England and Wales High Court (Chancery Division) Decisions

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Neutral Citation Number: **[2012] EWHC 3710 (Ch)**
Case No: **HC-2011-000 [illegible]**

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Before:

MR JUSTICE BARR

Between:

(1) DENISE MICHAEL SEARS	
(2) ROBERT JOHN SEARS	
(3) [illegible]	
(4) PRESTON DE GUISCARD ANTHONY SEARS WAITE	
(by his litigation friend MS DENISE MICHAEL SEARS)	
(5) [illegible]	
(as Personal Representatives of the Estate of Patricia Watt deceased)	**Claimants**
and	
(1) ANTHONY SEARS	
(2) PATSY WAITE	
(3) [illegible] (A PARTNERSHIP)	
(4) [illegible] (A PARTNERSHIP)	
(5) MERSEYSIDE TRUST	
(6) [illegible] LIMITED	
(formerly of the matter of group called "The Mighty Diamonds")	
(7) [illegible] LIMITED	
(formerly of the matter of group called "The Mighty Diamonds")	
(8) [illegible] (A PARTNERSHIP) LIMITED	
(9) MICHAEL [illegible]	
(10) CONTINENTAL [illegible] LIMITED	
(11) [illegible] LIMITED	
(12) [illegible] LIMITED	**Defendants**
(13) [illegible] LIMITED	
(formerly Lessees of Copyright Sector Limited)	
(14) [illegible] LIMITED	
(14) STREET BAR [illegible] LTD	
(15) LEASON MUSIC LIMITED	**Claimants**

[illegible]
[illegible] PRESTON QC, Ms CORNWELL and Mr [illegible] (instructed by [illegible]) for the Claimants
James [illegible] QC (instructed by [illegible]) for the 1st, 2nd & 3rd Defendants
[illegible] for the Defendants

HTML VERSION OF JUDGMENT

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Judgment

Mr Justice Barr:

Introduction

1. The band "Mexical Sound" ("MS"), with its five singers known as the Reggae Boys, enjoyed a short but spectacular success in the early 1980s. According to a song called "Pass the Dutchess", released in 1982, the band was "the hottest band in the land". Unfortunately, the success was short lived and the band ceased to exist in 1983. The claimants in these proceedings are the surviving members of the band and the estates of two of the deceased members of the band.

2. These the band's "co-ventures" in the enjoyment of another song, "Pass the Dutchess", which had been recorded by a Reggae group called "The Mighty Diamonds". The relationship between these two songs, which I shall call the "Dutchess" and "Diamonds" songs, is the subject matter of these proceedings. The Dutchess and Diamonds songs were written by the defendant Anthony Sears ("Anthony") and the claimant Denise Sears ("Denise") respectively. The Diamonds song was recorded by the Mighty Diamonds and released in the United Kingdom in 1982.

The parties

3. The claimants are members of MS and the second and third claimants are brothers. The fourth claimant, Jonathan Waite, is a musically and lyrically talented friend of the band, who was the Reggae Group's stage manager and who was a member of the audience when the Dutchess and Diamonds songs were first performed. The fifth claimant is the mother of the second and third claimants and the fourth claimant and was a member of the audience when the Dutchess and Diamonds songs were first performed. The fifth claimant died in 2010 and her estate is the successor to her interest in the "Dutchess" and "Diamonds" songs. The fifth claimant's estate is represented by the second and third claimants who are the executors of her will.

4. The eighth and ninth defendants are related companies, the eighth defendant ("Sports Power") is a new-wave publisher and apparently the recipient of the copyright in "Pass Dat", Sports Power's copy in the Dutchess and Diamonds songs and the ninth defendant ("Sports Power Music") is the music publishing company associated with Sports Power.

5. The tenth and eleventh defendants are companies in the Sports Power Group. Sports Power Music is a wholly owned subsidiary of the eleventh defendant.

6. Prince BP's grandson's principal business for the Claimants is the Council Estate of the Claimants of the Estate of Patricia Watt deceased. The fifteenth defendant acted for the 5th claimant and the 6th claimant in the matter of the Estate of Patricia Watt deceased.

7. The seventh and eighth defendants are companies in the Sports Power Group. The seventh defendant is the owner of the copyright in the Dutchess and Diamonds songs. The fifteenth defendant acted for the 5th claimant and the 6th claimant in the matter of the Estate of Patricia Watt deceased. The fifteenth defendant is the owner of the copyright in the Dutchess and Diamonds songs

90. Mr Brisby accepted that once time begins to run, nothing can interrupt it. Despite the potential harshness of this rule, it is of long standing and firmly established: *Purnell v Roche* [1927] 2 Ch 142. In *Sheldon v Outhwaite* [1996] AC 102, Lord Keith (with whose opinion Lord Mustill agreed) stated that section 1(2) of the 1980 Act effectively ensured that once time has started to run it will continue to do so, unless there is an express statutory provision to the contrary. At p 140, The Court of Appeal and the dissenting judgment of Lord Lloyd of Berwick considered the issue of disability specifically (per Sir Thomas Bingham MR at 110-111 and Lord Lloyd at 146 and 149). The latter noted that:

> "If the Plaintiff is of unsound mind when the cause of action accrues, the limitation period is extended. But there is no extension if he becomes of unsound mind during the running of the limitation period".

91. Accordingly, if time began to run on the fourth claimant's 18th birthday, it would not thereafter be interrupted, albeit that such time period could be postponed pursuant to section 32 of the 1980 Act. Therefore, if the claimant became of unsound mind after such a date reaching his majority, that will not stop time from running.

92. However, the first disability from which the fourth claimant was suffering when "*any right of action accrued*" for the purposes of section 28(1) of the 1980 Act, was not disability by reason of mental incapacity. The alleged disability by reason of mental incapacity is a subsequent disability ("the second disability"). Moreover, the claim in this case was issued on 4 February 2010, after the coming into force of the 2005 Act and the consequent amendments to section 38(2)-(4). That gives rise to two questions:

> (i) If the second disability commenced before the termination of the first disability, does that extend the limitation period? More specifically, if the fourth claimant came to lack mental capacity *before* his 18th birthday, would that stop time from running?
>
> (ii) Is the determination of whether or not the fourth claimant was of unsound mind or lacking in mental capacity to be made pursuant to the 1980 Act as it was at the time of the facts being considered or in its amended form? More specifically, is the relevant test whether the fourth claimant was incapable of managing and administering his property and affairs by reason of a mental disorder under the terms of the Mental Health Act 1983 ("the 1983 Act"), or whether he lacks capacity within the meaning of the 2005 Act to conduct legal proceedings?
>
> (i) *Subsequent overlapping disability*

93. For the fourth claimant, it was submitted that so long as a claimant is continually under "a disability", time does not begin to run, even if the second, overlapping disability is of a different nature to the first disability. For Woolf Seddon, it was argued that time began to run on the fourth claimant attaining his majority regardless of whether he can establish that he was under the second disability as at that date.

94. This question turns on the correct interpretation of section 28(1) of the 1980 Act. For convenience, I set this out again, together with sub-section (3):

> "(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.
>
> ….
>
> (3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person."

95. In support of his interpretation, Mr Brisby pointed to the wording "under a disability" in the final part of section 28(1). He submitted that if it had been intended to preclude extension in the case of a second, overlapping disability, the words "such a disability" or "that disability" would have been used. For her part, Ms Smith referred to section 28(3), which precludes extension of the limitation period where the cause of action passes from person under a disability to another person under a disability. She submitted that this showed the legislative intention to adopt a strict approach as regards any further extension.

96. On this question, on which there appears to be no authority, I prefer the submission of Mr Brisby. The thrust of section 28(1) is that so long as a person is under a disability, the limitation period should not start to run so that he is not potentially completed to commence proceedings. Since that applies to a child until he reaches the age of 18, if on his eighteenth birthday he is still under a disability, albeit a different disability from that which applied when the cause of action accrued, it would be inconsistent with the statutory purpose for the running of the limitation period to commence nonetheless. As I have already mentioned, the rule that a second disability which starts only after the cessation of the first disability will not cause an extension or suspension of the limitation period is capable of harshness. For a cause of action which accrues to a child, the limitation period will run from his eighteenth birthday even if he is involved in an accident the next day that causes brain damage such that he thereafter lacks mental capacity. But I see no reason to interpret section 28(1) so as to increase its potential harshness by imposing the same result if he developed a mental illness before – and possibly long before – his eighteenth birthday. The fact that mental incapacity can be long-lasting and that reference time may not run for a long time is inherent in the existing statutory scheme and not the result of this construction. I note that the Law Commission's recommendation that there should be a long-stop limiting period, but also that if a claimant develops lack of capacity after a limitation period has commenced then the running of time should be suspended, has so far not been adopted: *Limitation of Actions* (Law Com no. 270, 2001), paras 3.126-3.133. As for subsection 28(3), that is addressing a different and specific situation and it does not in my view assist on this point.

> (ii) *The relevant statutory test*

97. Where section 28(2) is engaged on the grounds of mental incapacity, there may well be a long period over which the claimant suffers from that incapacity. In *Maga v Archbishop of Birmingham* [2009] EWHC 780 (QB), where the cause of action accrued over 30 years before trial, Jack J held that the question of disability for the purpose of limitation should be determined under the law as it stood when the proceedings were commenced: see at [10]. This approach was followed in the Court of Appeal, where Sir Anthony May MR referred to this "obvious" approach: [2010] EWCA Civ 256, [2010] 1 WLR 1441 at [16]. In consequence, the amendments resulting from the 2005 Act were there disregarded. However, it appears that this point was conceded and was not the subject of argument. Therefore, I do not think that this approach is binding upon me.

98. Although *Maga* is of persuasive authority, I have respectfully come to the view that the applicable test is that determined by the law when the cause of action accrued. If it were otherwise, some claimants might find previously actionable torts had become time-barred before the commencement of the statutory amendment. The point may be illustrated hypothetically by supposing that someone suffered brain injuries in 1997 in an accident caused by another's negligence. Although the limitation period would normally expire in 2000, because the consequences of his injury fell within the condition of "unsound mind" under section 38(3) of the 1980 Act as it then stood, time did not begin to run and he did not start proceedings. However, his condition would not have met the stricter test for lack of capacity under the 2005 Act. Accordingly, once the 1980 Act was amended in April 2007 to introduce the new section 38(2), if the new test were to be applied it would no longer be possible for him to bring a claim since it would be time barred as from 2000. When the age of majority was lowered from 21 to 18, this particular problem was avoided by inclusion of a transitional provision for the purpose of the statute of limitations disapplying the lower age where a cause of action had already accrued: Family Law Reform Act 1969, schedule 3, para 8. Although no analogous transitional provision was introduced in conjunction with the 2007 amendment changing the test for mental disability in the 1980 Act, I do not regard that in itself as determinative. I consider that unless compelled by the statutory wording, the court should resist such a potentially retrospective imposition of a time bar, and I do not see anything in the 1980 Act which requires such a result.

99. Accordingly, I consider that the relevant test here for the purpose of section 28(1) of the 1980 Act is the version of section 38 prior to the amendment that introduced reference to mental incapacity under the 2005 Act. However, in case I am wrong about that, I shall consider the position under both tests.

> *Application to the facts*

100. Section 38 as it applied in 1984 when the cause of action accrued is set out at para 83 above. The primary test is whether the fourth claimant was by reason of mental disorder within the meaning of the Mental Health Act 1983 "incapable of managing or administering his property and affairs": sect 38(3). This is the same test as applied under RSC Ord 80 rule 1 governing the right of an individual to commence or compromise litigation without the interposition of a next friend or, in the former nomenclature, a guardian ad litem.

101. That test was considered by the Court of Appeal in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511 (a case that was not cited to me). In that case, the issue arose both under RSC Ord 80 r 1 and under section 38(3) of the 1980 Act (in its then form) as regards the capacity to litigate and compromise an action. In his judgment (with which Potter and Chadwick LJJ agreed), Kennedy LJ stated (at [27]):

> "What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all "lay client" decisions related to their actions to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the plaintiff is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in *White's* case (32 November 1987), capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere."

102. In a separate and detailed judgment, Chadwick LJJ provided an extensive discussion of the authorities which established two broad propositions (see at [58]):

> "First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained."

103. Referring to RSC Ord 80 and CPR 21, Chadwick LJ stated, at [75]:

> "… the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim he has, I see no reason why the law whether substantive or procedural should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the CPR, a litigation friend)."

104. Chadwick LJ further approved the approach adopted by Boreham J in the unreported case of *White v Fell*, which he summarised (at [77]) as follows:

> "In that case, also, it was necessary to decide whether the plaintiff had been incapable of managing her property and affairs in the context of a Limitation Act defence. The judge identified three features to which he thought it appropriate to have regard. First, the need for the plaintiff to have "insight and understanding of the fact that she has a problem in respect of which she needs advice". Secondly, the need to be able to instruct an appropriate adviser "with sufficient clarity to enable him to understand what she is asking him to do and to understand and make decisions based upon, or otherwise give effect to, such advice as she may receive". Boreham J accepted that the plaintiff was "now quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries". Further, he accepted that, if she succeeded in her claim for compensation "as almost inevitably she will", she would need to "take, consider and act upon appropriate advice" but that she might choose not to take advice. He accepted that "she may not understand all the intricacies of litigation, or of a settlement, or of a wise investment policy". But he was satisfied that, nevertheless, the plaintiff had not been shown to be incapable of managing her affairs. She possessed the necessary understanding to take the decisions which would be required in relation to a claim for compensation."

105. In the present case, there is evidence from Mr John Winfield, the Group Manager – Specialist Services at Birmingham City Council, and now the litigation friend of the fourth claimant, that he first met the fourth claimant in 1987 when senior social worker to the academic unit at All Saints Hospital in Birmingham. He states that the fourth claimant was then seriously ill with schizophrenia. Mr Winfield was involved in the process that led to the fourth claimant being detained under section 2 of the 1983 Act, which occurred on 18 April 1987. Mr Winfield says that the fourth claimant was constantly ill during the period of three years over which he knew him.

106. However, it is common knowledge that schizophrenia is a progressive illness and this evidence cannot establish the fourth claimant's mental state some two years earlier, on 23 May 1985 when he became 18. On behalf of the fourth claimant, there was produced from his medical records a letter dated 7 June 1985 from a consultant psychiatrist to whom the fourth claimant had been referred by his GP. That letter states that the GP had discovered the day before that the fourth claimant was suffering from a schizophrenic illness and confirmed the diagnosis. The letter refers to incidents that had occurred three weeks previously.

107. I accept that this letter is evidence from which it can be inferred that the fourth claimant was suffering from a relevant mental disorder as at his 18th birthday. But that is only part of the test. Following *Masterman-Lister*, the other part of the test is issue-specific: it is also necessary for the fourth claimant to establish, and the burden is on him, that he would not have been able to understand, with an appropriate explanation, that he may have a claim against MY's solicitors related to a failure to get the band publishing royalties for Kouchie, and to decide whether to make such a claim. Moreover, I think that the test has to be applied in the particular circumstances of the case. It is therefore relevant that the fourth claimant would have been able to consider this along with the other members of the band, including his elder brother. Obviously, the fourth claimant would not need to have understood the various intricacies of his claim, an aspect that I suspect elodes many claimants of entirely sound mind. But the evidence here, in my judgment, falls far short of showing that the fourth claimant would at that time have lacked sufficient understanding to take such decisions.

108. Accordingly, I find that the fourth claimant has not shown a sufficiently arguable case that he met the statutory criteria for disability by reason of unsound mind on his 18th birthday. However, even if I were wrong about that, in order to maintain the extension of the limitation period until at least six years before the start of this action, the fourth claimant would need to show that he remained under such a disability continuously until February 2004 when the proceedings were issued: *Wallbrook*.

109. It is convenient to consider the position as at 2002, when Mr Morgan, acting on behalf of the members of MY, obtained a copy of the Sparta Florida Agreement and mentioned it to at least some of them. Mr Winfield does not appear to have been in contact with the fourth claimant at that time, and the claimants' response to Woolf Seddon's request for further information served on 7 October 2011 states only that: "Mr Waite was treated as an outpatient during 2002 and 2003"; until on 22 August 2003 he was admitted to hospital under section 2 of the 1983 Act. Moreover, I think it is significant that Mr Morgan felt able to act in 2002 for the fourth claimant in the dispute with MY, and subsequently, on 4 February 2003, to conclude a settlement on his behalf with MC. The settlement Deed recites in December 2002 as regards a present for regarding rights. Evidently, Mr Morgan must have considered that the fourth claimant was mentally able to give him those instructions and decide to accept the settlement, and no application was made to the court for approval of that settlement under CPR Part 21.

110. I turn to consider the position in the alternative under section 38 in its current form, which applied as at the date of the issue of these proceedings. That requires a determination of whether the fourth claimant has shown that he lacked capacity within the meaning of the 2005 Act to conduct legal proceedings: see para 84 above. As I have mentioned, the matters to be considered before finding that a person lacks what is now called mental capacity have been broadened, such that a more detailed and sensitive evaluation is required before the statutory presumption of capacity is displaced. Moreover, the 2005 Act expressly provides that mental incapacity must be determined without regard to the relevant decision being a particular decision, or to any part of their behaviour: section 2(3). Because of the implications of a finding of mental incapacity for an individual's freedom of action, the thrust of the 2005 Act is to safeguard against a ready finding of lack of capacity. As under the 1983 Act, as explained in *Masterman-Lister*, the determination is issue-specific.

111. Further, the statutory code issued by the Lord Chancellor pursuant to section 42, which the court must take into account, provides as regards an assessment of people with fluctuating or temporary capacity, that "[a] person with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but disappear at others": para 4.26. The issue of the fourth claimant's mental capacity to decide to bring a claim has to be examined only at the time when this decision had to be made. Pursuant to section 28 of the 1980 Act, the limitation period will start to run once he was not under a statutory disability and will not thereafter be interrupted. Accordingly, he would have to establish that there was no period between 23 May 1985 and 4 February 2004 when he had the requisite capacity.

112. In short, it is clear that if, as I have found, the fourth claimant has not shown that he was "of unsound mind" under the test in section 38(2) of the 1980 Act in its previous form, he is unable to show that he lacked capacity under the new test which refers to the 2005 Act so as to avoid the application of a limitation period.

113. In my judgment, it is not adequate for the fourth claimant to say that his mental capacity is a matter for expert evidence which he would wish to call at trial. Where he seeks to rely on his incapacity to rebut an obvious limitation defence and the case comes before the court on a summary judgment application, particularly where that application was issued on 8 October 2010 and, for various reasons, came on for full argument over a year later, it is incumbent upon the fourth claimant to place before the court sufficient evidence to support his claim of mental incapacity. This is obviously not an issue that will be affected by disclosure from the defendants. I consider that it would be wholly wrong to permit the fourth claimant's claim to go to trial on all the substantive issues that are otherwise statute barred, on the speculative basis that he might by then be in a better position to establish his own mental incapacity that would overcome the limitation defence.

The claimants' application: the proposed Amended Particulars of Claim

114. Apart from various factual or drafting amendments, to which no objection is taken, the changes proposed in the draft Amended Particulars of Claim can be summarised as follows:

> i) As regards fraudulent breach of trust or fiduciary duty, the particulars are considerably expanded, including with quotations from Mr Seddon's witness statement: paras 14-16.
>
> ii) As regards misrepresentation, the allegations under para 17 of the various matters that Woolf Seddon "knew or ought to have known" are now pleaded as matters that Woolf Seddon "knew", including that they:
>
> a) "knew that the members of the band had a legitimate claim to be the owners of, or alternatively the owners of a share of, copyright subsisting in the Works and did not communicate such facts and matters to them"; and
>
> b) "knew that the nature and effect of the terms of the Sparta Florida Agreement were entirely contrary to the interests of the members of the band".
>
> I think the various amendments under this head clearly amount to a claim of fraudulent misrepresentation.
>
> iii) To the unlawful means and interference with trade claim there is added a new claim of conspiracy. I set out the amended paras 20-21 in an Appendix to this judgment.
>
> iv) A new claim is introduced as against all defendants of knowing receipt or dishonest assistance to the knowing receipt by others of property of the members of MY, with a claim to an account of consequent profits: para 22. That includes the allegation under the "Particulars of Knowledge/Dishonesty" at sub-para (iii) that:
>
> > "The fact that the Sparta Florida Agreement on its face betrays a calculated and profound concealment of material facts and matters from the members of the band by [Woolf Seddon] contrary to the band's interests."

115. The relevant principles to be applied when deciding whether to allow an amendment are not in dispute. First, an amendment should not be allowed if it has no real prospect of success, and therefore would be subject to an adverse summary judgment or a successful application to strike out under CPR rule 3.4. Secondly, if the effect of an amendment is to add a new claim after a period of limitation has expired, the court may not allow the amendment unless it arises out of the same or substantially the same facts as a claim already pleaded: section 35 of the 1980 Act and CPR rule 17.4(1)-(2). That is because, pursuant to section 35(1), a new claim introduced in an existing action is deemed to have been commenced on the same date as the original action, and the defendant would therefore otherwise be deprived of a limitation defence

116. In *Hemmingway v Smith Roddam* [2003] EWCA Civ 1342, Waller LJ encapsulated the test arising from the second principle as follows at [11]:

> "The test to be applied is thus, whether, even if a new claim is being made, the new claim arises out of "the same facts already in issue". The question is whether the factual issues under the old pleading were going to be litigated between the parties; if they were, then the court should take the view that section 35 had it in mind that the parties should be able to rely on a cause of action which substantially arises from those facts."

117. It is well established that the introduction of an allegation of dishonesty or fraud, where that was not previously alleged, amounts to a new cause of action. This also was an issue addressed in the *Paragon Finance* case, where Millett LJ stated at 406:

> "In my judgment it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action".
>
> In a later passage in his judgment, he said (at 418):
>
> "In the *Thakerar* case, Chadwick J observed that it would be "contrary to common sense" to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree. In all our jurisprudence there is no sharper dividing line than which separates cases of fraud and dishonesty from cases of negligence and incompetence."

118. In *Fattal v Wallbrook Trustees* [2010] EWHC 2767 (Ch), Lewison J, having referred to the judgment of Millett LJ in *Paragon Finance* said at [35]

> "It follows from this that the introduction of a claim based on dishonesty, where none existed before, is a new claim which does not arise out of the same facts as the previous claim or claims".

119. As regards fraudulent breach of trust or fiduciary duty, I have found that this claim is made in the existing Particulars of Claim and accordingly no new claim is involved. However, I also found that the allegation in the Particulars of Claim stood no realistic chance of success. In my judgment, there is nothing in the expanded particulars set out in the proposed Amended Particulars of Claim which further advances this claim or reflects that conclusion. Accordingly, permission to make that amendment is refused.

120. Aside from the issue of the applicable limitation period in a case of fraudulent breach a class 2 trust, I have found that the other claims against Woolf Seddon in the original pleading were time barred. It follows that the original action would not have proceeded to trial.

121. The claim for fraudulent misrepresentation is, on my interpretation of the original pleading, a new claim since previously the misrepresentation claim did not clearly allege fraud. I think that on balance it may be said to arise out of the same facts as the fraudulent breach of trust claim. However, for the reasons set out above I find that it has no prospect of success because both (a) there is no arguable basis for the allegation of fraud, and (b) as at the date of issue of the original claim it would have been out of time.

122. It is admitted by the claimants that the claim for conspiracy is new. The relevant paragraphs are appended to this judgment and I find them, at least in part, hard to follow. It is wholly unclear on what basis it is alleged that the Sparta Florida Agreement was "unlawful": para 20.2. The allegation is, at least clear, but it founders on the same twin obstacles that there is no factual basis to support an intention to infringe copyright and the limitation bar, applied as at February 2010. Moreover, on balance, I think that it does not arise out of substantially the same facts as the original pleading, since it alleges a deliberate combination between Woolf Seddon and the other defendants to the unlawful means. That is accordingly a further and distinct ground for refusing permission to amend.

123. The claim for knowing receipt/dishonest assistance (which is also admitted to be a new claim) appears designed to constitute a trust claim within section 21(1) of the 1980 Act. However, the analysis set out above as regards the original trust claim applies equally to this claim. I consider that if there was a trust at all, it was a class 2 trust, in the sense of a constructive trust imposed by way of an equitable remedy. As regards Woolf Seddon, I have already dealt with the allegation that they were in knowing or intentional breach of fiduciary duty. And aside from fraud or dishonesty, any such trust claim against Woolf Seddon was out of time when these proceedings were commenced.

124. Moreover, there is a further answer to this allegation of knowing receipt as against Woolf Seddon. Under the Sparta Florida Agreement, Woolf Seddon only received money in respect of copyright royalties pursuant to clause 4(a). Under that provision, one half of the sums then frozen relating to Kouchie and/or Dutchie in respect of royalties that had arisen in the UK and Ireland were to be paid to Woolf Seddon as solicitors for the Two Peaters. Aside from the fact that Woolf Seddon were obviously obliged to pass this money on to the Two Peters, the money was in respect of royalties accrued up to the date of the Sparta Florida Agreement. There is no provision for Woolf Seddon to receive any further money thereafter.

125. However, under the Virgin Agreements, replaced retroactively by the Music 10 Agreements, the members of MY had assigned all their publishing royalties to Virgin / Music 10. The period of the assignment under those agreements had not expired by November 1984. Accordingly, if and insofar as the monies which passed to Woolf Seddon under the Sparta Florida Agreement included royalties referable to a distinct copyright in Dutchie, the members of MY had no beneficial interest in or entitlement to those monies. This claim as against Woolf Seddon therefore has no chance of success.

Conclusion

126. Accordingly, I find that:

> i) Woolf Seddon are entitled to summary judgment on the claim against them as it stands. I consider that these proceedings are an attempt to turn a claim for professional negligence into a claim for fraud or dishonest breach of trust in order to overcome the obvious problems of limitation, and I regard the claim as wholly without merit.
>
> ii) The claimants' application for permission to amend the Particulars of Claim as regards Woolf Seddon is refused.

127. There is obviously no question of summary judgment as regards any of the other defendants since there is no application before the court on their behalf.

128. As regards the claimants' application for permission to amend the Particulars of Claim as regard the other defendants, the position is a little more complicated:

> i) The sixth, seventh, thirteenth and fourteenth defendants were not served with the application. The claimants accordingly accept that no order can be made as regards them. Reference to "the tenth to fifteenth defendants" below should be read as excluding the thirteenth and fourteenth defendants.
>
> ii) The remaining defendants were served and did not consent to the amendments but chose to take no part in the hearing of the application. However, the restriction under CPR rule 17.4 on permitting an amendment is mandatory. It therefore applies in their case as much as it does as regards Woolf Seddon, even though the claimants did not present any argument to the court as regards those other defendants. Accordingly:
>
> > a) The original claim for unlawful means/ unlawful interference with trade was pleaded against Woolf Seddon, Sparta Florida and the then tenth defendant (now the ninth defendant). The amendment in para 21 of the draft extends this allegation to what are now the tenth to fifteenth defendants. It is therefore a new claim as against the latter and as these allegations were not previously made against them, I consider that it does not arise out of substantially the same facts as the existing pleading. Since it would deprive them of a limitation defence, permission to make this amendment is refused.
> >
> > b) I have held that on balance the new claim of conspiracy is against Woolf Seddon does not arise out of substantially the same facts as in the original pleading. I reach the same view as regards that claim against Sparta Florida. The conclusion is that all the intentional wrongdoing that now are both the tenth to fifteenth defendants who were not the subject of any allegation of an intention to injure in the original Particulars of Claim and against whom the facts alleged are clearly new. Permission to introduce this claim by amendment is accordingly refused.
> >
> > c) The new trust claim and remedies for knowing receipt/ dishonest assistance are alleged against all the defendants and all (except the ninth defendant) ("Music Sales") are alleged to have acted dishonestly. No allegations of dishonesty were previously alleged against anyone other than Woolf Seddon. As regards all defendants other than Woolf Seddon and Music Sales, this is accordingly a claim that does not arise out of substantially the same facts and permission to introduce it is therefore refused. The difficulty in determining whether the claim against Music Sales arises out of substantially the same facts arises because of the lack of particularisation in para 23 of the original pleading. However, the allegation of knowledge on the part of Music Sales in para (v) of the particulars under the proposed para 22 of the Amended Particulars of Claim is new, and on balance I find that this claim against Music Sales also does not arise out of substantially the same facts. Since the alleged trust is a class 2 trust, the claim against Music Sales is barred in April 2011 and permission to amend is accordingly refused.
> >
> > d) In all other respects, the application for permission to amend concerning the defendants, other than the sixth, seventh, thirteenth and fourteenth defendants, is granted. That of course does not preclude any of those defendants from issuing an application for summary judgment.

APPENDIX

PROPOSED AMENDED PARTICULARS OF CLAIM: PARAS 20-21

"Inflicting harm by unlawful means/unlawful interference with trade/conspiracy

20. Further or alternatively, notwithstanding the generality, but in consequence of the totality, of the herein aforesaid facts and matters:

> 20.1 Under the terms of the Sparta Florida Agreement the Sixth to Eighth Defendants and the Tenth to Fifteenth Defendants and each of them purported to determine ownership of and/or authorise the exploitation of and/or be authorised the exploitation of and/or entitled to exploit copyright in Pass the Dutchie and distributed, or authorised the distribution of, monies that should have been paid by one or more of them and/or by a third party or third parties to the Claimants/Patrick Waite (as the case may be).
>
> 20.2 The First to Fifth Defendants (through the First Defendant) assisted and/or procured the Sixth to Eighth and the Tenth to Fifteenth Defendants to enter into the Sparta Florida Agreement with, and in the knowledge that, its terms and effect were as aforesaid.
>
> 20.3 The First to Eighth and Tenth to Fifteenth Defendants and each of them thereby deliberately combined together and/or intended to cause and/or knew that one or more of the other parties to the Sparta Florida Agreement intended to cause loss and damage to the Claimants/Patrick Waite (as the case may be) and furthermore intended to use unlawful means (namely infringement of copyright) in doing so.
>
> 20.4 The aforesaid conduct of each of the First to Eight and Tenth to Fifteenth Defendants was, or would be if it caused loss, (notionally) actionable as against each of the said Defendant at the suit of any one or more of the Sixth to Eighth and Tenth to Fifteenth Defendants (and also on behalf of the Claimants).

21. In the premises, the First to Eighth and the Tenth to Fifteenth Defendants and each of them:

> 21.1 conspired with the other in the herein aforesaid combination or common design to injure and/or to use unlawful means; and
>
> 21.2 inflicted the said harm by the said unlawful means; and
>
> 21.3 intended to injure or injure the Claimants/Patrick Waite (as the case may be)."

Note 1 'Kouchie' in Jamaican slang for a pot in which marijuana is kept; 'Dutchie' is a Dutch stewing pot in the same patois. [Back]

Note 2 i.e. as to who was entitled to be credited for Dutchie: see para 20 above [Back]

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