like application dated 28th January 2026 made by the Amicorp Defendants, to strike out the Claim pursuant to CPR 26.3, alternatively for the dismissal of the Claim pursuant to what is commonly referred to as the “reverse” summary judgment provisions of CPR 15.2, or either or both of such applications; and

(e) “the Court” or “this Court” shall mean this Division of the High Court of the Eastern Caribbean Supreme Court, based in the territory of the Virgin Islands, hearing the Applications.

[3] The Applications arise in proceedings which concern allegations of a substantial international fraud involving the Biscayne group of companies, the South Bay Real Estate Development Project in Florida, a series of note-issuing vehicles incorporated in the Cayman Islands and Ireland, and the investment of assets belonging to entities within the Romay family trust structures.

[4] On the opening day of the hearing, the Claimants contended that the SGG Defendants were seeking, through their skeleton argument, to advance a case that was materially different from that identified in their application notice. They submitted that this was procedurally impermissible, since it deprived them of proper

notice of the case they were required to meet. Unless the SGG Defendants abandoned any points not foreshadowed in their application, the Claimants said that they should be required to amend their applications and that the Claimants should then be given an opportunity to take instructions and respond to the amended case. Reliance was placed on **Briefline Assets Ltd v Falin**,[1] in which Jack J refused permission to pursue a case materially different from that set out in the notice of application.

[5] The Claimants further submitted that these new arguments first appeared in SGG's skeleton argument, which had only been served in the week before the hearing. In those circumstances, they said that unless they were afforded an opportunity to take instructions on the revised case, the proper course was to adjourn the applications to allow them to prepare an adequate response.

[6] The SGG Defendants subsequently served an amended application notice on 24th June 2026. In the absence of any substantive opposition from the Claimants to that amendment, I granted the application.

[7] Once permission to amend had been granted, the parties sensibly agreed that the limitation issue should be determined first within the Applications, as that issue could be addressed without the need for an adjournment. Both sides accepted that, if the Defendants succeeded on limitation, the proceedings would in effect be brought to an end. Conversely, if the Claimants succeeded, the remaining grounds could, if necessary, be dealt with at a later hearing.

[8] That course was plainly consistent with the overriding objective. It avoided unnecessary argument on issues that might never arise, while enabling the Court to determine what both sides accepted was the potentially dispositive issue.

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[1] BVIHC(COM) 2020/0223 (delivered 15 February 2022).

[9] Mr. Gibbon KC, on behalf of the Claimants, properly acknowledged that requiring the SGG Defendants to proceed solely on the case advanced in their original application would not preclude them from seeking the same relief under an amended application in subsequent proceedings. Put another way, no issue estoppel would arise to prevent the Defendants from advancing, in later proceedings, points not relied upon in their original application. In my judgment, that submission was plainly correct. It is also consistent with the modern and more confined scope of issue estoppel as explained by the Supreme Court in **Skatteforvaltningen (SKAT) v MCML Ltd**[2] — a decision handed down after the conclusion of the hearing of these Applications — which emphasises that issue estoppel is to be applied with due regard to its underlying rationale and is not to be extended beyond its proper scope.

[10] In those circumstances, I considered it appropriate to proceed on that basis and to determine only the limitation issue advanced by the Defendants. This judgment does not determine the substantive merits or legal viability of the pleaded causes of action in knowing receipt, dishonest assistance or unlawful means conspiracy, all of which may require determination at a later hearing. The sole issue presently before the Court is whether any or all of the Claims are statute-barred under the Limitation Ordinance 1961 ("LO"), or whether the commencement of the limitation period is postponed by operation of section 25 of that Ordinance. The judgment is therefore confined to that issue. Nothing in it should be taken as expressing any concluded view on the substantive merits of the pleaded causes of action or on the remaining grounds advanced in the Applications.

[11] At its broadest level, the Claimants allege that persons entrusted with the management and protection of their investment assets dishonestly caused those assets to be invested in securities which, unknown to the Claimants, were effectively worthless because they formed part of a long-running fraudulent investment

[2] [2026] UKSC 19.

scheme. The Defendants are alleged to have knowingly participated in, facilitated or assisted that wrongdoing in various capacities.

[12] The causes of action advanced against the Defendants include unlawful means conspiracy, dishonest assistance and knowing receipt.

[13] The Defendants deny liability. They contend, amongst other things, that the proceedings are time-barred. Following the late amendment to which I refer below, it is upon that last contention alone that the Applications depend at this stage.

[14] The Applications have been supported by extensive written submissions and a considerable body of documentary and expert material. The parties rely upon numerous authorities drawn from the law of the Virgin Islands, England and Wales, and other common law jurisdictions. The Court has considered all of that material, whether or not expressly referred to below.

[15] It is important to identify at the outset the limits of the present exercise.

[16] This Court is not conducting a trial. It is neither required nor entitled to determine disputed questions of fact, assess the credibility of witnesses, or resolve competing inferences where those matters properly require disclosure, cross-examination and the forensic process available only at trial.

[17] The issue is instead whether the Defendants have demonstrated that the limitation defence is so clear that the Claimants have no real prospect of establishing that the commencement of the limitation period was postponed under section 25 of the LO. In other words, the sole question for determination on the Applications is whether the Defendants have demonstrated that the Claims are so fundamentally defective or lacking in substance, by reference to the limitation issue, that they should be terminated without a trial.

[18] For the reasons which follow, I have concluded that they have not done so. That conclusion should not be understood as expressing any view on the ultimate merits of the Claimants' allegations. It reflects only my conclusion that the limitation issues raised by these Applications cannot properly be determined summarily.

[19] In my judgment, the Claims should proceed to trial.

[20] Before turning to the factual background, I should add one further observation. Much of the argument before me concerned not merely the chronology of events but the legal significance of the knowledge said to have been acquired by Mr. Diego and Ms. Mirta Romay (hereinafter referred to respectively as "Diego" and "Mirta"), whether that knowledge is capable of attribution to the Claimants, and the effect of such attribution upon the operation of section 25 of the LO. Those issues lie at the heart of the limitation defence. Although I conclude that they cannot be finally determined upon these Applications, they require careful consideration because they inform virtually every aspect of the parties' competing submissions on the limitation issue.

Procedural Background

[21] The Claim was commenced on 7th March 2024.

[22] The Claimants seek relief arising out of alleged losses said to exceed US$50 million. The amended Statement of Claim dated 4th April 2025 alleges that the losses were sustained through the acquisition of notes issued by several note-issuing entities and through related transactions involving the Claimants' assets.

[23] The Defendants deny the allegations and challenge the legal viability of the claims.

[24] The SGG Defendants issued an application seeking strike out and/or reverse summary judgment. The Amicorp Defendants thereafter issued a separate

application seeking the like or similar relief. Although the applications are not identical, there is significant overlap between them.

[25] Following the late amendment which I permitted in the afternoon of 23rd June, the only issue now raised by the Applications, and the only issue falling to me for decision, is whether the Claims, or any of them, are statute-barred under the LO, or whether the commencement of the limitation period is postponed pursuant to section 25 of that Ordinance. The grounds formerly advanced — concerning the Claimants' standing, and the legal viability of the claims in knowing receipt, dishonest assistance and unlawful means conspiracy — do not require a decision from me, but may need to be determined by me in the future, depending on the outcome of the limitation issue.

[26] Put starkly, the issue for this Court is whether, taking the Claimants' case at its highest and applying the established principles governing summary determination, the Defendants have shown that the limitation defence is bound to succeed.

The Factual Background

[27] For the purposes of determining these Applications, it is unnecessary to recite the entirety of the factual history. It is sufficient to summarise those matters necessary to understand the limitation issue and the parties' competing submissions. The account which follows is not intended to constitute findings of fact.

[28] The factual background is lengthy and complex, involving multiple jurisdictions, numerous corporate entities, several trust structures and a substantial body of documentary material. The summary which follows is drawn principally from the pleadings and the evidence filed on these Applications. I make no findings of fact on the Applications, and nothing in this judgment is to be taken as expressing agreement with any party's version of the underlying facts. The matters summarised below are stated primarily by reference to the Claimants' case because, for present

purposes, the Court is required to consider whether that case has a realistic prospect of success, not whether it will ultimately be established at trial.

[29] The Claimants are four investment-holding entities associated with the Romay family, a family of substantial means. The First, Second and Fourth Claimants (Rose Financial Limited Partnership, Silesia Limited Partnership and Rado Limited Partnership) are limited partnerships, and the Third Claimant (Clodi Holdings Limited) is a company. Each held assets which, on the Claimants' case, were ultimately referable to the Romay family and were administered within a structure of trusts of which professional trustees (latterly, professional trustees in New Zealand) were the legal owners. The members of the family most closely connected with the events in issue are Diego and Mirta Romay, who feature prominently in the Defendants' limitation defence. Diego and Mirta are the members of the Romay family most closely connected with the family's financial affairs; on the evidence, they acted as protectors in respect of certain of, and were beneficiaries under, the relevant trusts, and it was Diego whom Deutsche Bank contacted in May 2018 to inform him that they suspected that there was a substantial issue with their investments. It is their knowledge which the Defendants seek to attribute to the Claimants for the purposes of the limitation defence.

[30] The legal position occupied by Diego and Mirta is of particular importance. They were not directors or officers of the corporate Claimants; rather, they were beneficiaries of the relevant trust structures and, more importantly, acted as protectors under certain of the trust deeds. The extent of the powers thereby conferred upon them, and whether their knowledge may properly be attributed to the Claimants for the purposes of section 25 of the LO, emerged as one of the principal issues on these Applications. I return to that question later in this judgment.

[31] The central figure in the Claimants' case is Mr. Fernando Haberer ("Mr. Haberer"). The Claimants allege that Mr. Haberer was entrusted with the management of, and exercised substantial influence over, the investment of the family's assets, and that

he owed them fiduciary or equivalent duties in that capacity. The family's assets were held and managed through accounts at several financial institutions, including Deutsche Bank and Banque Pictet & Cie.

[32] Mr. Haberer was also associated, together with Mr. Roberto Cortes and Mr. Ernesto Weisson (whom the parties refer to collectively, together with Mr. Juan Carlos Cortes, as the "Principals"), with a group of businesses which I shall describe as the Biscayne Enterprise. Beginning in or about 1999, the Biscayne Enterprise promoted a series of real estate developments centred upon the South Bay Project in Florida. Those developments were financed, in part, through the issue of notes ("the Notes") by a number of special purpose vehicles ("the Note Issuers") incorporated in the Cayman Islands and, in one instance, in Ireland. The Note Issuers included entities such as SG Strategic Income Limited and GMS Global Step Up Note Limited.

[33] The Notes were issued in global form and held through a multi-layered chain of intermediaries. On the evidence before the Court, each global note was issued to BT Globenet Nominees Limited as depositary and registered holder, that entity acting as nominee for Deutsche Bank AG, London Branch as common depositary; interests in the global notes were cleared through the Euroclear and Clearstream systems; and sub-participations were then held, by a descending succession of contractual relationships, through institutions, including Banque Pictet & Cie and an entity within the Deutsche Bank group, until they reached the ultimate investors. It was by this route that the Claimants came to hold their interests in the Notes.

[34] The Claimants allege that the Biscayne Enterprise was, in substance, a long-running fraud in the nature of a Ponzi scheme. They contend that, by no later than 2015, the enterprise was insolvent and devoid of any realistic prospect of repaying investors; that the sale and "rolling over" of the Notes nonetheless continued; and that funds raised from new investors were applied in discharging the enterprise's existing liabilities and in sustaining a false appearance of commercial viability. The gravamen of the Claimants' complaint is that their own assets were dishonestly

deployed, in breach of the duties owed to them, into Notes which those responsible knew to be worthless.

[35] The Defendants do not accept that characterisation. Their case is that the existence and nature of any fraud, the timing of any insolvency and the knowledge of those alleged to have participated in it all remain matters requiring proof at trial, if the Claim eventually proceeds to trial. Nothing in this summary should, therefore, be understood as recording findings upon those issues.

[36] The two groups of corporate Defendants are alleged to have facilitated that scheme in different ways. The Amicorp Defendants (the First to Seventh Defendants) are alleged to have created and implemented two trusts established under the Virgin Islands Special Trusts Act 2003 — the SBH Trust and the Vanguardia Trust — in or about late 2016, and thereafter to have administered those structures. On the Claimants' case, those trusts were the vehicles through which the Notes were sold to the Claimants.

[37] The SGG Defendants (the Eighth and Ninth Defendants) are alleged to have provided corporate services to entities within the Biscayne structure. The Eighth Defendant (SGG Management (BVI) Ltd) is said to have contracted to provide nominee directorship services to the Note Issuers, and, through the Amicorp-administered trusts, to have acted as director of certain holding vehicles within the wider structure. The Ninth Defendant (IQ EQ Management (Curacao) N.V., formerly SGG Management (Curacao) N.V.) is alleged to have provided corporate administration services. Mr. Jacobus Vink was, at the material time, the managing director of both SGG Defendants, and Mr. Herman Oosten was an employee said to have been engaged in providing the relevant services.

[38] These alleged roles differ materially. The Claimants allege that the Amicorp Defendants were directly involved in the establishment and administration of trust structures through which the Notes were marketed or acquired, whereas the SGG

Defendants are said to have participated through the provision of corporate and nominee services to entities within the Biscayne structure. Whether those respective roles are capable of giving rise to liability is not presently before the Court.

[39] Upon that foundation, the Claimants advance three causes of action against the Defendants: unlawful means conspiracy; dishonest assistance in the breaches of fiduciary duty said to have been committed by Mr. Haberer and others; and knowing receipt of assets traceable to those breaches. The total loss claimed is said to exceed US$50 million.

[40] The position of the Third Claimant, Clodi, stands somewhat apart from that of the others. Its claim does not arise from the purchase of Notes. It concerns the transfer, in March 2018, of securities worth more than US$6 million out of Clodi's account, pursuant to instructions which the Claimants allege Mr. Haberer gave by forging the necessary signatures, in order to discharge in part an overdraft incurred on the account of another claimant. The relevant instructions are dated 8th and 15th March 2018, and the transfers are said to have been effected on 9th and 16th March 2018. That claim is factually distinct from the investment claims advanced by the remaining Claimants and raises separate questions concerning accrual and limitation.

[41] A central controversy between the parties concerns when the Claimants discovered, or ought to have discovered, the alleged wrongdoing. The Claimants' case is that the truth was concealed from them and was not discovered until 2018. The Defendants contend that the Claimants were, or ought to have been, alerted to it considerably earlier. The principal matters relied upon by the Defendants are these. On 27th May 2016, the United States Securities and Exchange Commission issued a Cease-and-Desist Order ("SEC Order") that made findings of regulatory misconduct against persons and entities connected with the Biscayne Enterprise and named certain of the Note Issuers. The Defendants contend that Diego and Mirta became aware of that Order in about June 2016. The Claimants contend that the Order did not reveal the fraud now alleged, that Mr. Haberer furnished false

reassurances when it was raised with him, and that the materials available to them did not disclose the wrongdoing.

[42] The Defendants contend that receipt of the SEC Order in 2016 constituted the relevant trigger for the purposes of postponement under section 25.

[43] The significance of the SEC Order lies not in any allegation that it disclosed the entirety of the fraud now alleged, but in the Defendants' contention that it was sufficient to place a reasonably diligent investor upon enquiry. Whether that contention is correct depends upon a careful examination not only of the contents of the SEC Order itself but also of the surrounding circumstances, the explanations said to have been given by Mr. Haberer, the extent of Diego and Mirta's knowledge at the time, the powers available to them where they were protectors, and the enquiries which a reasonably diligent person occupying their position would have undertaken.

[44] On the Claimants' case, the true position became apparent only in May 2018, when Deutsche Bank contacted Diego, in his capacity as protector of the relevant trusts, concerning an overdraft. The position is stated in the following terms in Diego's first affidavit sworn on 20th April 2026:

> "36. Up until May 2018 I received occasional statements for the trust accounts. These statements suggested that my investments were doing well. For example, I received an Investment Review on 20 February 2018 stating that the Rado account held around $7 million in a 'money market deposit account' plus various blue chip fixed-income investments worth about US$1.3 million. I know now, but did not know at the time, that these account statements were fabricated.
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> 37. The first time I had any suspicion that something wasn't right was on 9 May 2018 when I received a phone call from Pascal Landrove at Deutsche Bank Miami. Deutsche Bank knew I was the Protector of the trust which held the Rado account and so contacted me as I was told that they were not receiving replies from Haberer. I was informed that there was an overdraft on the account of Rado in the sum of $2.5 million."

[45] The Defendants challenge that account. As I have said, they submit that the relevant trigger, for the purposes of section 25, occurred substantially earlier, namely upon receipt of the SEC Order in 2016. The Claimants contend that the SEC Order neither revealed nor could reasonably have revealed the concealed fraud alleged in these proceedings.

[46] The Note Issuers were placed into liquidation in the Cayman Islands in 2018, and members of the Romay family submitted proofs of debt in those liquidations.

[47] The joint liquidators of the Note Companies intimated potential claims against (in particular) the Ninth Defendant. Following a mediation and a substantial disclosure exercise, the joint liquidators entered into a settlement with, *inter alia*, the SGG Defendants, comprising an original settlement agreement dated 13th April 2022 and an Amended and Restated Settlement Agreement ("the ASA") dated 23rd May 2023. The Defendants contend that the ASA released the claims now advanced; the Claimants contend that it neither did, nor could, release their own direct claims.

[48] There have also been related proceedings in Florida arising out of the same events.

[49] These proceedings were commenced in this Court by a claim form dated 7th March 2024, and the Claimants' case is set out in an amended Statement of Claim dated 4th April 2025.

[50] The Claimants' case may be summarised in broad terms as follows.

[51] Beginning in approximately 1999, a group of individuals associated with the Biscayne Enterprise promoted a series of real estate developments centred on the South Bay Project in Florida. Financing was allegedly obtained through the issuance of notes by several special purpose vehicles. Those vehicles included Cayman Islands companies and, in certain instances, an Irish issuer.

[52] The Claimants allege that by no later than 2015, the enterprise was insolvent and that investor funds were being used to sustain a fraudulent scheme. They contend that note sales continued notwithstanding the absence of any realistic prospect of repayment. They further contend that funds raised from investors were used to meet existing liabilities and maintain the appearance of commercial viability.

[53] As noted above, a central figure in the Claimants' case is Mr. Haberer.

[54] The Claimants allege that Mr. Haberer occupied positions of trust in relation to their assets and exercised substantial influence over investment decisions affecting them. The Claimants contend that Mr. Haberer and others caused the Claimants' assets to be invested in notes which they knew to be worthless.

[55] The Defendants are alleged to have facilitated or assisted that conduct. The SGG Defendants are alleged to have been involved, through corporate directorships and the provision of corporate administration services, with relevant entities within the Biscayne structure. The Amicorp Defendants are alleged to have been involved in creating and implementing two VISTA trusts — the SBH Trust and the Vanguardia Trust — which, on the Claimants' case, were used to sell the Notes to the Claimants, and in administering those structures.

[56] The Defendants deny those allegations.

[57] The SGG Defendants, in particular, place at the forefront of their submissions several features of the factual matrix which, they say, the Court should have well in mind when assessing each head of claim. I record them at this stage without expressing any view upon them.

[58] First, the SGG Defendants emphasise that they never had any direct relationship with the Claimants, the Romay family, or the Romay family trusts. They were not the Claimants' trustees, advisers, investment managers or counterparties. Their

only connection with the matters complained of, they submit, is that the Eighth Defendant contracted to provide nominee directorship services to the Cayman note-issuing companies (i.e., the Note Issuers), and that the Eighth Defendant (through the Amicorp-administered VISTA trusts) acted as director of certain holding vehicles within the wider structure. In the SGG Defendants' case, their presence in the narrative is, at best, circumstantial.

[59] Second, the SGG Defendants draw attention to what they characterise as a "black hole" at the heart of the Claimants' case: the Claimants do not plead, and have not evidenced, the dates on which, or the counterparties from whom, their trustees acquired their interests in the Notes. The SGG Defendants submit that this omission is of particular significance because, on the Claimants' own pleaded case, the scheme is said to have commenced no later than 2013, the Notes were issued and "rolled over" over a period of time, and at least the Fourth Claimant appears to have been invested in instruments connected with the alleged scheme by 31st December 2015 and Mr. Haberer was corresponding with Mr. Romay about Biscayne in January 2016. The SGG Defendants contend that the Claimants may already have been invested in, and suffered loss in respect of, worthless notes before the SBH and Vanguardia structures (with which the SGG Defendants are said to be connected) were established in or about late 2016, with the consequence that the matters of which the SGG Defendants are said to have had knowledge cannot have caused the loss alleged.

[60] Third, the SGG Defendants stress that Mr. Haberer — the only person alleged to have owed fiduciary duties to the Claimants — is not a party to these proceedings, notwithstanding the central role ascribed to him. The same is true of Messrs Roberto Cortes and Ernesto Weisson (together with Mr. Haberer), none of whom is an employee, officer or agent of the SGG Defendants. The SGG Defendants submit that the Claimants' case against them is, in substance, an attempt to fix accessory liability upon a remote corporate service provider for the acts of non-parties with whom the SGG Defendants had no relevant connection.

[61] I record these contentions because they inform each of the discrete grounds on the limitation issue, to which I now turn. They are forcefully advanced and are not without substance. They do not, however, alter the limited nature of the present exercise. Whether the Claimants are able to fill the evidential gaps which the SGG Defendants identify, and whether the inferences for which the Claimants contend can properly be drawn, are matters which, for the reasons given below, cannot be determined on these Applications.

[62] For present purposes, I do not attempt to resolve the factual disputes between the parties. The allegations must be considered solely for the purpose of determining whether the claims are capable of proceeding to trial. I record those matters only because they formed part of the submissions advanced on these Applications.

[63] It is against the above factual background that the Applications fall to be determined.

[64] I emphasise once again (and make no apology for doing so) that nothing contained in this section should be understood as expressing any finding upon disputed facts. My task is confined to determining whether the limitation defence advanced by the Defendants is capable of summary determination or whether the issues raised require resolution at trial.

[65] In determining these Applications, I have taken the Claimants' pleaded case at its highest except where contradicted by incontrovertible contemporaneous documents. It is neither necessary nor appropriate at this stage to resolve disputed questions of fact, credibility or inference, save where the applicable authorities permit such a course.

The Applicable Principles

Summary Judgment

[66] The Defendants seek summary judgment pursuant to CPR 15.2 and, in the alternative, strike out pursuant to CPR 26.3. Although both jurisdictions are invoked, they are conceptually distinct.

[67] Summary judgment involves an evaluative assessment of the available evidential material, whereas strike out is ordinarily concerned with the legal sufficiency of the pleaded case.

[68] CPR 15.2 empowers the Court to grant summary judgment where a claimant has no real prospect of succeeding on the claim or issue.

[69] The principles governing applications for summary judgment are well established. They have been considered on many occasions in this Court, including, most recently, by me in **Access Bank Plc v Orjiako and others**.[3]

[70] Those principles were conveniently summarised by Lewison J (as he then was) in **Easyair Ltd v Opal Telecom Ltd**,[4] as approved by the English and Welsh Court of Appeal in **Ward (AC) & Son Ltd v Catlin (Five) Ltd**.[5]

> "The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman*;[6]

[3] BVIHC (COM) 2023/0282 (delivered 1 October 2025).
[4] [2009] EWHC 339 (Ch), at [15].
[5] [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301, at [24], per Etherton LJ (as he then was).
[6] [2001] 1 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 Ltd v Patel*;[7]

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 Ltd v Patel*;[8]

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)*;[9]

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 The Bolton Pharmaceutical Company 100 Ltd*;[10]

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

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[7] [2003] EWCA Civ 472, at [8], per Potter LJ.

[8] [2003] EWCA Civ 472, at [10], per Potter LJ.

[9] [2001] EWCA Civ 550.

[10] [2006] EWCA Civ 661.

> 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*.[11]"

[71] It is appropriate to mention one further point on summary judgment under the ECSC CPR. Unlike CPR Part 24 in England and Wales, CPR 15.2 does not confer a residual discretion to refuse summary judgment merely because there is some other compelling reason for a trial. The Court's task is, therefore, to apply the statutory test prescribed by the Rules. This means that if the Court is satisfied that a party has no real prospect of succeeding on the claim, defence or issue in a claim, it cannot go on to consider whether the claim should go to trial anyway because there is a compelling reason for it to go to trial. Accordingly, once the statutory threshold under CPR 15.2 is satisfied, this Court does not possess a separate residual discretion to refuse summary judgment merely because a trial might otherwise be desirable. That marks a significant distinction from CPR Part 24 in England and Wales.

[72] In **Nam Tai Property Inc v West Ridge Investment Company Ltd**,[12] Webster JA adopted the approach of Lewison J, summarised in **Easyair**, in the following terms:

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[11] [2007] EWCA Civ 725.

[12] BVIHCMAP2022/0046 (Judgment, 27 July 2023), at [20] and [21].

"[20] …

4.1. Does the Defence and Counterclaim have a 'realistic' as opposed to a 'fanciful' prospect of success?

4.2. A claim is 'fanciful' if it is entirely without substance. A 'realistic' prospect of success carries some degree of conviction beyond being merely arguable.

4.3. The object is to winnow out cases that are not fit for trial. The Court must avoid conducting a 'mini-trial' without disclosure and oral evidence. The Court should avoid being drawn into an attempt to resolve conflicts of fact. The Court should bear in mind what evidence can reasonably be expected to be available at trial.

4.4. The Court should be alive to the warning in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** that '[i]f it is possible to show by evidence that although material... 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 ….'

4.5. The Court must assume disputed questions of fact in favour of the party against whom the application is made … The conclusion that a defence has no real prospect of success ought only to be reached in the clearest of cases, 'where it is clear that a [statement of case] on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court.' This is a high bar."

[21] I will follow this approach and would only add the following qualification from the judgment of Lewison J in **Easyair** (following his reference to the court not conducting a mini trial at this stage) … 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... This qualification is important because it is not every statement that a party, against whom summary judgment is sought, makes in its pleading or evidence that the court should assume in favour of that party. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement."

[73] Where written evidence has not been tested by cross-examination, the Court will not, save in exceptional cases, reject that evidence on the papers: see **Easyair Ltd v Opal Telecom Ltd**. Ordinarily, the court will treat such evidence at its highest for present purposes, unless the party seeking to displace it shows that it is plainly incredible, is conclusively contradicted by admitted facts or indisputable documents, or that some other compelling reason exists to reject it, such as obvious fabrication, material internal inconsistency, or demonstrable impossibility or improbability: see **Kireeva v Bedzhamov**,[13] at [34], adopting the observations of Rimer LJ in **Coyne v DRC Distribution Ltd**,[14] at [58]; and **Three Rivers District Council v Governor and Company of the Bank of England (No 3)**,[15] at [94]-[107], per Lord Hope of Craighead.

[74] The Court's task is not to decide where the truth ultimately lies, but to determine whether the Defendants have demonstrated that the Claimants have no real prospect of successfully resisting the limitation defence.

[75] The limits of deciding credibility on the papers are explained in **Easyair.** The Court of Appeal's treatment of the approach to untested evidence is helpfully summarised in **Kireeva**, at [34]. Contemporaneous documentary material may, in some cases, demonstrate that an assertion is plainly inconsistent with the record and so justify rejection on the papers, but the mere fact of dispute or contradiction in rival statements does not, of itself, establish manifest incredibility.

[76] When a party seeks to rely on documentary contradiction or other matters to displace untested oral evidence, that party should identify with precision the documents or facts said to be decisive and explain why they render the evidence manifestly incredible or conclusively undermined; bare or generalised assertions of

[13] [2022] EWCA Civ 35, [2023] Ch 45.
[14] [2008] EWCA Civ 488.
[15] [2001] UKHL 16, [2003] 2 AC 1.

inconsistency will not suffice: see **Access Bank v Orjiako** for an example where contemporaneous records were treated as decisive on the papers.

[77] Accordingly, unless that high threshold is met, the Court must proceed on the basis of the Claimants' evidence and that of their witnesses, taking it at its reasonable highest for present purposes.: see **Kireeva v Bedzhamov**,[16] at [34]. The effect of that approach is to require, on an application decided on written evidence, that the party disputing that evidence demonstrate that it is either inherently implausible or is undermined by clear and incontrovertible documentary or agreed factual material. That principle and the qualification derived from **Easyair** are not in conflict. The Court will not accept uncritically assertions that are contradicted by contemporaneous documentary material, but nor will it, on the papers alone, reject evidence which is not manifestly incredible merely because it is contested. The Court must therefore distinguish between evidence that is inherently incredible or demonstrably contradicted by contemporaneous documents, and evidence whose reliability depends upon findings of credibility or competing inferences which can only properly be resolved at trial.

[78] Allegations of fraud, dishonesty, knowing assistance and conspiracy are not immune from summary determination: see the authorities cited in **Access Bank Plc v Orjiako**. Equally, they frequently depend on questions of knowledge, intention, participation, reliance, and causation, which often hinge on disclosure and oral evidence. It follows that neither the seriousness of the allegations nor the seriousness of the consequences for the Defendants alters the applicable test. The Court must apply the ordinary principles governing summary judgment, whilst recognising that allegations of fraud frequently depend upon questions of knowledge, intention and inference which are ordinarily ill-suited to determination without disclosure and oral evidence.

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[16] [2022] EWCA Civ 35, [2023] Ch 45.

[79] As I observed in **Access Bank Plc v Orjiako**, a court will be slow to grant summary judgment where a claim is founded on fraud or other serious want of probity. That principle operates differently, where, as here, it is the defendant who brings the application. In such a case, the defendant must demonstrate not merely that the fraud allegations are difficult to prove, but that they are incapable of proof even on the most favourable assumptions available to the claimant.

[80] In determining the Applications, the Court must apply the ordinary principles governing summary judgment while recognising that the burden of establishing the constituent elements of the causes of action ultimately rests upon the Claimants. Equally, the Court must guard against converting an application under CPR Part 15 into a premature or mini trial. The question remains whether, viewing the evidence at its proper level, the claimant has a realistic, as opposed to fanciful, prospect of establishing the allegations at trial. The onus of proving the facts and matters upon which the Claimant relies, at trial, under this ground is upon it, though there may be situations where the onus of proving certain facts and matters on which reliance is placed by a party will lie upon that party.[17]

[81] This point is crucial in the present case. That is because the Defendants say that, even if one accepts the written evidence adduced on the Applications by the Claimants at its highest, there is simply no case for the Defendants to answer. In other words, there is simply no material in the possession of the Claimants (and none likely to be available in the future) that would lead the Court to the conclusion, based on the standard of proof that it has to apply (the burden being on the Claimants to prove their case on evidence that is cogent and clear), that the Claim will succeed.

[17] See Halsbury's Laws of England, 5th Edition, Reissue, Civil Procedure, Volume 12, 2020, paras. 699 and 700.

Strike out

[82] CPR 26.3 empowers the Court to strike out a statement of case, *inter alia*, where it discloses no reasonable ground for bringing or defending a claim. The principles governing a strike out are equally well established.

[83] The jurisdiction to strike out a statement of case on the ground that it fails to disclose any reasonable grounds for bringing or defending a claim (or application) is materially narrower than the Court's jurisdiction to grant summary judgment. Strike out focuses primarily — and often exclusively — on the adequacy of the case as "pleaded" or "set out" on the face of the relevant document; it is not an evaluative jurisdiction that involves a review of the totality of the evidential record. As Lord Wilson JSC (with whom Baroness Hale DPSC and Lords Clarke, Hughes and Hodge JJSC agreed) explained in **Wyatt v Vince (Nos 1 and 2)**:[18]

> "It is indeed common practice in civil proceedings to join an application to strike out under [the English and Welsh CPR] rule 3.4 with an application for summary judgment … But in *Swain v Hillman*,[19] Lord Woolf MR observed that the power under rule 24.2 of the English and Welsh CPR [i.e., the power to grant summary judgment] … was wider than the power under rule 3.4 and that under the latter, unlike the former, the general focus of the court was only on the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then Hale J, crisply put it three months later, 'the essence of a strike out is that one does not look at the evidence on the claim': *Bridgeman v McAlpine-Brown*."[20]

[84] In a strike out application, the Court ordinarily assumes that the pleaded facts are true. The application focuses on the statement of case rather than the evidence. The rule confers a discretion which must be exercised sparingly and only where the defect or complaint in the statement of the case is clear.

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[18] [2015] UKSC 14, at [24].
[19] [2001] 1 All ER 91.
[20] 19 January 2000, unreported, [2000] CA Transcript No 39, at p 4.

[85] The distinction between strike out and summary judgment assumes particular importance in the present case because the principal limitation arguments depend not merely upon the pleadings but upon witness evidence, contemporaneous documents and competing inferences. The Applications therefore fall to be determined principally through the summary judgment jurisdiction. In any event, where an application to strike out a pleading is founded on the terms of the pleading itself, and the proposed amendment would cure the alleged defect by disclosing an arguable cause of action or defence, the court will ordinarily permit the amendment unless the party opposing it can demonstrate material prejudice that cannot fairly be addressed by costs or an adjournment. The general approach to amendments is, therefore, liberal, and permission will usually be granted where it serves the interests of justice and avoids striking out a pleading that can properly be put into good order, as reflected in the authorities on amendments and strike-out, including the principles stated in **Swain v Hillman** and the broader approach to amendments under the CPR.

[86] Although in the present case, the Defendants assert that the Claimants' pleaded case does not support one or more of the heads of claim, I am not satisfied that this is so. In any event, the strike-out applications are, in large part, unnecessary because summary judgment relief is wider in scope than the strike-out relief sought in the Applications. The relief for summary judgment sought by the Defendants turns on the Court's assessment of the written evidence adduced in support of the Applications, and in those circumstances, the strike-out relief is largely otiose.

Fraud and Dishonesty Claims

[87] A significant feature of the present proceedings is that the claims involve allegations of fraud, dishonesty, conspiracy, knowing receipt and dishonest assistance.

[88] There is an apparent paradox inherent in determining the limitation issue before trial. The Court may, for limitation purposes, be required to assume the truth of

allegations of fraud which remain disputed on the merits. That apparent inconsistency is a necessary consequence of determining limitation before trial and does not involve any premature finding that the fraud has in fact been established.

[89] Claims alleging fraud, dishonesty, knowing assistance and conspiracy are subject to the same procedural rules as any other civil claim. Nevertheless, because such allegations involve serious findings of misconduct, the law requires them to be distinctly pleaded and ultimately supported by cogent evidence. Those well-established requirements do not create a separate summary judgment test; rather, they inform the Court's assessment of whether the claimant has demonstrated a realistic prospect of establishing the allegations at trial.

[90] The general principle that summary judgment should not be granted lightly where a claim is based on fraud or other serious want of probity (see, by way of examples, **JD Wetherspoon Plc v Van de Berg & Co Ltd & others**,[21] at [27]; and **Wrexham Association Football Club Ltd v Crucialmove Ltd**,[22] at [57]) does not apply where a defendant seeks summary judgment to dismiss a claim based on such grounds. There are many reasons for this. They include the following matters.

[91] First, a claim based on fraud or serious want of probity needs to be pleaded with much greater detail than an ordinary civil claim, such as for breach of contract: see **Three Rivers District Council v Bank of England (No 3)**,[23] at [183]-[190], per Lord Millett, a claim not supported by proper particulars risks being struck out or being summarily dismissed.

[92] Second, the claimant has to provide cogent evidence to support such a claim (see, by way of examples, **Re B**,[24] **Fiona Trust & Holding Corp v Privalov**,[25] and

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[21] [2007] EWHC 1044 (Ch).
[22] [2006] EWCA Civ 237.
[23] [2001] UKHL 16, [2003] 2 AC 1.
[24] [2008] UKHL 35.
[25] [2010] EWHC 3199 (Comm).

Kensington International Ltd v Montrow International Ltd (in Provisional Liquidation),[26] per Hariprashad-Charles J: "allegations of fraud must be supported by highly cogent evidence." (Emphasis supplied)). If that evidence falls short of what is required to make good that claim at trial, the Court will readily dismiss the claim summarily.

[93] Third, it is well established that, even where a party succeeds in the litigation on grounds that do not depend upon findings of fraud or dishonesty, the Court may take into account, when exercising its discretion as to costs, the fact that serious allegations of fraud or dishonest conduct were advanced without an adequate evidential foundation and were ultimately not established. In an appropriate case, that may justify a departure from the ordinary rule that costs follow the event under CPR 64.6: see the commentary in the White Book (2026 Edition), at paras. 44.2.20–44.2.25, concerning the equivalent provisions of CPR 44.2 in England and Wales.

[94] In the present case, therefore, the Court should readily be willing to dismiss a claim based on such allegations where it is satisfied that the allegations will simply not be made out at trial, either because the case has not been pleaded properly (or with sufficient particularity) or because the evidence to support it is incapable of being established at trial.

[95] Although the allegations advanced in these proceedings are serious, I remind myself that seriousness cuts both ways. Allegations of fraud should not proceed to trial merely because they are pleaded in emphatic terms. Equally, allegations of fraud should not be summarily dismissed merely because they involve disputed questions of knowledge, intention or participation. The Court must remain focused upon the test prescribed by CPR 15.2 and resist any invitation, whether explicit or implicit, to resolve contested factual issues which properly belong to the trial

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[26] [2007] 5 JBVIC 0902.

process. Against that legal framework, I turn to the parties' competing submissions on the operation of section 25 in the circumstances of the present case.

Limitation, Section 25, Attribution, Disposition and Costs

Limitation

Introduction

[96] I turn to the limitation issue, which, following the amendment to the SGG Defendants' application, is the only issue requiring determination at this stage.

[97] The limitation issues raised by these Applications are central to the Defendants' applications for summary judgment. Although each Defendant advances its arguments in slightly different ways, the essential issues may conveniently be grouped under four headings: (i) whether any of the pleaded causes of action are *prima facie* statute-barred; (ii) if so, whether section 25 postpones the commencement of the limitation period by reason of fraud or deliberate concealment; (iii) when, applying the statutory test, the Claimants discovered, or could with reasonable diligence have discovered, the fraud alleged in these proceedings; and (iv) whether any relevant knowledge falls to be attributed to one or more of the Claimants.

[98] Those questions are closely interrelated but analytically distinct and should be considered separately.

[99] It is important to distinguish between the ultimate burden which will arise at trial and the burden resting upon applicants seeking summary judgment. The present applications are not concerned with whether the Claimants have proved postponement under section 25. Rather, the question is whether the Defendants have demonstrated that the Claimants have no realistic prospect of establishing the necessary facts at trial.

[100] The limitation defence raises questions of both law and fact. The legal principles governing section 25 of the LO are largely uncontroversial. The real dispute concerns their application to the facts alleged in these proceedings.

[101] More particularly, the parties disagree as to:

(a) whether the Claimants discovered the alleged fraud before March 2018;

(b) whether they could, with reasonable diligence, have discovered it earlier;

(c) whose knowledge is capable of being attributed to the Claimants for the purposes of section 25; and

(d) whether those issues are capable of determination on a summary judgment application.

[102] Those questions overlap. They cannot sensibly be considered in isolation because the answer to each may depend upon the answer to the others. It is, therefore, convenient to begin by identifying the statutory framework before considering the parties' competing submissions.

[103] The limitation defence raises a serious and potentially dispositive issue and, therefore, requires particularly careful consideration. If it is ultimately established, it may prove dispositive of the whole or substantial parts of the proceedings. The fact that I reject the Applications should not be taken as minimising the significance of the point. On the contrary, limitation is plainly one of the principal issues likely to arise at trial.

[104] The Defendants have developed the argument carefully and rely upon both documentary material and a substantial body of authority. Nevertheless, for the

reasons that follow, I am not satisfied that the issue can properly be determined on a strike-out or summary judgment application.

The Defendants' Case

[105] The relevant provisions of section 25 of the LO are in the following terms:

> "Where, in the case of any action for which a period of limitation is prescribed by this Ordinance, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid, or
>
> (c) the action is for relief from the consequences of a mistake,
>
> <u>the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it</u> …" (Emphasis supplied).

[106] The parties agree that if section 25 applies, time does not begin to run until the fraud has been discovered or could, with reasonable diligence, have been discovered. Their dispute concerns the application of those statutory concepts to the present facts. In other words, the parties accept that section 25 is engaged if, but only if, the Claimants establish that the commencement of the limitation period was postponed because the relevant fraud was not discovered, and could not with reasonable diligence have been discovered, before the critical date.

[107] The claim was issued on 7th March 2024. The Defendants submit that the relevant causes of action accrued more than six years earlier. Accordingly, absent postponement under section 25 of the LO, the claims are statute-barred.

[108] The Defendants do not take issue with the proposition that the Claimants' pleaded claims fall within limb (a) and/or limb (b) of section 25, in that they are pleaded as claims in fraud and/or as claims in which a right of action is alleged to have been concealed by fraud. Under limb (a) of section 25, a claim is "based upon the fraud" of a defendant or his agent where fraud is an essential element of the cause of action, including claims in deceit and other claims in which dishonesty forms part of the cause of action, such as fraudulent conspiracy, dishonest assistance, and deliberate breach of fiduciary duty.

[109] While accepting that the Claimants seek to rely upon fraud and concealment, the Defendants maintain that section 25 does not assist the Claimants because the Claimants could, with "reasonable diligence", have discovered the alleged fraud long before March 2018.

[110] It is important to distinguish between the existence of fraud and its discoverability. Section 25 is not concerned with whether fraud occurred; it is concerned with when the claimant knew, or ought reasonably to have known, sufficient facts to enable proceedings to be commenced.

[111] The centrepiece of the Defendants' case is the SEC Order issued on 27th May 2016. The Defendants submit that the SEC Order revealed serious misconduct within the Biscayne group. It identified regulatory breaches, conflicts of interest and serious concerns regarding the sale of notes linked to the South Bay development. The Defendants contend that Diego and Mirta Romay knew of the SEC Order by June 2016. They further contend that they knew of Mr. Haberer's connection with Biscayne and that certain financial institutions had concerns arising from the SEC proceedings. If correct, that submission would mean that the postponement provisions contained in section 25 ceased to operate in 2016, with the consequence that these proceedings, commenced in March 2024, would *prima facie* be statute-barred.

[112] The Defendants submit that these matters were more than sufficient to place a reasonable investor on enquiry. They contend that a reasonably diligent investigation would have revealed the fraud and the relevant causes of action well before March 2018. They rely upon several authorities to support this premise. Those cases include **Paragon Finance Plc v D B Thakerar & Co**;[27] **Test Claimants in the FII Group Litigation & others v Revenue and Customs Commissioners**;[28] **OT Computers Ltd v Infineon Technologies AG**;[29] **Media Trust SpA (as trustee for the Jacaranda Trust) v BGB Weston Ltd and others**;[30] and **Marty Steinberg *et al* v Swisstor and Co and another**.[31]

[113] The English authorities referred to above are concerned principally with section 32 of the Limitation Act 1980 of England and Wales. Although section 32 is not in identical terms to section 25, it is materially similar in substance. The reasoning in those authorities cannot be applied wholesale to section 25, but it is nevertheless of real assistance in construing and applying that provision.

[114] These authorities establish several propositions which are not materially in dispute:

(i) the burden of bringing a claim within section 25 rests upon the claimant;

(ii) the test is objective;

(iii) the Court asks what a reasonably diligent person occupying the claimant's position would have discovered;

(iv) reasonable diligence does not require extraordinary investigations; and

[27] [1999] 1 All ER 400, CA.
[28] [2020] UKSC 47.
[29] [2021] EWCA Civ 501.
[30] [2024] EWHC 3277 (KB).
[31] BVIHCMAP2011/0012 (delivered 12 March 2012).

(v) the enquiry is highly fact-sensitive.

[115] Although each authority concerns the application of statutory postponement provisions, the factual contexts differ materially. Care must therefore be taken not to extract general propositions divorced from their factual setting.

[116] The Defendants submit that section 25 protects claimants who have been deceived, but not those who fail to pursue obvious lines of enquiry. In essence, the Defendants' position is that the Claimants ignored warning signs which should have prompted an investigation. Had those investigations been undertaken, the Defendants contend that the relevant claims would have been discovered in time.

[117] It is convenient to record the Defendants' limitation case in a little more detail, since it was developed at length and is, as I have indicated, the most substantial of the grounds advanced.

[118] The statutory framework is, for present purposes, common ground. The default period is six years: in respect of unlawful means conspiracy, by virtue of section 4(1)(a) of the LO; and in respect of knowing receipt and dishonest assistance, by virtue of section 19(2) of the LO. The Claimants seek to displace that period by reliance upon section 25, which postpones the commencement of time, in cases of fraud or concealment, until the claimant has discovered the fraud or could with reasonable diligence have discovered it. The Amicorp Defendants accept, for the purposes of these Applications only, that the longer Virgin Islands default period applies, and reserve their right to contend at trial for a shorter foreign limitation period.

[119] The Defendants emphasise that the burden of bringing the case within section 25 lies upon the Claimants: see **Paragon Finance Plc v DB Thakerar & Co**[32] and **Test**

[32] [1999] 1 All ER 400.

Claimants in the FII Group Litigation and others v Revenue and Customs Commissioners,[33] at [203]. They rely in particular upon the decision of the Court of Appeal in **Marty Steinberg v Swisstor & Co**,[34] at [69], for the proposition that a claimant relying upon section 25 must identify both the point in time at which the fraud was actually discovered *and* grapple with the distinct question of when it could with reasonable diligence have been discovered; and upon the observation, at [24], that section 25 exists to afford latitude to the innocently mistaken, and not to the incompetent. They further rely upon **Paragon Finance** (per Millett LJ, as he then was) and **FII**, for the proposition that the claimant must show that it could not have discovered the fraud without exceptional measures which it could not reasonably have been expected to take.

[120] As to the operation of the test, the Defendants rely upon **OT Computers Ltd v Infineon Technologies AG and another**,[35] at [47] (per Males LJ), for the proposition that the requirement of reasonable diligence applies throughout — both at the stage of being put on notice and at the stage of investigation — and that the claimant is to be treated as knowing that which a reasonably attentive person in its position would have learnt, and that which a reasonably diligent investigation would then have revealed. They rely upon **Upham and others v HSBC Bank Plc**,[36] at [586], for the identification of the "trigger" for investigation as the point at which it is objectively apparent that something has gone wrong such as to prompt the question "why?"; and upon **European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v Treon and others**,[37] at [775] (Miles J, as he then was), for the proposition that the statutory postponement is available to the defrauded claimant who could not normally have discovered the facts, but not to every victim of fraud, however careless.

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[33] [2020] UKSC 47.
[34] BVIHCMAP2011/0012 (delivered 12 March 2012).
[35] [2021] EWCA Civ 501, [2021] QB 1183.
[36] [2024] EWHC 849 (Comm).
[37] [2021] EWHC 2866 (Ch).

[121] The Defendants place particular reliance upon the decision of Spencer J in **Media Trust SpA v BGB Weston Ltd and others**,[38] which they submit is closely analogous on its facts. There, a fall of over 50% in the value of a fund holding was the agreed trigger; the director of the corporate trustee asked a financial professional for an explanation and was given false reassurances, supported by documents later shown to be forgeries; and the court held that the proper question was not what the claimant did but what it did not do, and that a simple enquiry of the relevant third party (the brokers) would have revealed the fraud, so that reliance upon the fraudster's reassurance did not amount to exercising reasonable diligence. The Defendants submit that Mr. Haberer's reassurances occupy precisely the position of the false reassurances in **Media Trust**, and that a simple enquiry of the Claimants' banks would, here too, have revealed the position.

[122] For present purposes, I make no finding as to the accuracy or otherwise of those explanations. Their relevance lies in the parties' competing submissions as to what a reasonably diligent person would have done in response.

[123] On the facts, the Defendants identify the trigger as the receipt by Diego and Mirta of the SEC Order in late June 2016.

[124] The Defendants emphasise the following features: that the occasion of receipt was the refusal of a bank (SunTrust) to open an account naming a Biscayne entity as adviser, by reason of the SEC Order — itself, they say, an obviously concerning event where tens of millions of dollars were at stake; that the Order was forwarded to, and received by, both Diego and Mirta; that it named Biscayne-related entities, named Roberto Cortes (whom Diego had met), and named certain of the very Note Issuers (including SG Strategic Income Ltd and GMS Global Step Up Note Ltd) in which the Claimants were by then already invested; and that it recorded findings of deliberate breaches of United States securities law.

[38] [2024] EWHC 3277 (KB).

[125] Against that background, the Defendants point to what they characterise as a wholesale failure of diligence. Diego acknowledges that he did not read the SEC Order, leaving the matter to his late father's personal manager, Dr Alberto Stark, who made limited enquiries of Mr. Haberer; Diego accepted Mr. Haberer's explanations notwithstanding that Mr. Haberer was emailing him from a Biscayne address. Mirta likewise says that she did not engage with the matter in any significant way and did not read the documents because they were complex and in English. The Defendants submit that the Order could readily have been read (and, if necessary, translated), and that, had it been read, its significance for the Claimants' investments would have been apparent.

[126] The Defendants additionally rely on a contemporaneous article in the financial press (the Finews article of 2012/2013), which Diego acknowledges he received but did not read, reporting that Mr. Haberer had speculated with client funds in Argentina, leading to the closure of an office and the termination of his employment. They submit that this rendered the failure to scrutinise Mr. Haberer's later reassurances the less excusable, and that the fact that the article was in German is no answer, given that machine translation was readily available.

[127] They submit, further, that the obvious and reasonable step, once the SEC Order was received, was to make enquiry not of the suspected wrongdoer, Mr. Haberer, but of independent third parties — in particular, the Claimants' banks. They point out that Diego had a direct and long-standing relationship with Deutsche Bank, and that it was Deutsche Bank which contacted Diego on 9th May 2018 in his capacity as protector; from which they invite the inference that, had Diego made enquiry of Deutsche Bank at any time after the SEC Order, the loss would have been revealed. Mirta, they say, could likewise have enquired of Banque Pictet.

[128] The Defendants further submit that this issue cannot be divorced from the issue of attribution. Their case is that the relevant knowledge is that of Diego and Mirta

because, although not directors of the Claimants, they occupied positions of effective control within the relevant trust structures as protectors and beneficiaries and, on the Claimants' own pleaded case, were the persons responsible for protecting and pursuing the Claimants' interests. Accordingly, they submit that the knowledge acquired by Diego and Mirta in 2016 must be treated as the knowledge of the Claimants for the purposes of section 25.

[129] The precise operation of those structures, and the respective roles of the trustees, Protectors and beneficiaries, assumes significance in the parties' competing submissions on attribution and reasonable diligence, to which I return later in this judgment.

[130] Finally, the Defendants rely upon the Claimants’ own averments in the Florida proceedings (Case No. 2018-035014-CA-43). They point to the allegation, in the Second Amended Complaint, that the SEC had specifically identified those behind the fraud, and that certain of the very notes sold to the plaintiffs were so identified; to an email of 12th January 2016 from Mr. Haberer to Diego, exhibited in those proceedings, enclosing an account statement listing the Fourth Claimant’s holdings in SG Strategic Income Ltd; and to averments that Diego and Mirta asked multiple questions of Mr. Haberer about the investments in or around January and February 2018. The Defendants submit that these materials demonstrate that the Claimants were on notice, well before 7th March 2018, of their investment in notes implicated in the wrongdoing exposed by the SEC Order, and that the Claimants cannot consistently rely upon the SEC Order to establish the fraud while disclaiming its significance as a trigger. They further submit that the Claimants’ evidence on these matters is unlikely to improve at trial, a point I expressly noted in **Access Bank Plc v Orjiako**, where summary judgment was granted in the claimant’s favour. They also rely on the observations of Master Brightwell in **Frontiers Capital v Flohr**[39] at [107], where he observed that it was not enough for a claimant simply to say that

[39] [2025] EWHC 678 (Ch).

the issue raised a question of fact and was, therefore, suitable only for trial; rather, the claimant was required to adduce sufficient evidence to demonstrate a real prospect of success. On that basis, the Claimants must do more than assert concealment: they must place before the Court evidence capable of giving their section 25 case a real prospect of success.

[131] I should note that the chronology given herein is not itself in dispute. What is disputed is the legal significance of the earlier events for the purposes of section 25.

The Claimants' case

[132] The Claimants accept that section 25 requires consideration of "reasonable diligence". However, they dispute virtually every factual premise upon which the Defendants' argument rests.

[133] First, they contend that the SEC Order did not reveal the Ponzi scheme alleged in these proceedings. They emphasise that even the SEC itself did not uncover the full extent of the fraud.

[134] Second, they submit that Mr. Haberer provided explanations which appeared plausible at the time.

[135] Third, they contend that Mr. Haberer actively concealed the true position and provided false reassurances and misleading information. They further allege that documentation was manipulated in a manner which obscured the true position.

[136] Fourth, the Claimants contend that the true significance of the relevant events did not emerge until May 2018, when Deutsche Bank raised concerns regarding the overdraft position.

[137] Fifth, they contend that the issue of reasonable diligence is inherently fact-sensitive and that the issue depends upon what information was actually available, what was understood, what enquiries would reasonably have been made and what those enquiries would have revealed. Those matters, they submit, require a trial.

[138] The Claimants further submit that the Defendants' case impermissibly assumes answers to disputed factual questions, including what information Deutsche Bank and Banque Pictet possessed in 2016, what those institutions would have disclosed had enquiries been made, and whether any such enquiries would have uncovered the alleged Ponzi scheme rather than merely regulatory concerns. Those, they submit, are paradigmatic issues for trial.

[139] The Claimants meet the Defendants' specific points as follows.

[140] As to **Media Trust**, they submit that the analogy is inapposite: there, the decisive enquiry was readily identifiable (a single enquiry to a named broker about specific, identifiable account numbers) and its result was known to a certainty (the documents were forgeries); here, by contrast, what enquiry would have been reasonable, to whom it should have been directed, and whether it would in fact have unmasked a concealed fraud perpetrated by trusted advisers and operated through a multi-layered cross-border structure, are all matters of genuine dispute which cannot be resolved without evidence. The very task which **Media Trust** requires — the identification of the reasonable step not taken and of what it would have revealed — is, they submit, intensely fact-sensitive.

[141] As to the failure to enquire of the banks, the Claimants submit that this presupposes findings as to what Deutsche Bank and Banque Pictet knew, and would have disclosed, in 2016 and 2017, and as to whether the loss was then apparent — none of which is established; and that the fact that Deutsche Bank contacted Diego in May 2018 says nothing about what an earlier enquiry would have yielded. As to the Finews article, they submit that its content, whether and to what extent it was read

or understood, and its bearing upon the reasonableness of later reliance upon Mr. Haberer, are matters of fact and credibility. As to the Florida proceedings, they submit that averments made in later pleadings, with the benefit of hindsight and of information acquired after the event, do not establish what was reasonably discoverable before March 2018. The fact that subsequent pleadings, prepared with the benefit of hindsight and extensive disclosure, describe matters in a particular way does not establish what could reasonably have been discovered at the relevant time.

[142] The parties place different emphasis upon that May 2018 communication. The Defendants rely upon it as demonstrating that reasonable enquiries would have exposed the relevant facts at an earlier stage. The Claimants contend that the communication itself was the catalyst for the subsequent discovery of matters which had previously remained concealed.

[143] The significance of the Deutsche Bank communication cannot be assessed in isolation. Its relevance depends upon the state of knowledge then possessed by those acting on behalf of the Claimants, the enquiries that had previously been undertaken, the explanations that had been received, and the extent to which further investigation would reasonably have been expected at the relevant time.

[144] Underlying all of these points, the Claimants emphasise that the wrong of which they complain is a concealed fraud, and that the gravamen of their section 25 case is that Mr. Haberer and others actively concealed the true position and furnished false reassurances; that the SEC Order, whatever regulatory concerns it raised, did not reveal the Ponzi scheme now alleged (a scheme whose full extent, they say, even the regulator did not then uncover); and that there is, in consequence, a material distinction between awareness of regulatory concern and discovery of the cause of action now asserted against these Defendants.

[145] The Claimants advance, in addition, a logically prior submission: that the Defendants have not established that a *prima facie* limitation period bars the claims at all, even leaving section 25 aside. They make the point in two ways.

[146] First, in relation to the claims for an account (in knowing receipt and, where an account of profits is sought, in dishonest assistance), they submit that time runs, under sections 2(7)(a) and 4(2) of the LO, from the date on which the matter arose in respect of which the account is claimed, which, for knowing receipt, is the date of receipt; and that the Defendants have nowhere stated, still less evidenced, when any relevant fee was received. The application asserts only that "to the extent" fees were received before 7th March 2018, they are time-barred, which the Claimants submit is no evidential basis for summary judgment, the timing of receipt lying within the Defendants' own knowledge.

[147] Second, in relation to the Third Claimant, the Claimants submit that no limitation period applies at all, for the reasons considered below in connection with the position of that Claimant.

Discussion

[148] Section 25 does not disapply the law of limitation in cases of fraud. Unlike section 33 of the Limitation Act 1980 of England and Wales, which confers a discretion to disapply limitation in personal injury claims, section 25 operates by postponing the commencement of the applicable limitation period until the claimant has discovered the fraud or could with reasonable diligence have discovered it.

[149] The policy underlying section 25 is readily apparent. A defendant should not ordinarily be permitted to rely upon the expiry of a limitation period where the existence of the cause of action has itself been concealed by fraud. Equally, Parliament has made clear that the postponement is not indefinite. Once the

claimant either acquires the requisite knowledge or could reasonably have done so through the exercise of reasonable diligence, time begins to run.

[150] In **Paragon Finance**, above, at 418, Millett LJ (as he then was) summarised when the court would be willing to postpone the commencement of the relevant period of limitation:

> "The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud <u>without exceptional measures</u> which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree." (Emphasis in italics provided by the Judge. Underlined emphasis provided by me).

[151] That passage has repeatedly been treated as the starting point for the modern approach to constructive discovery. It must, however, be read in the context of the facts of **Paragon** itself and in the light of the subsequent observations of **OT Computers Ltd v Infineon Technologies AG**,[40] to which I now turn.

[152] What amounts to "reasonable diligence" is a matter of fact and impression in each case and is frequently unsuitable for summary determination.

[153] The proper approach for the Court to take is to adhere closely to the statutory language and resist the temptation to import broad propositions from other fact-specific decisions, which are of limited assistance where the circumstances differ. That caution is of particular importance in the present case. The authorities relied upon by both parties arose in markedly different factual settings, including

[40] [2021] EWCA Civ 501.

professional negligence claims, cartel litigation, investment fraud and commercial disputes. Their value lies in the legal principles they establish rather than any factual analogy. Ultimately, the question whether reasonable diligence was exercised, and what information might have been discovered by such enquiries, calls for a value judgment by the judge charged with the issue. That judgment is a practical, common-sense assessment of whether, on the facts as found and by reference to the enquiries a person in the claimant's position would reasonably have made, facts indicative of fraud would have been revealed. In ordinary cases that evaluative exercise is fact-intensive and poorly suited to resolution on a summary application — a point which, in my judgment, was recognised by Males LJ in **OT Computers Ltd v Infineon Technologies AG**,[41] at [55]:

> " … it is a mistake to read this passage [i.e., Millet LJ's above passage in Paragon Finance] as creating a special test applicable to business cases (whatever precisely those may consist of), and a still greater mistake to treat the phrase 'a business of the relevant kind' as if it were some kind of statutory test applicable in all circumstances where section 32 has to be considered in a business context. As Lewison LJ said in *Butters v Hayes* [2021] EWCA Civ 252, [2021] 4 All ER 1185, [2021] 1 WLR 2886, at [42], 'it is a mistake to read a judgment as if it were a statutory text, especially on a point that was not in issue'…

[154] And then, at [56], Males LJ observed:

> "… To treat the terms of a judgment as laying down a rule of law applicable to circumstances which were never in contemplation runs counter to the whole approach of the common law, which develops flexibly as new factual situations arise. What was said in Paragon Finance has rightly been described as 'authoritative guidance', and no doubt will provide the answer in many cases, but it can be no more than guidance. To treat it as providing an answer to the present case would be to force a square peg in a round hole."

[155] Although not material to the outcome, it is worth noting — arguably in the Defendants' favour — that in **OT Computers**, Males LJ described the issues relevant to postponing the commencement of the limitation period as "questions of

[41] [2021] EWCA Civ 501.

fact and will depend on the evidence." That characterisation, however, risks oversimplification. Those issues are more accurately characterised as questions of mixed law and fact: they require the court to apply the legal standard of reasonable diligence (as articulated by the authorities) to the particular facts of the case. The distinction matters. The court does not determine what constitutes "reasonable diligence" as a pure question of fact; rather, it applies an objective legal standard to the particular factual circumstances proved or assumed. Different judges may legitimately reach different evaluative conclusions on different factual matrices without applying different legal tests. Accordingly, where the authorities cited in this judgment (and my references to them) refer to such issues as "pure questions of fact", they should, in my judgment, be read as referring to questions of mixed law and fact.

[156] The authorities (see **Paragon Finance Plc v D B Thakerar & Co**, above, **OT Computers Ltd v Infineon Technologies AG**,[42] and **Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners**, above) establish that the relevant enquiry is objective. The Court must ask what a reasonably diligent person in the claimant's position would have done. The enquiry is nevertheless intensely fact-sensitive. It is not enough to identify a potentially suspicious event and conclude that time therefore began to run. As Arden LJ (as she then was) observed in **OT Computers**, the exercise is often highly fact-specific. The classic statement of the test was given by Millett LJ **in Paragon Finance Plc v D B Thakerar & Co**,[43] at 418:

> "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take."

[42] [2021] EWCA Civ 501.
[43] [1999] 1 All ER 400.

[157] It is convenient to refer to the "governing passages" a little more fully, for they structure the analysis which follows.

[158] In **OT Computers**, Males LJ explained that the constructive-discovery enquiry proceeds in two stages: the Court must ask, first, whether there was something to put the claimant on notice of the need to investigate, and, secondly, what a reasonably diligent investigation would then have revealed. As to the standard, his Lordship emphasised that, although it is objective, its purpose is to protect the actual claimant: "the purpose of the section is to ensure that the claimant — the actual claimant and not a hypothetical claimant — is not disadvantaged by the concealment."[44] The objective standard, therefore, strips out the purely subjective characteristics of the particular claimant — whether it happened to be, in the language of the cases, slothful, naive, shy, nervous, uncurious or ill-informed — but it does not licence the substitution of a different, hypothetical claimant for the one which in fact sustained the loss. As Males LJ observed in **OT Computers**, at [38]:

> "Commenting on this decision in *Hussain v Mukhtar* [2016] EWHC 424 (QB) … Mr. Martin Chamberlain QC [as he then was], sitting as a Deputy High Court Judge, suggested that this did not mean that personal characteristics such as naïveté and inexperience in financial matters should be taken into account as to do so would involve a departure from the objective standard which the cases require. I would agree that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, uncurious or ill informed, are not relevant. But it does not necessarily follow, as Lord Hoffmann said in *Peconic*,[45] that the claimant must be assumed to be someone or something which he is not."

[159] In **OT Computers Ltd**, Males LJ posited a two-stage enquiry: first, whether there was anything to put the claimant on enquiry; and second, what a reasonably diligent investigation would then have revealed. The court emphasised that this assessment

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[44] *Ibid*, at [59].

[45] I.e., Peconic Industrial Development Ltd v Lau Kwok Fai and others (2009) 11 ITELR 844, Court of Final Appeal, Hong Kong.

must be conducted without the benefit of hindsight, examining events as they would have appeared at the relevant time. He observed:[46]

> " … although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the 'trigger'), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

[160] Section 25 does not require the claimant to have discovered every detail of the alleged fraud before time begins to run. Equally, it is not enough that the claimant merely suspects that something may be amiss. The statutory enquiry is whether sufficient facts were known, or ought reasonably to have been known, to enable proceedings to be brought. Where that threshold lies will necessarily depend upon the nature of the particular cause of action and the surrounding circumstances.

[161] What constitutes reasonable diligence cannot be assessed in the abstract. It depends upon the position occupied by the claimant, the nature and value of the transaction, the relationship between the parties, the extent to which trust and confidence existed, and the information available at the relevant time. The enquiries reasonably expected of an institutional investor managing substantial international investments may differ materially from those expected of an inexperienced private individual. Equally, where investments are managed through professional trustees,

[46] [2021] EWCA Civ 501, at [47].

advisers and protectors, the legal relationships between those actors may bear directly upon what enquiries would reasonably have been expected.

[162] Reasonable diligence is not an abstract or mechanistic standard. It is an objective standard applied to the actual claimant in the circumstances in which that claimant found itself. The enquiry necessarily requires consideration of what information was available, how it would reasonably have been understood, what further enquiries would reasonably have been undertaken, and what those enquiries would probably have revealed. Those questions are, as I have stated, intensely fact-sensitive.

[163] The statutory enquiry under section 25 is best analysed in stages. First, what facts were known, or reasonably available, to the claimant at the material time? Second, what enquiries would a reasonably diligent person in that position have undertaken? Third, what information would those enquiries probably have revealed? Finally, would that information have enabled the fraud now relied upon to be discovered? Each stage is capable of giving rise to disputed questions of fact.

[164] The Defendants identify a number of enquiries which they say ought reasonably to have been undertaken, including enquiries of Deutsche Bank, Banque Pictet, the trustees and professional advisers. The Claimants dispute not only whether such enquiries would reasonably have been expected, but also what information those enquiries would in fact have produced. On the present evidence, each step in that reasoning remains contested.

[165] Before considering the competing submissions, it is convenient to identify what does, and what does not, appear to be in dispute. First, the parties agree that the relevant statutory question is one of constructive discovery under section 25. Secondly, they agree that the applicable test is objective. Thirdly, they agree that the burden rests upon the Claimants to establish that the commencement of the limitation period was postponed.

[166] The principal disputes concern the application of those principles. The Defendants contend that the SEC Order, considered together with other surrounding circumstances, was sufficient to place Diego and Mirta upon enquiry in 2016. The Claimants contend that it did no such thing, that the alleged fraud remained effectively concealed notwithstanding the SEC proceedings, and that the subsequent reassurances provided by Mr. Haberer prevented any reasonably diligent person from discovering the true position before 2018.

[167] The parties also disagree upon a logically anterior question, namely whose knowledge falls to be considered for the purposes of section 25. The Defendants submit that the relevant knowledge is that of Diego and Mirta. The Claimants dispute that proposition and contend that the question of attribution cannot properly be determined upon these Applications. Although I ultimately conclude that it is unnecessary finally to determine the attribution issue for the purposes of disposing of the Applications, it forms an important part of the parties' submissions and requires consideration.

[168] An additional point of significance arises from the decision in **Pagden v Fry**,[47] at [101], where Mr. Tom Smith KC, sitting as a deputy judge of the High Court, confirmed that, where a defendant raises limitation by reference to the primary period and a claimant's answer is reliance on section 25, it is incumbent on the claimant to put forward evidence demonstrating that its section 25 case has a real prospect of success. It is not enough merely to assert that the fraud was concealed; the claimant must demonstrate, with evidence, that reasonable diligence would not have uncovered it.

[169] This point further underscores the importance of the evidential contest on this issue. However, unlike the position **in Pagden v Fry**, this can only fairly be resolved at trial.

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[47] [2025] EWHC 1918 (Ch).

[170] The **Pagden** litigation concerned a highly fact-sensitive dispute about the management, disposal and liquidation of a group of companies' investment portfolios, including allegations that substantial portfolios had been transferred to related vehicle companies at an undervalue and that the former managers and liquidators had charged excessive fees or otherwise mismanaged the funds. The claimants, acting through replacement liquidators, sought to investigate the underlying transactions in detail, and the court treated the case as one that depended heavily on the contemporaneous documents, the contractual arrangements and the commercial justification advanced for the transactions. Procedurally, the companies had first to be restored to the register, replacement liquidators appointed and a protective claim issued so that the claimants could preserve their position and carry out the necessary enquiries.

[171] The court accepted that those steps were necessary because the claimants could not sensibly formulate their claims until they had obtained the material needed to identify the essential facts. In that context, the limitation period was treated as running only once the claimants, through the investigation enabled by those procedural steps, had obtained sufficient information to know the gist of their claims and to embark on proceedings with proper particulars. The court was, therefore, concerned not with when the claimants first suspected wrongdoing, but with when they had sufficient detail to plead and pursue a properly particularised case. While summary judgment was granted on some issues, it was because the evidential material did not support the claimants' case with sufficient specificity, or because the point could be determined as a matter of law without waiting for a full factual trial; but the main allegations remained too fact-sensitive and too dependent on the detail of the transactions for broad summary disposal.

[172] The principal issue is whether, on the evidence presently before the Court, the Defendants have demonstrated that the SEC Order, whether viewed alone or together with the surrounding circumstances, was sufficient to commence the

running of time under section 25. That question cannot be answered simply by reading the SEC Order in isolation. It requires consideration of the circumstances in which it was received, the information then available to the Claimants (or those whose knowledge is said to be attributable to them), the explanations said to have been given by Mr. Haberer, and the enquiries which a reasonably diligent person in that position would have been expected to undertake. Whether those explanations were truthful is not the present question. The issue is whether, viewed objectively and in their proper factual context, they were capable of affecting what a reasonably diligent person would have done thereafter.

[173] It is convenient, at this point, to record certain further principles upon which the Claimants rely and which I accept as correctly stated.

[174] The first concerns the breadth of section 25. The section is engaged not only where the action is "based upon the fraud of the defendant" (limb (a)), which includes any claim of which dishonesty is an essential element, such as fraudulent conspiracy, dishonest assistance and deliberate breach of fiduciary duty, but also where "the right of action is concealed by the fraud" of the defendant (limb (b)), in which context the word "fraud" is used in a sense embracing conduct falling far short of fraud at common law, and extending to any case in which the defendant has acted unconscionably, including where the wrongful act is committed surreptitiously: see **Tito v Waddell (No 2)**[48] at 245.

[175] In **Canada Square Operations Ltd v Potter**,[49] the Supreme Court addressed several key issues concerning the interpretation and application of section 32(1)(b) of the Limitation Act 1980 of England and Wales. While, as noted above, that provision is not identical with section 25 and, therefore, has no direct analogue in the LO, the observations in that case, and other cases on section 32, are instructive on how the Court should approach section 25.

[48] [1977] Ch 106.
[49] [2023] UKSC 41, [2024] AC 679.

[176] The Claimants' evidence is that Mr. Haberer promptly reassured Diego Romay that the SEC proceedings related only to a technical regulatory issue and that investors' assets remained secure. Whether those reassurances were truthful is not presently the issue. The relevant question is whether a reasonably diligent person, having received those reassurances in the surrounding circumstances, would nevertheless have been expected to investigate further.

[177] The answer to that question cannot, in my judgment, be divorced from the relationship which then existed between Mr. Haberer and Diego and Mirta. The Claimants allege that Mr. Haberer had, over many years, acquired an exceptional position of trust and confidence, exercised substantial control over the management of the relevant investments and repeatedly presented himself as acting exclusively in the Claimants' interests. Those allegations, if ultimately established, may bear directly upon what enquiries a reasonably diligent person would or would not have considered necessary.

[178] In **Canada Square**, the Supreme Court clarified that the term "concealment", under section 32(1)(b), encompassed both active steps taken to hide a fact and the failure to disclose a fact. The Court emphasised that concealment did not require a breach of a legal duty or a duty arising from morality or utility. Instead, the focus was on whether the fact was kept secret, regardless of the defendant's knowledge of its relevance to the claimant's cause of action: see also **DLA Piper UK LLP v Henshaws Farming LLP and others**.[50]

[179] The Defendants submit that numerous enquiries were available, including enquiries of Deutsche Bank, Banque Pictet, the SEC itself, the relevant trustees and professional advisers. They contend that such enquiries would rapidly have exposed the true position. The Claimants dispute each step in that chain of

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[50] [2025] EWHC 542 (Ch).

reasoning. They contend that the evidence presently before the Court does not establish what information any of those parties possessed in 2016, what they would have disclosed if approached, or whether such enquiries would, in fact, have revealed the alleged fraud.

[180] The authorities make it clear that a "fact relevant to the claimant's right of action" for the purposes of section 32(1)(b) of the Limitation Act 1980 must be an essential fact — one without which the cause of action would be incomplete. Recent and earlier decisions (notably **Canada Square**, **Paragon Finance Plc v Thakerar**, **Johnson v Chief Constable of Surrey**[51] and **Arcadia Group Brands Ltd v Visa Inc and others**[52]) emphasise a narrow construction: the statutory phrase does not reach facts that merely strengthen the claimant's case, increase the prospect of success, or provide corroborative evidence. Put shortly, a relevant fact is a necessary ingredient or the "gist" of the cause of action that the claimant must prove to make out a *prima facie* case; ancillary matters or evidential details that merely enhance or explain the claim do not qualify under section 32(1)(b) or section 25(b).

[181] Deliberate concealment under section 32(1)(b) requires intentional concealment with knowledge of wrongdoing, and the limitation period is postponed until the claimant discovers or could reasonably have discovered the concealed fact: see, by way of examples, **Cave v Robinson Jarvis & Rolf**;[53] **Canada Square**, above; **Paragon Finance Plc v D B Thakerar & Co**, above; and **Paragon Finance Plc and another v Thimbleby & Co**.[54] In other words, concealment must be deliberate, requiring an intention to keep the relevant fact secret. Recklessness, as opposed to deliberate action, is insufficient to meet the threshold under section 32(1)(b). This interpretation underscores the importance of "intentionality" in determining whether the limitation period can be postponed.

[51] [1992] Lexis Citation 2286.
[52] [2015] EWCA Civ 883.
[53] [2003] 1 AC 384.
[54] [1999] 1 All ER 400.

[182] In addition, these and other authorities make it clear that concealment could occur through either active steps to hide a fact or a failure to disclose it and that the limitation period under section 32(1)(b) is postponed until the claimant discovers, or could with reasonable diligence have discovered, the concealed fact. This ensures that claimants are not unfairly barred from pursuing their claims due to the defendant's deliberate actions.

[183] In **Morjaria and others v Mirza**,[55] Thompsell J summarised what the law required in the following terms:

> "1649. Where s. 32 applies, time does not start to run until the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> 1650. The law on this point was recently summarised in *Duke of Sussex v MGN Ltd* [2023] EWHC 3217 (Ch); [2024] E.M.L.R. 5 at [1384]. In short, time runs from the point when a claimant knew, or could with reasonable diligence have known, that they had a "worthwhile claim". A claimant who has no actual knowledge is fixed with knowledge of:
>
> i) what a reasonably attentive person would learn; and
>
> ii) once there is something (a 'trigger') to put him on notice of the need to investigate, what a reasonably diligent investigation would reveal.
>
> The actual circumstances of the claimant are to be taken into account, but his personal characteristics, such as naivety, lack of curiosity or being ill-informed, are disregarded.
>
> 1651. Another summary is given in the judgment of Trower J in *Boyse (International) Ltd v NatWest Markets Plc and another* [2021] EWHC 1387 (Ch) (at [27]-[40]). In summary:
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> i) The claimant will have 'discovered the fraud' when he has discovered the essential facts constituting the alleged fraud. Generally, this is determined by

[55] [2025] EWHC 1961 (Ch).

the application of the 'statement of claim' test - i.e. does the claimant have sufficient knowledge to enable it to plead a claim?

ii) In some cases, discovery of the relevant facts involves a process over a period of time as pieces of information become available, so that it may be difficult to identify a precise point of time at which the claimant has (or is deemed to have) sufficient knowledge.

iii) The court must look for the gist of the cause of action to see if that was available to the claimant without knowledge of the concealed material. At the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court.

1652. Time starts to run before the claimant has the requisite knowledge if, by exercising reasonable diligence, the claimant could have discovered the fraud or concealment. This is a question of fact in each case. As Neuberger LJ stated in *Law Society v Sephton & Co* [2004] EWCA Civ 1627,[56] reasonable diligence "means not the doing of everything possible, not necessarily the doing of anything at all, but the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase." For the purposes of this case, the standard is thus what an ordinarily prudent joint venture partner would do, or what an ordinarily prudent claimant would do, having regard to all the circumstances."

[184] The exercise required by section 25 is necessarily incremental. It is not sufficient to ask whether a reasonably diligent person might have undertaken further enquiries. The Court must also ask what those enquiries would probably have revealed and, critically, whether the information thereby obtained would have enabled the claimant

[56] Thompsell J appears to have given the wrong case reference for this quote. It was not Neuberger LJ who said this, but Webster J in Peco Arts Inc v Hazlitt Gallery Ltd [1983] 3 All ER 193 at 199. The words have been approved in subsequent cases, including OT Computers, at [29] and Gresport Finance Ltd v Battaglia [2018] EWCA Civ 540, at [50].

to discover the fraud alleged. On the present evidence, each stage of that enquiry is contested.

[185] Section 25 does not require a claimant to have discovered every detail of the alleged fraud before time begins to run. Nor is it sufficient that the claimant merely suspects that something may be amiss. The statutory question is whether sufficient facts were, or ought reasonably to have been, known to enable proceedings to be commenced. Where that threshold lies will depend upon the nature of the claim and the surrounding circumstances.

[186] The authorities repeatedly emphasise that questions of constructive discovery are intensely fact-sensitive. That observation is particularly apt here. The Court would be required to determine, amongst other matters, the significance reasonably attributable to the SEC Order, the credibility of Mr. Haberer's explanations, the nature of the relationship of trust and confidence alleged by the Claimants, the extent of the protectors' powers under the trust deeds, the information available from third parties and the inferences reasonably to be drawn from the subsequent conduct of Diego and Mirta. Those are not issues that can be determined merely by reading affidavits and written statements.

[187] The Defendants do not dispute that the Claimants' claims, as pleaded, fall within limb (a) and/or limb (b); nor, given the nature of the allegations, could they. Equally, however, the authorities demonstrate that a claimant who receives information sufficient to prompt an investigation cannot indefinitely postpone time by relying upon assurances from the very person whose conduct is potentially in question.

[188] The second concerns the allocation of the burden upon an application of this kind. Although the burden of bringing a case within section 25 lies, at trial, upon the claimant, on a defendant's application for summary judgment, it is for the defendant to establish that the claimant has no real prospect of showing at trial that it neither knew, nor could with reasonable diligence have discovered, the fraud: **Various**

Claimants v MGN Ltd,[57] at [9] and [178]. In addition, the facts not having been determined at this stage, the question of limitation falls to be determined on the assumption that the facts alleged by the Claimants will be proved: **Seedo v El Gamal**,[58] at [51]. In this context, it is important to distinguish between the burden resting upon the Claimants at trial and the burden resting upon the Defendants on these Applications. At trial, the Claimants will bear the burden of establishing the facts necessary to bring themselves within section 25. On an application for summary judgment, however, the Defendants must satisfy the Court that the Claimants have no real prospect of doing so. Those are distinct enquiries and should not be conflated.

[189] The third concerns what, precisely, must have been discoverable before time begins to run. It is not enough that the claimant could have suspected, or even discovered, that the defendant had behaved dishonestly; time runs only when the claimant has discovered, or could with reasonable diligence have discovered, the particular fraud which is the subject of the claim, in the sense of having discovered enough to plead its case: **Barnstaple Boat Co Ltd v Jones**;[59] and **Seedo v El Gamal**, at [48] and [52]. In the context of fraudulent concealment under limb (b), the English Court of Appeal has expressed the test in terms of the claimant's ability, with reasonable diligence, to discover that it has a worthwhile claim: **Gemalto Holding BV and others v Infineon Technologies AG and other companies**,[60] at [43]-[45]; and there is, at least, a respectable argument, which the Claimants are entitled to deploy at trial, that the more favourable "pleadable case" test applies to postponement under section 25 of the LO.

[190] Taken individually, some of these issues might arguably admit of summary determination. Taken collectively, however, they form an interconnected factual

[57] [2022] EWHC 1222 (Ch).
[58] [2023] EWCA Civ 330, [2023] Ch 473.
[59] [2007] EWCA Civ 727, [2008] 1 All ER 1124.
[60] [2022] EWCA Civ 782, [2023] Ch 169.

matrix in which the resolution of one issue frequently depends on findings regarding another. In those circumstances I am unable to conclude that the Defendants have established that the Claimants have no real prospect of successfully invoking section 25.

[191] The content of the knowledge which must be shown to have been discoverable has been refined in the more recent authorities, and the refinement matters here.

[192] In the **FII** litigation, the Supreme Court held that the limitation period did not begin to run until the claimant knew, or by the exercise of reasonable diligence could have known, enough to justify taking the preliminary steps necessary to commence proceedings — for example, notifying the prospective defendant, seeking legal advice and gathering evidence. Subsequent authorities have expressed that threshold as the point at which the claimant could reasonably discover that it had a "worthwhile claim".

[193] As the Court of Appeal explained in **Gemalto Holding BV v Infineon Technologies AG**, the relevant enquiry is not directed to the claimant's ultimate prospects of success, still less to the point at which the claimant might have expected to win. Rather, it is the practical question whether the claimant had then discovered, or could with reasonable diligence have discovered, enough to show that it had a claim worth pursuing. That approach is to be distinguished from the position in personal injury litigation in England and Wales, where section 11(4) postpones the commencement of time until the claimant had the requisite actual or constructive knowledge, while section 33 confers a separate and discretionary power on the court to disapply the limitation period altogether. The two provisions serve different functions: the former postpones the start of time; the latter permits the court, in its discretion, to override the statutory bar where it is equitable to do so: see, for example, **AB and others v Ministry of Defence**.[61]

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[61] [2012] UKSC 9.

[194] The substance of this point was explained by Sir Geoffrey Vos MR in **Gemalto Holding** in the following terms:[62]

> " … the test adumbrated by the Supreme Court must be intended to operate in all situations in which there has been mistake, fraud or concealment, and to be consistent with the Limitation Act more generally. It would make no sense for the limitation period for a road traffic accident to start running when it happens (at which point the victim may know nothing about the circumstances of the accident that, for example, rendered them unconscious), but for section 32 to allow a claimant a lengthy period of investigation before it is said to have 'discovered' that the facts relating to its claim have been concealed. The person who is run down knows that they have a worthwhile claim, even if they may eventually be shown to have been responsible for the accident by running in front of the vehicle. The claimant cannot postpone the start of the limitation period until it has had the time to investigate the details of the claim and the possible defences and to evaluate its prospects, any more than the road traffic victim is able to do so. That is what the six-year limitation period is for. The question of whether a claim is worthwhile is not a complex balance of the chance of success … The limitation period is not postponed until the claimant can show that it is more likely than not to succeed. Of course, if the putative claim would be struck out as not disclosing a cause of action, it would be right to say that the claimant had not discovered that it had a worthwhile claim … That is why I say that I am far from sure that there is a real difference between the statement of claim test and the FII test so far as concealment cases are concerned."

[195] The distinction is of direct importance in the present case because the Defendants' argument conflates awareness of regulatory concern with the discovery of the particular concealed fraud now pleaded against these Defendants. Those are not the same thing, and whether the one would, with reasonable diligence, have led to the other is the very question in dispute.

[196] I agree with the Claimants that it is important not to conflate knowledge of regulatory intervention with knowledge of the fraud alleged in these proceedings. Whether the SEC Order merely disclosed regulatory concerns or was sufficient to place a reasonably diligent person on enquiry regarding the alleged fraud lies at the heart

[62] [2022] EWCA Civ 782, [2023] Ch 169, at [47].

of the parties' disagreement under section 25. A regulatory investigation may, in some circumstances, be sufficient to place a reasonably diligent person upon enquiry. Equally, it may disclose only matters of regulatory concern. Whether the SEC Order crossed that threshold in the circumstances of this case is one of the central issues raised by these Applications.

[197] The fourth is that questions of this character are pre-eminently unsuited to summary determination. The two stages of the constructive-discovery enquiry are both questions of fact dependent upon the evidence: **OT Computers**, at [47]; and the questions of what a claimant knew and when, and of what reasonable diligence would have revealed, have been described as "quintessentially inapposite for summary judgment": see **Baroness Lawrence of Clarendon OBE and others v Associated Newspapers Ltd**,[63] at [82], per Nicklin J, referring to the observations of Andrews LJ in **Various Claimants v MGN Ltd**,[64] in which she refused to grant permission to appeal against the decision of Fancourt J (as he then was) in that case, on the issue; and **Van Rooyen v Various Respondents**,[65] at [58], per Leech J.

[198] In my judgment, each of those questions depends upon factual findings which cannot safely be made on the present Applications.

[199] In **Baroness Lawrence of Clarendon OBE and others v Associated Newspapers Ltd**, Nicklin J stated, in emphatic terms, why summary judgment was unsuitable in limitation cases under section 32 (the equivalent of section 25 of the LO in England and Wales):[66]

> "I have (ultimately, without difficulty) reached the conclusion that each claimant does have a real prospect of overcoming a limitation defence (if

[63] [2023] EWHC 2789 (KB), [2024] 1 WLR 3669.
[64] [2022] EWHC 1222 (Ch).
[65] [2026] EWHC 1286 (Ch).
[66] [2023] EWHC 2789 (KB), [2024] 1 WLR 3669, at [189]-[190].

such a defence is ultimately relied upon by Associated). In other words, I consider that each claimant has a real prospect of demonstrating concealment by Associated which was not (and could not with reasonable diligence have been) discovered by the relevant claimant before October 2016. At each stage of the inquiry required by section 32, the court would be required, at trial, to determine the factual position (drawing inferences upon the evidence where appropriate and justified). In anything but a plain and obvious case, where a knock-out blow can be delivered, resolution of the factual issues necessary to resolve whether a defendant can defeat a claim on the grounds of limitation will require the court to ascertain the relevant facts. As Males LJ observed in ***OT Computers*** [2021] QB 1183, para 47, they are "questions of fact and will depend on the evidence" (see also his comments in ***Canada Square Operations Ltd*** [2022] QB 1 …). Ascertaining the facts, following consideration of disputed evidence, is to be done at a trial, not on a summary judgment application.

"Associated has not been able to deliver a 'knock-out blow' to the claims of any of these claimants. Fair resolution of any limitation defence — and any reliance on section 32 in opposition to it — must await trial. Although not binding on me as a matter of precedent, I can only echo Andrews LJ's succinct summary … above." (Emphasis supplied).

[200] Likewise, in **Van Rooyen**, Leech J observed:

"[the claimants] relied on the decision of Fancourt J in *Grant v News Group Newspapers Ltd* [2023] EWHC 1273 (Ch) in support of their submission that limitation issues which turn on questions of fact such as what a party knew and when they knew it were not suitable for summary determination… I accept that submission as a matter of general principle." (Emphasis supplied).

[201] As in **Baroness Lawrence of Clarendon**, I do not consider that, on the material presently before the Court, the Defendants have delivered the kind of "knock-out blow" contemplated by that case and the other authorities cited at the hearing so as to justify disposing of the limitation issue without trial.

[202] I bear in mind that the Defendants invoke the standard of reasonable diligence by reference to the Romays as "financially sophisticated individuals"; but the objective standard does not permit the substitution of a hypothetical claimant for the actual claimant, and the personal characteristics of the actual claimant are, in any event, left out of account: **OT Computers**, at [38] and [59]-[61].

[203] I remind myself what the Court must consider to identify the date when the commencement of the limitation period starts to run where a claimant contends that they did not have actual or constructive knowledge of the fraud upon which they rely:

(i) the information that was actually known to the claimant;

(ii) what a reasonable person in their position would have understood from that information;

(iii) what enquiries a reasonably diligent person would have undertaken;

(iv) what those enquiries would probably have revealed; and

(v) whether any concealment prevented the discovery of the relevant cause of action.

[204] This Court should also have regard to the additional principle identified in **Gresport Finance Ltd v Battaglia**,[67] at [49]: there must be something that puts the claimant on notice of the need to investigate whether there has been a fraud, before the requirement of reasonable diligence is engaged. The analysis of these questions is highly fact-specific: see **Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd**,[68] at [32], summarising the applicable principles (that decision has since been considered, on further appeal, by the Court of Appeal at **Tradition Financial Services Ltd v Bilta (UK) Ltd and others**,[69] and by the Supreme Court in **Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd**,[70] which confirms that the burden lies on the claimant to show, on the

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[67] [2018] EWCA Civ 540.
[68] [2022] EWHC 723 (Ch).
[69] [2023] EWCA Civ 112.
[70] [2025] UKSC 18.

evidence, that it could not with reasonable diligence have discovered the fraud, and that this burden is not discharged by mere assertion or by reliance on presumptions favourable to the claimant); and **Arif v Sanger**,[71] which the Defendants submit is helpful reading in this area.

[205] Similar observations appear in **Media Trust,** and the other authorities relied upon by the parties. As has been emphasised in **OT Computers Ltd** and the other cases analysed above, the Court must consider what a claimant in the position of the particular claimant, with its attributes and means, acting reasonably diligently, would and could have discovered. The exercise is not abstract; it is grounded in the particular facts and circumstances of the claimant's situation at the material time.

[206] Two further principles, pressed by the Defendants, should be recorded, because they are correct and I accept them. The first is that the burden under section 25 lies upon the Claimants, and that, as the above authorities make clear, a claimant invoking the section must both identify the date of actual discovery and grapple with the separate question of when discovery could reasonably have been achieved; a claimant who does neither cannot bring itself within the section, which exists for the innocently mistaken and not for the incompetent. The second is that, as **European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v Treon and others** confirms, the indulgence of a postponed limitation period is not available to every victim of fraud, however careless that victim may have been in attending to its own affairs.

[207] I also accept that, as Spencer J emphasised in **Media Trust**, the correct focus of the enquiry, once a trigger is established, is not upon what the claimant in fact did, but upon what a reasonably diligent claimant would and could have done — and, in particular, upon the steps not taken which it would have been reasonable to take, and upon what those steps would have revealed. These principles are well settled,

[71] [2025] EWHC 1540 (KB).

and I keep them firmly in mind. The difficulty, for the purposes of these Applications, lies not in the principles but in their application to contested and undisclosed facts, to which I now turn.

The SEC Order

[208] I begin with the SEC Order because it lies at the centre of the Defendants' case.

[209] The parties' positions diverge fundamentally as to the legal significance of the SEC Order. So far as I understand the Defendants' case, they do not contend that the SEC Order revealed the full extent of the alleged fraud; indeed, that would be difficult to maintain, given that the Order contains no express reference to fraud. Rather, their case is that the Order was the event that ought to have put the Claimants, or those whose knowledge is said to be attributable to them, on enquiry to investigate the circumstances in which it was made, and that it therefore constituted the relevant trigger for the purposes of section 25. The Claimants, by contrast, contend that the Order disclosed no more than regulatory concerns and did not reveal, nor could it have enabled the discovery of, the fraud now alleged.

[210] It is important not to conflate three distinct questions. The first is what information the SEC Order objectively conveyed. The second is whether that information was sufficient to place the Claimants upon enquiry. The third is whether a reasonably diligent investigation initiated at that point would probably have led to discovery of the fraud alleged in these proceedings. Those questions are related but not identical, and the answer to one does not necessarily determine the answers to the others.

[211] I agree with the Defendants that the SEC Order represents a substantial difficulty for the Claimants. It was neither routine nor insignificant regulatory communication. It was the product of a formal SEC investigation. It identified serious regulatory failings, conflicts of interest and misconduct involving Biscayne-related entities and

individuals. Moreover, on the Defendants' case, it referred to entities connected with investments held by the Claimants. These are matters which a trial court may ultimately regard as highly significant when assessing reasonable diligence.

[212] At the hearing, Mr. Gibbon submitted that further context supported the Claimants' position: the SEC Order was a matter of public record affecting a substantial number of investors in Biscayne-related structures, yet none is said to have regarded it as sufficient to prompt proceedings before 2018. On that basis, he submitted, it would be surprising if a reasonably diligent investor in the Claimants' position had been expected to act earlier.

[213] The Claimants may well be right about that. However, for the purposes of these Applications, I am not persuaded to accept the submission.

[214] I do not suggest that I have examined every document in the bundles with minute care. But I can identify no evidence as to what other investors actually knew, what enquiries, if any, they made, or why proceedings were not brought earlier. The absence of litigation by third parties is at least as consistent with inertia, ignorance or contractual constraint as it is with a considered view that the SEC Order lacked evidential significance. The point, therefore, cannot bear the weight the Claimants place upon it. Equally, it cannot simply be ignored: whether, and to what extent, the wider market's response — or lack of it — informs what a reasonably diligent investor in the Claimants' position would have done is itself a question of fact and inference that cannot be resolved on the material presently before the Court.

[215] The Defendants are also entitled to rely upon evidence suggesting that Diego and Mirta were aware of the SEC Order.

[216] The SEC Order undoubtedly records matters capable of giving rise to legitimate concern. Equally, however, it does not purport to identify the fraudulent scheme alleged in these proceedings, nor does it identify the Claimants as victims of that

scheme. Whether a reasonably diligent person in the position of the Claimants would nevertheless have been prompted to undertake investigations which would probably have led to discovery of the pleaded fraud remains an evaluative question requiring careful examination of all the surrounding circumstances.

[217] The SEC Order is plainly a significant document, but its significance for limitation purposes depends upon factual conclusions which cannot presently be made.

[218] If the matter were before the Court after trial, these facts might prove highly significant. However, the present question is not whether the SEC Order ought ultimately to defeat the Claimants' reliance on section 25. The question is whether the Court can determine that issue now.

[219] In my judgment, it cannot. There are several reasons for this.

[220] First, there is a substantial dispute concerning the significance of the SEC Order and the conclusions which a reasonably diligent investor would have drawn from it. The Defendants say that it revealed enough to trigger an investigation. The Claimants say that it did not reveal the fraud now alleged. Those positions are not equivalent.

[221] A person may become aware of regulatory concerns without thereby discovering a complex fraud. Whether the SEC Order crossed that threshold is a matter requiring detailed factual analysis. The distinction is not a technical one. The SEC Order was, on any view, a regulatory document recording findings of regulatory breaches and conflicts of interest against Biscayne-related entities and individuals. The fraud now alleged is of a larger and different character — a concealed, long-running scheme in the nature of a Ponzi, operated through a multi-layered cross-border structure and, on the Claimants' case, deliberately hidden from them by trusted advisers. Whether a reasonably diligent reader of the Order in 2016 would have moved from the one to the other — from awareness of regulatory concern to discovery of a

pleadable claim in fraud against these Defendants — is exactly the kind of evaluative, fact-laden question which the authorities consign to trial.

[222] Second, the Claimants allege active concealment by Mr. Haberer. That allegation lies at the heart of their case. The Court cannot presently determine whether the allegation is true. Nor can it determine the extent to which any concealment affected the ability of the Claimants to discover the relevant wrongdoing.

[223] Third, the issue of reasonable diligence itself remains contested. The Defendants contend that enquiries should have been made. The Claimants contend that enquiries were made and that the answers provided were misleading. Determining whether additional enquiries were required involves a nuanced assessment of circumstances, relationships and knowledge. Such an assessment is ordinarily undertaken at trial.

[224] Fourth, the Court would be required to determine not only what enquiries a reasonably diligent person would have made, but what those enquiries would, in fact, have revealed. That second stage of the analysis is particularly difficult to conduct at present because the Court lacks evidence from the institutions said to have been capable of providing the relevant information.

[225] It is convenient, at this point, to say something of the state of the written evidence, as it bears directly upon why the issue cannot be determined now.

[226] The material before the Court on limitation consists principally of the parties' written evidence, the SEC Order, and certain contemporaneous documents and allegations drawn from the Florida proceedings. None of the witnesses has been cross-examined on that evidence. On the Claimants' side, the evidence is that Diego did not himself read the SEC Order, but referred it to his late father's personal manager, Dr Stark, who made limited enquiries of Mr. Haberer and accepted the explanations

given. The evidence is also that Mirta did not engage with the documents, which were in English and which she found complex.

[227] The Claimants' evidence is further that Mr. Haberer, far from disabusing them, actively reassured them, furnished false or incomplete information, and procured the manipulation of documents to conceal their true exposure. The Defendants rely upon the same primary facts to the opposite effect, contending that a reasonably diligent recipient of the SEC Order would have read it, grasped its significance, and made enquiry of the banks rather than of the suspected wrongdoer. Which of these competing accounts is to be accepted, and what a reasonably diligent investigation would in fact have yielded, are quintessentially matters for oral evidence and cross-examination. I would add that there has not yet been an exchange of witness evidence in this case; the precise terms of the written evidence, once tested, may bear materially upon the analysis, which is a further reason for caution before any summary disposal.

[228] Fifth, the issue concerns not merely knowledge of misconduct in general but knowledge of the fraud alleged against these Defendants. There is a material distinction between suspicion of irregularity and discovery of a cause of action. Whether the SEC Order was sufficient to reveal the latter is a question requiring detailed factual examination.

[229] I should engage directly with the specific factual matters upon which the Defendants relied, as they were advanced with care, and I would not wish them to be thought to have been left out of account.

[230] The analogy with **Media Trust** is, I accept, the Defendants' strongest point, and I have considered it with corresponding care. There is undoubtedly a parallel between the false reassurances given by the financial professional in that case and the reassurances which Mr. Haberer is said to have given here. But the analogy is not exact, and its limits matter on a summary application. In **Media Trust**, the court was

able to identify with precision both the enquiry which should have been made and the information which that enquiry would inevitably have produced. The present case is materially different. Here, by contrast, the identification of the reasonable step not taken, the person to whom enquiry should have been directed, and the answer that such enquiry would have produced, are all matters in dispute, and turn upon evidence not presently before the Court — including evidence of what the relevant banks knew and would have disclosed, of the operation of the trust and note structures, and of the nature and effect of the concealment alleged. The very exercise which **Media Trust** requires is, on these facts, one which cannot be performed without a trial.

[231] The submission that the Claimants ought to have enquired of independent third parties, in particular their banks, rather than of Mr. Haberer, is likewise a point of potential force at trial. But it presupposes findings as to what Deutsche Bank and Banque Pictet knew, and would have revealed, in 2016 and 2017, and as to whether the relevant loss was by then apparent. The fact that Deutsche Bank contacted Diego in May 2018, in his capacity as protector, does not establish what an enquiry made of the bank at an earlier date would have yielded. These are matters for evidence. The present evidence does not permit findings as to what information those institutions would, in fact, have disclosed had enquiries been made in 2016.

[232] The Finews article, and the Defendants' reliance upon Diego's acknowledgement that he received but did not read it, may bear upon the reasonableness and the credibility of the Claimants' reliance upon Mr. Haberer. But whether, and to what extent, the article was read or understood, whether it concerned conduct of the same character as that now in issue, and what effect it should have had upon a reasonably diligent person in the Claimants' position, are questions of fact and credibility which a court can properly resolve only at trial; the submission that any language difficulty was readily curable by machine translation, while not without merit, cuts both ways and cannot be determined on the papers.

[233] The Defendants' reliance upon the Claimants' own averments in the Florida proceedings is, I accept, a forceful forensic point. There is an apparent tension between the Claimants' reliance upon the SEC Order to establish the existence of the fraud and their disclaimer of its significance as a trigger for the purposes of limitation, and the Claimants will need to confront that tension at trial. But averments made in later proceedings, with the benefit of hindsight and of information acquired after the relevant date, do not, without more, establish what was reasonably discoverable before 7th March 2018; and the weight to be given to those averments, and to the January 2016 correspondence exhibited in the Florida proceedings, is a matter for the trial judge upon the full record. I record, in fairness to the Defendants, that these are amongst the most telling of the points advanced against the Claimants, and that the Claimants' ultimate prospects on limitation may well prove to be modest; but a modest prospect is not the same as no real prospect, and it is the latter which the Defendants must establish. The points advanced by the Defendants are capable of carrying considerable weight at trial and may ultimately prove difficult for the Claimants to answer. The question on these Applications, however, is whether those points admit of only one conclusion. In my judgment, they do not.

[234] I should deal, for completeness, with the remaining specific matters by which the Defendants seek to establish an earlier trigger. For the purposes of these Applications, the Claimants have satisfactorily answered each of them.

[235] The Defendants rely upon an account statement sent to Diego in January 2016, which listed, among the Fourth Claimant's holdings, an investment in "SG Strategic Income", one of the Note Issuers later named in the SEC Order. The Claimants answer that it would be unrealistic to expect an individual to fasten upon a single, undescriptive line item representing some four per cent of the portfolio, and then to recall it months later when the SEC Order came to attention; and that, on their case, Mr. Haberer falsified statements precisely in order to conceal the Claimants' investments in the Notes. The Defendants rely upon averments in the later Florida

proceedings concerning Mr. Haberer's association with "Biscayne Capital-related entities" and Diego's knowledge of Mr. Haberer's partners; the Claimants answer that those averments were made with the benefit of hindsight, that Diego was unsure of the identities in question, and that Mr. Haberer had dishonestly represented that the Uruguayan Biscayne entity was unconnected with any United States Biscayne entity. The Defendants rely upon Diego's victim-impact statement as evidencing "dealings" with Mr. Roberto Cortes; the Claimants answer that Diego recalls only a single brief meeting in about 2008 to 2009, years before the Defendants' alleged wrongdoing began. And the Defendants rely upon questions raised by members of the Romay family with Mr. Haberer about the trusts' investments; the Claimants answer that these go only to demonstrate that Mr. Haberer actively concealed the position and gave untrue or incomplete information. Whether these matters, individually or together, constituted a trigger, and whether a reasonably diligent investigation would have followed and what it would have revealed, are questions of fact and credibility which cannot be resolved on the papers.

[236] The Court must also guard against the wisdom of being too wise after the event. The fact that subsequent investigations ultimately revealed an extensive fraud cannot itself determine what a reasonably diligent person would have appreciated in 2016. The statutory enquiry under section 25 requires the Court to assess the position prospectively and by reference only to the information then available, rather than with the benefit of later discoveries.

[237] Even assuming that one or more of the matters relied upon by the Defendants amounted to a trigger sufficient to place the Claimants on enquiry, the second stage of the analysis remains problematic. The authorities require the Court to ask not merely whether enquiry should have been undertaken, but what a reasonably diligent enquiry would have revealed. The Defendants submit that enquiries directed to independent institutions would have exposed the relevant wrongdoing. The Claimants dispute that proposition. No evidence from those institutions is presently before the Court. Nor is there evidence capable of demonstrating with confidence

what information would have been available or disclosed in response to such enquiries. In those circumstances, the Court lacks the evidential foundation necessary to conclude that discovery of the causes of action now pleaded was inevitable.

[238] I would emphasise the second-stage difficulty, because it appears to me decisive at this stage. Even on the assumption most favourable to the Defendants — that the SEC Order, or some other matter, constituted a trigger — the authorities require the Court to be satisfied not merely that enquiry should have been made, but that a reasonably diligent enquiry would in fact have revealed the concealed fraud now alleged. That is the second stage of the **OT Computers** enquiry, and it is a question of fact, dependent upon evidence which is simply not before me: in particular, evidence of what Deutsche Bank, Banque Pictet and the other institutions in the chain knew, and would have disclosed, had enquiry been made of them in 2016 or 2017. The Defendants invite me to infer that such enquiry would have unmasked the fraud; but an inference of that kind, drawn against a claimant on a summary application, in the teeth of a positive and particularised case of active concealment, and without any evidence from the institutions said to hold the answer, is not one which the Court can properly draw on the present record.

[239] There is, moreover, a more fundamental difficulty in the Defendants' path, to which the Claimants rightly draw attention. Even assuming that one or more of the matters relied upon amounted to a trigger, the Defendants advance no positive case as to how a reasonably diligent investigation, following that trigger, would, in fact, have led to the discovery of Mr. Haberer's and the Investment Managers' fraud, still less to the discovery of the distinct wrongdoing, and the fraudulent concealment, alleged against each of these Defendants. The burden upon this application being theirs, the absence of any such positive case is significant. It is, on the contrary, at least realistically arguable that reasonable enquiry would not have revealed the Defendants' wrongdoing, the more so because, on the Claimants' case, further steps would have been taken to conceal it, as Mr. Haberer is said to have done

when the SEC Order was raised with him. The second stage of the **OT Computers** enquiry, namely what diligence would have revealed, is, on this record, simply not answered by the Defendants.

[240] The Defendants' limitation argument depends upon a prior attribution question, which is itself neither straightforward nor obviously one-sided.

[241] Finally, I accept the Defendants' submission, founded upon **Frontiers Capital v Flohr**, that it is not enough for the Claimants merely to assert that the fraud was concealed and to invite the Court to send the matter to trial. But the Claimants have done more than that. They have advanced a positive and particularised case of active concealment and false reassurance, and a positive case that the SEC Order, whatever its regulatory significance, did not reveal the scheme now alleged. Whether that case is made good is for trial, but it is a case of sufficient substance to defeat an application for summary judgment.

[242] Drawing these matters together, I am not persuaded that the Defendants have demonstrated that the Claimants' limitation arguments are devoid of any realistic prospect of success. The issues raised under section 25 involve evaluative questions concerning knowledge, attribution, reasonable diligence, the effect of the SEC Order, the chronology of relevant events and the factual context in which those events occurred. Those questions are closely intertwined with disputed issues of fact which cannot fairly be resolved upon the present material. Whether the Claimants will ultimately establish postponement is a matter for trial. The present question is whether they have a realistic prospect of doing so. In my judgment they plainly do.

[243] That conclusion leads directly to the further issue arising between the parties, namely whether the relevant knowledge is capable of being attributed to the Claimants.

Attribution

[244] Before considering whether the Claimants could, with reasonable diligence, have discovered the alleged fraud before March 2018, it is necessary to identify whose knowledge is relevant for the purposes of section 25. That question emerged as a substantial issue during oral argument. The Defendants contend that the knowledge of Diego and Mirta falls to be attributed to the Claimants. The Claimants dispute that proposition and submit that the issue is both legally and factually unsuitable for summary determination.

[245] The attribution issues arise at two distinct levels. The first concerns the legal principles governing the attribution of knowledge and conduct to a corporate or trust structure. The second concerns the factual question whether, applying those principles to the present evidence, knowledge possessed by particular individuals can properly be attributed to any of the Claimants for the purposes relied upon by the Defendants. Those questions should not be conflated.

[246] The Defendants place particular emphasis upon the role of Diego and Mirta as protectors. They submit that their powers under the relevant trust deeds, together with their active involvement in the affairs of the trust structures, distinguish them from passive beneficiaries and make them the individuals whose knowledge should properly be considered for the purposes of section 25. The Claimants dispute both the factual premise and the legal conclusion, contending that the evidence regarding the protector arrangements remains incomplete and that the significance of those powers cannot fairly be assessed without a full examination of the trust documentation and the surrounding evidence.

[247] The issue of attribution provides the legal foundation for the Defendants' case on reasonable diligence. Unless the Defendants first establish that the knowledge of Diego and Mirta is properly attributable to the relevant Claimants for the purposes of section 25 of the LO, their contention that the Claimants could, with reasonable

diligence, have discovered the alleged fraud at an earlier date cannot materially advance the limitation defence. Only if attribution is established does it become necessary to consider the further questions of the content of that knowledge, the point at which it was acquired, whether it was sufficient to place the Claimants upon enquiry, and what a reasonably diligent person in their position would thereafter have done.

[248] There is a further difficulty with the Defendants' case, at this stage at any rate, on this issue.

[249] The Defendants' argument proceeds on the basis that the knowledge of Diego and Mirta is attributable to the Claimants. The Claimants dispute that proposition. Attribution is not a mechanical exercise.

[250] The Defendants' submission is not founded upon ordinary principles of corporate attribution. It is common ground that Diego and Mirta were not directors or officers of the corporate Claimants. Rather, the Defendants rely upon what they describe as a special rule of attribution, derived from the approach explained by Lord Hoffmann in **Meridian Global**, and subsequently discussed by the Privy Council in **Julien and others v Evolving Technologies and Enterprise Development Company Ltd**.[72]

[251] They submit that the particular statutory context of section 25 requires the Court to identify whose knowledge should fairly be treated as that of the corporate Claimants for the purposes of constructive discovery.

[252] In support of that submission, the Defendants rely upon several features of the factual matrix. They submit that Diego and Mirta were not merely beneficiaries of the relevant trusts but also acted as protectors of certain of them, with significant powers under the trust deeds. Those powers are said to have included powers

[72] [2018] UKPC 2, [2018] BCC 376.

relating to investment decisions, direct communication with the trustees and the receipt of information concerning the trusts. The Defendants further rely upon the fact that, on the Claimants' own evidence, Diego and Mirta were the individuals who responded to the events of 2018 by questioning Mr. Haberer, instructing lawyers, seeking documents from Amicorp and ultimately commencing proceedings in the United States.

[253] The Defendants also place considerable reliance upon the Claimants' own pleadings. They submit that, for the purposes of section 25, the Claimants expressly rely upon Diego and Mirta Romay's knowledge in pleading when the fraud was first discovered, while simultaneously denying that their knowledge can be attributed to the corporate Claimants for the purposes of constructive discovery. They contend that those positions are difficult to reconcile.

[254] The Defendants further rely upon the Claimants' own pleadings, pointing out that they repeatedly identify Diego and Mirta Romay as the persons through whom the fraud was ultimately discovered and by whom subsequent investigations were undertaken. They submit that the Claimants cannot simultaneously rely upon that knowledge for the purposes of section 25 whilst denying that it is capable of attribution to the corporate Claimants. Whether that submission is ultimately correct is not a matter that I need determine on these Applications. It is sufficient to observe that it raises issues requiring a careful analysis of the pleadings, the trust structures and the applicable principles of attribution.

[255] As the authorities make clear, attribution depends upon context and purpose: see **Meridian Global Funds Management Asia Ltd v Securities Commission**,[73] at 507-511, per Lord Hoffmann, where the Privy Council explained that the rules of attribution depend upon the purpose of the relevant legal rule and cannot be applied mechanically. The question is not simply whether an individual had knowledge, but

[73] [1995] 2 AC 500.

whether that individual's knowledge should, in law, be treated as the knowledge of the corporate entity for the particular purpose in question. That depends on the nature of the individual's role, authority and relationship to the entity. The question is not simply whether an individual possessed knowledge. It is whether that knowledge should be treated as the knowledge of the relevant corporate claimant for the purposes of the statutory enquiry. The issue may require examination of corporate structures, authority, governance arrangements and the relevant factual matrix.

[256] As Lord Hoffmann explained, questions of attribution are ultimately questions of construction. The Court asks whose acts, knowledge or state of mind Parliament intended should count as those of the company for the purpose of the particular statutory provision under consideration. The answer may differ according to the statutory context. The ordinary rules of attribution will often suffice. In exceptional cases, however, the Court may recognise a special rule of attribution where necessary to give effect to the purpose of the legislation.

[257] As I observed during the course of argument, questions of attribution do not invariably present the same degree of difficulty. In some statutory contexts, Parliament has expressly or impliedly provided for the attribution to a corporate entity of the knowledge, acts or state of mind of its officers or other individuals for the purpose of establishing the corporation's liability. Examples include section 501(2) of the Insolvency Act 2003 of the Virgin Islands (the broad equivalent of section 432 of the Insolvency Act 1986 of England and Wales), section 90A of, and Schedule 10 to, the Financial Services and Markets Act 2000, and section 14 of the Company Directors Disqualification Act 1986, as it applies to England, Wales and Scotland.

[258] In **Tesco Supermarkets Ltd v Nattrass**,[74] the House of Lords considered the circumstances in which the acts and state of mind of an individual could be identified with those of the company for the purposes of liability under the UK Trade Descriptions Act 1968. In cases of that kind, although questions of attribution may still be fact-sensitive, the statutory purpose for which attribution is sought is generally well-defined, and the enquiry may, depending upon the circumstances, be capable of determination without extensive factual investigation.

[259] The present case is of an altogether different character. The Court is concerned not with the attribution of knowledge within a single corporate entity for the purpose of establishing statutory liability, but with the attribution of knowledge across a complex matrix of companies, trusts, protectors, beneficiaries, and professional trustees, for the distinct purpose of determining whether the commencement of the limitation period was postponed under section 25 of the LO. That enquiry is necessarily both purpose-specific and intensely fact-sensitive. It requires a careful examination of the legal relationships between the various actors, the capacities in which they acted, the powers they possessed, the functions they performed, the chronology of the knowledge said to have been acquired, and, critically, the purpose for which attribution is sought. As the Privy Council reiterated in **Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd**,[75] attribution is not governed by any single universal rule but depends upon the purpose of the substantive rule in question and the context in which attribution is sought. In a case of the present complexity, involving multiple corporate and trust structures and sharply contested questions as to the acquisition and attribution of knowledge, it will often be inappropriate to determine such matters summarily. They will ordinarily require the fuller evidential examination available through disclosure, oral evidence, and cross-examination at trial. This contextual and purposive approach is also reflected in academic commentary, which has moved away from rigid general rules

[74] [1972] AC 153.
[75] [1995] 3 All ER 918.

towards a more nuanced analysis: see, for example, Ferran, E, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239.

[260] The written evidence bears upon this question, but it does not resolve it. The Claimants' assets were held within a structure of trusts of which professional trustees (latterly in New Zealand) were the legal owners, and the Claimants have expressly reserved their position as to whether the relevant knowledge, for the purposes of section 25, is that of those professional trustees or that of Diego and Mirta. The Defendants, for their part, point to the evidence that Diego and Mirta were closely involved in the relevant structures — as protectors of the trusts, as beneficiaries, and, in Diego's case, as the individual to whom Deutsche Bank addressed itself in May 2018 — and contend that their knowledge must, for the purposes of the limitation enquiry, be treated as that of each Claimant. These competing accounts cannot be evaluated, still less reconciled, without disclosure of the trust instruments and governance arrangements, and without testing the deponents' evidence as to who, in fact, made or was responsible for the relevant decisions. The state of the written evidence on this question is, accordingly, a further reason why the issue is unsuitable for summary determination.

[261] The issue is, therefore, not presently capable of definitive resolution. This constitutes an additional reason why summary judgment is inappropriate.

[262] I should address the Defendants' specific position on attribution, which differs from the position adopted by the Claimants. The Defendants assert — consistently with the Claimants' own evidence — that it is the knowledge of Diego and Mirta, not the knowledge of any Amicorp-appointed director or officer, that is said to be attributed to the Claimants. On that footing, they rely upon the principle identified by the Privy Council in **Julien and others v Evolving Technologies and Enterprise Development Company Ltd**,[76] in which the Board raised the possibility that the

[76] [2018] UKPC 2, [2018] BCC 376.

knowledge of a controlling individual may, in appropriate circumstances, constitute the knowledge of a company for the purposes of the limitation enquiry. The Board did not resolve that question definitively. However, as explained by Mr. Tom Smith KC, sitting as a deputy judge of the High Court, in **Pagden v Fry and other**,[77] at [106]–[118], the potential holding in **Julien** is relatively narrow and is unlikely to apply where, as may be the case here, the relevant corporate entity has an innocent director or other participant. The precise scope of that principle, and whether it applies to the present facts — including whether the Romays are properly to be characterised as "controlling" the Claimants in the relevant sense — are themselves contested questions which cannot be resolved without evidence and full factual examination.

[263] The authorities demonstrate that attribution is not governed by any universal rule. It is a context-specific enquiry directed to the purpose for which attribution is sought, the legal relationship under consideration, and the substantive rule of law being applied. That necessarily requires careful attention to both principle and the underlying factual matrix.

[264] I, therefore, refrain from expressing any concluded view as to whether the knowledge of Diego and Mirta is capable of attribution to the Claimants for the purposes of section 25. The issue raises substantial questions of both law and fact. It should be determined, if necessary, upon a complete evidential record after disclosure and oral evidence, rather than upon affidavit evidence alone.

[265] As noted above, the Defendants placed particular reliance on the recent decision of the Privy Council in **Julien**. There, the Board considered whether the knowledge of a sole shareholder might, in an appropriate case, be attributed to a company for the purposes of the statutory postponement provisions of section 14 of the Limitation of Certain Actions Act 1997 of Trinidad and Tobago — a provision materially identical,

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[77] [2025] EWHC 1918 (Ch).

for present purposes, to section 32 of the Limitation Act 1980 of England and Wales, and closely analogous to section 25 of the LO.

[266] The Board ultimately found it unnecessary to determine the point because the appeal could be decided on other grounds. Nevertheless, the discussion is of considerable interest because it recognises that questions of attribution under any limitation legislation may require the development of a special rule tailored to the statutory context.

[267] Equally, the Board emphasised the difficulty of laying down any bright-line rule. Lord Briggs observed that whether shareholder knowledge should be attributed may depend upon the particular factual circumstances, including the extent to which the shareholder actively controlled the affairs of the company.

[268] The Defendants submit that an analogous approach should be adopted here by reference to Diego and Mirta Romay's role as protectors. The Claimants submit that the analogy is inapt and that the question cannot be properly determined without full findings regarding the operation of the trust structures, the protectorship arrangements, and the powers actually exercised by Diego and Mirta.

[269] Particular reliance was placed by the Defendants upon the decision of the Privy Council in **Julien**.

[270] They submit that the Board recognised that attribution for the purposes of statutory postponement provisions may require a context-specific approach that extended beyond the ordinary rules of corporate attribution.

[271] The Claimants submit that **Julien** does not establish any such principle, and emphasise that the Board ultimately found it unnecessary to determine the attribution issue on the facts of that appeal. They contend that the observations relied upon by the Defendants must therefore be read in their proper context.

[272] In my judgment, **Julien** demonstrates that attribution under limitation legislation can raise difficult, context-sensitive questions. It does not, however, establish any general proposition that the knowledge of beneficiaries, shareholders or protectors is automatically attributable to associated corporate entities. The authorities instead reinforce the need to examine both the statutory purpose and the factual context carefully.

[273] I should add that the Defendants, for their part, contend that the knowledge of Diego and Mirta is plainly to be attributed to the Claimants, relying upon the contextual and purposive approach to attribution explained in **Meridian Global Funds Management Asia Ltd v Securities Commission** and **Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd**,[78] and upon the real-life involvement of Diego and Mirta in the relevant structures — as protectors of certain of the trusts, as beneficiaries, and, in Diego's case, as the individual contacted by Deutsche Bank in May 2018. That is a substantial submission. But attribution, as those very authorities make clear, depends upon the purpose of the rule in question and upon a detailed appreciation of the relevant relationships and governance arrangements; and the Claimants, for their part, have reserved their position as to whether the knowledge of Diego and Mirta, rather than that of the New Zealand professional trustees, is the relevant knowledge for the purposes of the statutory enquiry. The competing positions cannot be resolved without evidence. The point, therefore, reinforces, rather than diminishes, my conclusion that the limitation issue is unsuitable for summary determination.

[274] I would add only this. The Defendants' case on limitation proceeds upon the footing that the knowledge of Diego and Mirta is to be attributed to each of the Claimants. But Diego and Mirta were never officers of the Claimants, and the question whether, and for what purpose, an individual's state of mind is to be attributed to a company

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[78] [2019] UKSC 50.

depends upon the factual and legal context, the purpose for which attribution is said to arise, and the nature of the proceedings: **Bilta (UK) Ltd (in liquidation) v Nazir (No 2**),[79] at [9], [41], [44] and [202]-[209]. Whether the relevant knowledge is that of Diego and Mirta, or that of the professional trustees through whom the Claimants were administered, and whether and how any such knowledge is to be attributed to each Claimant for the purposes of section 25, are themselves contested questions which the Court cannot resolve without a full factual enquiry.

[275] The evidence presently before the Court appears to establish that, under the relevant trust deeds, the Miro Trust (which owned the First Claimant) had a Protector Committee, although the evidence is that neither Diego nor Mirta was a member of that Committee. The position in relation to the Docil Trust (which owned the Third Claimant) appears to be different: the evidence is that it did not have a Protector at all at any material time prior to May 2018. The precise scope of any powers conferred by the relevant trust arrangements, the manner in which such powers were capable of being exercised, and the extent to which they were in fact exercised, remain matters which are either disputed or insufficiently developed on the present evidence. Those issues may ultimately prove important both to attribution and to the assessment of reasonable diligence. The evidence presently before the Court establishes that Diego and Mirta occupied positions as protectors under certain of the relevant trust deeds. The precise extent of their powers, the manner in which those powers were capable of being exercised, whether they acted individually or through a Protector Committee, whether other persons also served on that Committee at material times, and the extent to which those powers were actually exercised all remain matters which are either disputed or insufficiently developed on the present evidence. Those issues may ultimately prove important to both attribution and the assessment of reasonable diligence.

[79] [2015] UKSC 23, [2016] AC 1.

[276] The Claimants rely upon **Bilta (UK) Ltd (in liquidation) v Nazir** as demonstrating that attribution is a context-specific enquiry which cannot be resolved by the application of inflexible rules. I respectfully agree with that general proposition. The authorities emphasise that attribution depends upon the purpose for which the question arises and the statutory or common law context in which it falls to be determined.

[277] These Applications require the Court to exercise particular caution. Attribution is rarely a purely abstract legal question. Even where the governing legal principles are not controversial, their application often depends on detailed findings concerning corporate governance, authority, agency, knowledge, control, purpose, and chronology. Those matters frequently depend upon disclosure, contemporaneous documents and oral evidence.

[278] I am not persuaded that the attribution issue can properly be determined upon these Applications. That conclusion is not because the Defendants' arguments are devoid of merit. On the contrary, they raise substantial questions based on respected authorities and detailed submissions. Rather, I conclude that the issue cannot fairly be resolved without fuller findings concerning the trust structures, the protector arrangements, the actual powers exercised by Diego and Mirta, and the wider factual context in which those powers were exercised. Those matters are better suited to determination at trial.

[279] It follows that I do not find it necessary, nor would it be appropriate, finally to determine whether Diego and Mirta's knowledge is attributable to the Claimants for the purposes of section 25. That issue remains open for determination at trial. My conclusion is confined to holding that the present evidential record is insufficient to permit that question to be answered summarily. Nothing in this judgment should be understood as shifting the burden which will rest upon the Claimants at trial. My conclusion is confined to the present Applications and reflects only my inability to

conclude that the Defendants have demonstrated that the Claimants have no real prospect of discharging that burden.

[280] In my judgment, the present attribution issues cannot properly be characterised as involving straightforward applications of settled legal principles to undisputed facts. Rather, they require the Court to determine what knowledge particular individuals possessed at different times, the capacity in which they were acting, whether that knowledge should properly be attributed to one or more of the Claimants for the relevant legal purpose, and how those conclusions interact with the limitation issues already discussed. Those are precisely the kinds of evaluative questions which should ordinarily be determined after a full trial.

[281] In addition, the attribution analysis cannot be divorced from issues of limitation. Whether any relevant knowledge should be attributed to a Claimant necessarily informs the question whether that Claimant discovered, or could with reasonable diligence have discovered, the fraud alleged. Equally, the answer to the limitation question may itself depend upon findings concerning the factual circumstances in which that knowledge was acquired. The two enquiries therefore overlap significantly.

[282] Accordingly, I do not consider that the attribution issue can properly be determined upon the present evidential record. That conclusion reflects the procedural posture of these Applications rather than any concluded view upon the substantive merits of the competing arguments.

The Position of Clodi

[283] The Claimants also submit that at least part of the case stands on a different footing.

[284] The Third Claimant's position requires separate consideration. Unlike the claims advanced by the other Claimants, its pleaded cause of action depends upon a

distinct factual chronology and different alleged acts causing loss. It cannot automatically be assumed, therefore, that the limitation analysis applicable to the remaining Claimants necessarily produces the same result.

[285] The Third Claimant's claim concerns transfers occurring in March 2018. On the Claimants' case, the relevant transactions occurred on or after 8th March 2018. If that is correct, those claims may not be *prima facie* statute-barred even without reliance upon section 25. The Defendants dispute aspects of that analysis. Nevertheless, the point further illustrates why a detailed trial analysis will be required.

[286] Whether the Third Claimant's claim is in fact statute-barred depends upon factual questions concerning when the relevant loss was sustained, and the relationship between that loss and the pleaded fraudulent scheme. Those questions are not identical to those arising in relation to the remaining Claimants. On the present material, I am not persuaded that they can fairly be resolved summarily.

[287] I should put the point more firmly, in deference to the Claimants' submission.

[288] The Third Claimant's pleaded claim is not founded upon any purchase of Notes at all; it concerns the transfer, effected by Mr. Haberer (on the Claimants' case, by forging the necessary signatures), of more than US$6 million of securities out of the Third Claimant's account to discharge, in part, an overdraft incurred on another Claimant's account. The transfer instructions are dated 8th and 15th March 2018, and the transfers are said to have occurred on 9th and 16th March 2018. The claim having been commenced on 7th March 2024, even the earliest of those instructions postdates the commencement of the six-year period, with the consequence that, on the Claimants' case, no limitation period applies to the Third Claimant's claim at all, without any need to rely upon section 25. The Defendants' answer, that they "do not know" whether or when the relevant instructions and transfers occurred, is not a basis upon which the Court could enter summary judgment or strike the claim out;

it is, if anything, a reason for permitting the claim to proceed to a stage at which the facts can be established.

[289] I should address one specific aspect of the Defendants' Clodi argument, which was pressed in the Amicorp skeleton argument. The Defendants submit that even if Clodi's claims concerning the March 2018 transactions are not *prima facie* statute-barred, the Claimants' own pleaded case asserts a single, unitary conspiracy which, on their case, was discoverable as far back as 2016. Accordingly, the Defendants say, the fact that the latest acts forming part of the conspiracy occurred in March 2018 does not assist Clodi, because the conspiracy as a whole was already discoverable, and time therefore ran from an earlier date in respect of all claimants. That is an arguable submission and one which may ultimately carry substantial weight. However, it raises its own factual questions: whether the conspiracy was, in fact, unitary; whether the March 2018 transactions were part of the same scheme or constituted independent wrongdoing; and when, precisely, the Claimants acquired, or could have acquired, sufficient knowledge to plead a claim. These are matters for the trial judge.

[290] The SGG Defendants advanced their own, distinct, submissions in relation to Clodi, which I should record. They emphasise that the Clodi claim (said to be worth approximately US$6 million in the context of a total claim said to exceed US$50 million) does not appear to allege any involvement on the part of the Defendants at all, and has, on their characterisation, been "tacked on" to the Claim. They submit that the alleged instructions and payments — said to have been given on 8th and 15th March 2018 and made on 9th and 16th March 2018 — are matters in respect of which they reserve all their rights, including as to the authenticity of the documents and as to when the instructions were in fact given and the payments in fact made. They submit, further, that had Diego and Mirta exercised reasonable diligence following the SEC Order, steps would have been taken to preserve Clodi's assets before any draining of its account, or proceedings would have been brought within the primary period.

[291] I have considered the Defendants' submission that the Third Claimant's claim should nevertheless be analysed as part of a single overarching conspiracy. While that submission may ultimately prove correct after trial, I am not satisfied that it eliminates the distinct factual issues concerning accrual of damage upon which the Third Claimant relies.

[292] These submissions do not alter my conclusion. Whether the Defendants had any involvement in the Clodi transactions, whether the relevant instructions and payments fell before or after 7th March 2018, the authenticity and effect of the documents relied upon, and whether the Clodi claim is properly to be regarded as part of a single, unitary conspiracy discoverable at an earlier date or as independent wrongdoing, are each disputed questions of fact.

[293] They are, for the reasons already given, matters for the trial judge and not for summary determination.

[294] Accordingly, I am not persuaded that the Defendants have established that the Third Claimant's claim has no realistic prospect of overcoming the limitation defence. Whether that claim ultimately succeeds will depend upon factual findings which remain to be made at trial.

Conclusion on Limitation

[295] I accept that the Defendants have raised a serious limitation defence. I further accept that the SEC Order may ultimately prove highly significant. The Claimants may face a substantial challenge in explaining why the events of 2016 did not lead to earlier discovery of the alleged wrongdoing. However, those observations do not provide a basis for dismissal at this stage. The Court is not required to determine whether the limitation defence will ultimately succeed. The Court is required to determine whether the Claimants have no realistic prospect of defeating it. In my

judgment, they plainly do have such a prospect. The limitation issue depends upon disputed facts, competing inferences and matters of credibility. The issue is therefore not whether the fraud has been established, but whether the Defendants have demonstrated that the Claimants have no realistic prospect of establishing that the commencement of the limitation period was postponed pursuant to section 25.

[296] The limitation ground, therefore, fails.

Observations

[297] Before leaving the matter, I should record three observations.

[298] First, this judgment is concerned only with the propriety of determining the limitation defence summarily. It should not be read as resolving any issue which remains for trial.

[299] Second, although I have referred in some detail to a number of authorities, I have considered the principal authorities and submissions advanced by counsel, whether or not they are expressly discussed in this judgment. In view of the relatively short period between the conclusion of the hearing and the delivery of this judgment, I have sought to consider that material as fully as the circumstances reasonably permitted. Where a particular authority or submission is not addressed expressly, it should not be inferred that it has been overlooked; rather, I have not found it necessary to refer to it separately in order to dispose of these Applications.

[300] Third, nothing in this judgment should be read as diminishing the force of the Defendants' submissions on attribution or reasonable diligence. Those submissions raise substantial questions of law and fact. My conclusion is simply that those questions require the fuller evidential and forensic process available at trial.

Overall Conclusion

[301] It is undoubtedly the case that the Defendants have advanced substantial arguments in support of the Applications. Those arguments have been carefully developed and supported by considerable authority. They raise issues which will require close scrutiny at trial. However, the Court's function in these Applications is limited. The Court must not conduct a mini-trial or resolve factual disputes unless it can clearly be demonstrated that they would simply not withstand scrutiny by reference to what has been said in the past or to contemporaneous documents and that their position is unlikely to be improved at trial: see, for example, **Access Bank Plc v Orjiako**, above. Specifically, it must not determine contested questions of knowledge, intention, dishonesty or reasonable diligence without the benefit of a full evidential process unless the answer is clear. In the present case, the answer is not clear.

[302] I have, in deference to the care with which the Defendants' submissions were advanced, addressed the limitation defence in detail: the trigger said to be constituted by the SEC Order; the analogy pressed upon me with **Media Trust**; the contention that the Claimants ought to have made independent enquiry of their banks rather than of Mr. Haberer; the *Finews* article; the averments in the Florida proceedings; the second stage of the constructive-discovery enquiry, namely what a reasonably diligent investigation would have revealed; and the question of attribution. I have considered these points both individually and cumulatively. Each is, to a greater or lesser degree, a point of substance, and several may prove formidable at trial. But none of them, whether taken alone or together, persuades me that the Claimants' case on limitation is bound to fail, or is without a realistic prospect of success, such as would justify dismissal at this stage.

[303] Drawing the threads together, I am unable to conclude that the Defendants have established that the Claimants have no real prospect of successfully relying upon

section 25. That conclusion follows from the cumulative effect of the issues identified above rather than from any single disputed fact.

[304] Those disputed issues include, amongst others:

(i) the proper significance of the SEC Order in its contemporaneous context;

(ii) the effect of the explanations and reassurances allegedly given by Mr. Haberer;

(iii) whether those reassurances were capable of dispelling or postponing any duty to investigate further;

(iv) what enquiries a reasonably diligent person in the position of Diego and Mirta would have undertaken;

(v) what information those enquiries would probably have revealed;

(vi) whether that information would have enabled the alleged fraud now relied upon to be discovered;

(vii) whether Diego and Mirta's knowledge is attributable to the Claimants for the purposes of section 25; and

(viii) the significance, if any, of the powers exercisable by Diego and Mirta as protectors under the relevant trust deeds.

[305] Many of those issues involve evaluative judgments based upon disputed facts, competing inferences and the proper interpretation of contemporaneous documents. Others involve questions of law whose resolution depends upon a fuller

understanding of the underlying factual matrix. In my judgment, they cannot fairly be determined upon written evidence alone.

[306] It is important to emphasise that this conclusion does not involve any reversal of the burden of proof. The burden of establishing the requirements of section 25 will remain upon the Claimants at trial. My conclusion is simply that the Defendants have not demonstrated, for the purposes of CPR 15.2, that the Claimants have no real prospect of discharging that burden.

[307] Nor should anything in this judgment be understood as resolving the parties' competing arguments concerning attribution. Those arguments were fully and skilfully developed before me. They raise important issues concerning the operation of the LO in the context of corporate claimants whose assets are held through trust structures. I have concluded only that those issues cannot be appropriately determined in these Applications.

Disposition

[308] For those reasons, the Applications for strike out and summary judgment founded upon the limitation defence are refused. It follows that (subject to the outstanding issues in respect of which strike out and/or summary judgment have been stood over for another day), the proceedings will continue to trial on the limitation issue unless otherwise disposed of.

[309] On behalf of the SGG Defendants, Mr. Lowe KC invited me not to give directions, at this stage, as regards the other issues that fall for determination on the Defendants' application for a strike-out or summary judgment. Neither Ms John KC nor Mr. Gibbon KC appeared to object to that. I agree with them. If and to the extent that the Defendants wish to pursue the further heads of claim for summary judgment and strike out, I invite them to confer and agree on any relevant directions. If agreement cannot be reached, the matter must be listed for a hearing.

[310] I again emphasise that nothing in this judgment is to be taken as expressing any concluded view on the ultimate merits of the claims or defences, whether in relation to limitation or any other issue that remains to be determined by this Court. I make no apology for reiterating that point: it is an important qualification. I have no doubt the parties appreciate that the oral evidence to be adduced at trial may cast a fundamentally different light on the matters before me, which involve only a limited enquiry undertaken for the purposes of the Applications.

[311] I invite the parties to reach agreement on the costs of the Applications to date. If they are unable to do so, they should list the matter for a short hearing. I would request the parties to obtain a listing of this matter for the issue of costs to be determined (and for any ancillary matters arising from this Judgment). I suggest a time estimate of 45 minutes. I am content to deal with the hearing by Zoom. I am also content to dispense with attendance by counsel and any other representatives who are based outside this jurisdiction.

[312] I wish to express my sincere gratitude to counsel and their respective legal teams for the clarity, skill and professionalism with which they presented their clients' cases, and for their cooperation throughout the hearing of the Applications. I had thought that after the oral submissions were completed, I might deliver an *ex-tempore* judgment, though the time left to me after the hearing on 24th June meant that I could not do so. On reflection, that may well have been for the best, as it afforded me the opportunity to consider with care and properly reflect on the many persuasive arguments advanced both in writing and orally by counsel on all sides.

[313] While this Judgment does not address every point raised in the skeleton arguments and during the hearing on 23rd and 24th June 2026, nor is it required to do so, I am satisfied that it deals with all substantive issues necessary for the determination of the Applications.

Abbas Mithani KC

High Court Judge (Ag)

By the Court

Registrar