Neutral Citation Number: [2025] EWHC 542 (Ch)

Case No: BL-2023-001496

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

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

Date:17/3/2025

Before:

MASTER CLARK

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Between:

DLA PIPER UK LLP		**Claimant**
- and -		
(1)	**HENSHAWS FARMING LLP**	
(2)	**BENJAMIN DEAN**	
(3)	**STUART MICHAEL MELIA**	
(4)	**LISA HENSHAW**	
(5)	**LEE HENSHAW**	
(6)	**JAMES ALFRED DAVIDSON &**	**Defendants**
(7)	**MYERSON TRUST CORPORATION LIMITED**	
	(as administrators of the estate of the late Cyril Ford Middleton Henshaw)	

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Zoe Barton KC & Daniel Petrides (instructed by **DLA Piper UK LLP**) for the **Claimant**
Martin Budworth (instructed by **JMW LLP**) for the **2nd & 3rd Defendants**
Neil Berragan (instructed by **Pannone Corporate LLP**) for the **1st, 4th & 5th Defendants**
Richard Wilson KC & Sparsh Garg (instructed by **Myerson Limited**) for the **6th & 7th Defendants**

Hearing dates: 11 & 12 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Master Clark:

1. This is my judgment on the defendants' applications[1] to strike out the claim and/or for summary judgment on it.

Factual background, the parties and the claim

The Land

2. The underlying subject matter of this claim is land known as land at the north side of Gaw End Lane, Lyme Green, Macclesfield, Cheshire ("**the Land**"), which at the relevant time was undeveloped Green Belt land.

3. On 3 July 1998, the owner of the Land, Richard Stainer, died. His will dated 21 April 1994 created a trust over his residuary estate, including the Land. The beneficiaries of the trust were 2 individuals and 10 charities ("**the Charities**"), a number of which are household names.

4. On 29 March 2005, the will trustees transferred the Land to new trustees to hold it for the same beneficiaries on the terms of an express deed of trust of that date. I refer to the trustees from time to time holding the Land on those terms as "**the trustees**".

The parties

5. The claimant, DLA Piper LLP ("**DLA**"), is the former solicitor of the trustees. DLA brings this claim as assignee of the trustees' rights of action against the defendants under an assignment dated 12 October 2023 ("**the Assignment**").

6. The first defendant, Henshaw Farming LLP ("**the 2nd LLP**"), is a limited liability partnership. Its members at the relevant times were the second to fifth defendants, and the late Cyril (Joe) Henshaw, who died on 3 January 2021. Mr Henshaw's business was skip hire and waste disposal. The sixth and seventh defendants, James Davidson and Myerson Trust Corporation Limited, are the administrators of Mr Henshaw's estate ("**the administrators**").

[1] by notices dated 17 April 2024 (D6 & D7), 3 May 2024 (D1, D4 & D5) and 14 May 2024 (D2 & D3)

7. The second and third defendants, Benjamin Dean and Stuart Melia, describe themselves as having a professional background in property[2], and provided professional services to Mr Henshaw.

8. The fourth and fifth defendants, Lisa and Lee Henshaw ("**the Henshaw children**"), are the adult children of Mr Henshaw. They worked for him in his business, though they deny that they held management positions in it. They and the 2nd LLP are represented by the same solicitors and counsel. I refer to them together as "**the Henshaw parties**".

Factual background

9. In 2008, DLA agreed to act on a pro bono basis for the trustees in the sale of the Land. David Couch of BNP Paribas was instructed to market the Land as land agent.

10. In 2012, the trustees entered into negotiations to sell the Land to Mr Henshaw. However, an incident occurred, after which the trustees decided not to sell to him.

11. On 14 January 2013, Silk Park Developments LLP ("**the 1st LLP**") was incorporated as the corporate vehicle to buy the Land, using funds advanced by Mr Henshaw, but his interest in it was not disclosed to the trustees. Its members at or immediately after its incorporation were Mr Dean and Mr Melia, and Silk Park Farming Limited (of which Mr Melia was the director and shareholder). DLA and the first to fifth defendants allege that Mr Henshaw controlled the 1st LLP.

12. On 12 March 2013, the Land was transferred to the 1st LLP for the sum of £250,000, which was provided by Mr Henshaw. The TR1 ("**the Transfer**") included an overage agreement (in clause 11.3). This provided that overage (referred to as "Clawback") would be payable to the trustees in specified circumstances, including the granting of planning permission in respect of the Land and the further sale of part of the Land (not to be sold without the trustees' approval) within 40 years. The Transfer included:

> "11.3.7 [The 1st LLP] and [the trustees] will act in good faith with one another in relation to the application of this clause 11.3 and while this clause remains in force all transactions entered into between [the 1st LLP] and any third party shall be conducted in good faith and at arm's length and [the 1st LLP] will reply promptly to requests for information concerning the use, development or disposal of [the Land] …

[2] Defence, [26]. The administrators' case is that they are qualified chartered surveyors, who advised Mr Henshaw and acted on his behalf in the purchase of properties – D6 & D7 Defence [13.1]

11.3.8 [The 1st LLP] will not structure the Development or disposal of [the Land] in any manner where the principal purpose is to avoid or reduce payment of Clawback."

13. Clause 11.3.19 of the Transfer provided:

> "By this provision the parties apply to the Land Registry for a restriction to be entered in the proprietorship register of the Registered Title, such restriction to follow form N as set out in schedule 4 to the Land Registration Rules 2003 and being worded as follows: …"

14. I refer to the restriction provided for by the Transfer as "**the Restriction**".

15. On 17 June 2013, the Henshaw children became members of the 1st LLP.

16. In the usual way, the 1st LLP submitted the Transfer to the Land Registry. The registration of the 1st LLP as proprietor was completed on 27 June 2013. However, the Restriction was not registered on the register of title of the Land.

17. On 14 March 2014, the 1st LLP entered into an option agreement to sell the Land to Bovis Homes (now Vistry Homes). The trustees were not informed of this agreement nor of the negotiations leading up to it.

18. On 3 November 2014, the 2nd LLP was incorporated. Its members on incorporation and at all relevant times were the second to fifth defendants, and, until his death, Mr Henshaw.

19. On 1 April 2015, the 1st LLP transferred the Land to the 2nd LLP for £1 ("**the 2015 Transfer**"). The trustees were not informed of this nor of the negotiations leading up to it. On 28 April 2015 the 1st LLP was dissolved. The trustees were also not informed of this. The effect of the 2015 Transfer was to defeat the trustees' entitlement to overage under the Transfer.

20. On 15 May 2015, the 2015 Transfer was registered at the Land Registry.

21. On 9 January 2018, the trustees found out that the Restriction was not registered when Mr Couch downloaded an office copy entry of the registered title of the Land. In June 2018, the 2nd LLP and Bovis Homes applied for planning permission.

22. On 15 July 2019, DLA on behalf of the trustees asked the 2nd LLP to consent to the registration of the Restriction on the title to the Land. No substantive response was received. On 3 January 2021, as noted above, Mr Henshaw died.

23. On 28 January 2021, outline planning permission was granted; and on 5 September 2022, reserved matters were approved. A few days later, on 9 September 2022, the sale of the Land to Bovis Homes completed for £10,389,560. DLA estimates that under the Transfer, the trustees would have been entitled to more than £5 million by way of overage as a result of the planning permission and sale to Bovis Homes. The vast majority of this sum would have gone to the Charities.

24. On 12 October 2022, draft particulars of claim, in which the trustees were claimants, were served on the 2nd LLP.

25. On about 28 October 2022, Mr Dean and Mr Melia retired from the 2nd LLP, receiving about £5 million. The remainder is held in the bank account of the 2nd LLP and the Henshaw children, pursuant to undertakings.

26. On 17 April 2023, DLA formally terminated its retainer with the trustees. The trustees then retained new solicitors, Pinsent Masons, who advised and acted for them in relation to the negotiation, drafting and execution of the Assignment.

27. The Assignment was, as noted above, entered into on 12 October 2023. It included the following terms. By clause 2 the trustees assigned to DLA the 'Rights', defined as "all rights and/or causes of action…arising out of or in connection with" various matters including the overage provisions in the Transfer, the Transfer itself, and the 2015 Transfer.

28. Clause 3.1 provides for DLA to "hold on bare trust for the sole benefit of [the trustees] all Damages it receives."

29. Clauses 3.2 and 3.3 provide: that

> "3.2 Without prejudice to paragraph 3.1, [DLA] shall be entitled to claim and retain any sum it is awarded by the Court in respect of its costs and expenses incurred prior to and in connection with or arising out of any proceedings it brings in respect of the Rights and the enforcement of any judgment in any such proceedings regarding the Rights.
>
> 3.3 In the event of a settlement being reached before or after any such proceedings are taken, notwithstanding paragraph 3.2, the Assignors shall first be entitled to a sum from all Damages received by the Assignee equal to the amount to which the Original Trustees would have been entitled under the First Transfer, plus a reasonable amount in respect of interest thereon for the period since they would have been paid from the Vistry Sale. For the avoidance of doubt any surplus thereafter shall be retained by the Assignee for the purpose of its costs and expenses in accordance with paragraph 3.2."

30. By clause 5, the trustees covenant to take such action and execute such documents as may be reasonably required for the pursuit of any claim.

31. By clause 6.2. the parties agreed that:

> "[DLA] shall be solely responsible for the management and conduct of any proceedings initiated by it in respect of the Rights (if any and including as to terms on which such proceedings may be brought to an end). [DLA] shall in its absolute discretion be entitled to instruct lawyers and to manage and control all proceedings (including as to their progression and termination) in relation thereto."

32. On 19 October 2023, DLA gave notice of the Assignment to the defendants.

Claim

33. The claim was issued on 8 November 2023. It alleges that the first to fifth defendants and Mr Henshaw procured the 1st LLP's breaches of the Transfer and/or conspired to injure the trustees by unlawful means.

34. All the defendants have filed Defences defending the claim on various grounds, and have issued Part 20 claims against each other, which give conflicting accounts of the control of the 1st LLP and the 2nd LLP, and the motivations for the Transfer and the 2015 Transfer.

35. The defences (common to all defendants) which are the basis of the applications are that:
    (1) the claim is barred by limitation;
    (2) the Assignment is unenforceable by reason of maintenance and/or champerty.

36. The applications were issued before the deadline for Replies to the Defences.

37. In its Replies, DLA
    (1) relies upon section 32 of the Limitation Act 1980 as postponing the commencement of the limitation period from 1 April 2015 (the date of the 2015 Transfer) to 9 January 2018 (the date when the trustees first knew of it);
    (2) denies that the doctrine of maintenance applies to the Assignment because DLA has a legitimate commercial interest in the trustees' claims;
    (3) denies that the doctrine of champerty applies to the Assignment because DLA does not stand to receive a "division of the spoils";
    (4) denies that the Assignment is invalidated by either the statutory or common law rules applying to solicitor-client relationships.

Summary judgment – legal principles

38. CPR 24.2 provides, so far as relevant:

"The court may give summary judgment against a claimant … on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, … or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

39. A comprehensive summary of the principles emerging from the relevant caselaw was provided by Cockerill J in *Daniels v Lloyds Bank* [2018] EWHC 660 (Comm) [49], recently adopted by Nicklin J in *Lawrence v Associated Newspapers* [2023] EWHC 2789 (KB); [2024] 1 W.L.R. 3669 at [77]:

"(i) The burden of proof is on the applicant for summary judgment;

(ii) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

(iii) The criterion 'real' within CPR r 24.2(a) is not one of probability, it is the absence of reality: Lord Hobhouse of Woodborough in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, para 158;

(iv) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] CP Rep 51, para 8;

(v) The court must be astute to avoid the perils of a mini-trial but is not precluded from analysing the statements made by the party resisting the application for summary judgment and weighing them against contemporaneous documents (ibid);

(vi) However disputed facts must generally be assumed in the claimant's favour: *James-Bowen v Comr of Police of the Metropolis* [2015] EWHC 1249 (QB) at [3];

(vii) An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all the evidence: *Apovdedo NV v Collins* [2008] EWHC 775 (Ch);

(viii) If there is a short point of law or construction and, 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: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725;

(ix) 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. 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: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] Lloyd's Rep PN 526; *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

(x) The same point applies to an extent to difficult questions of law, particularly those in developing areas, which tend to be better decided against actual rather than assumed facts: *TFL Management Services Ltd v Lloyds TSB Bank plc* [2014] 1 WLR 2006, para 27."

40. Proposition (x) is supported by the remarks of Lord Collins in *Altimo Holdings and Investment Ltd v Kygryz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [84]:

> "The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e g *Lonrho Plc v Fayed* [1992] 1 AC 448, 469 (approving *Dyson v Attorney Genera*l [1911] 1 KB 410, 414: summary procedure ought not to be applied to an action involving serious investigation of ancient law and questions of general importance . . .); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 740—741 (Where the law is not settled but is in a state of development . . . it is normally inappropriate to decide novel questions on hypothetical facts); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557 (strikeout cases); *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon* Ltd [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function to decide difficult questions of law which call for detailed argument and mature consideration."

41. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.

Striking out – legal principles

42. CPR 3.4(2) provides, so far as relevant:

> "**Power to strike out a statement of case**
> (2) The court may strike out a statement of case if it appears to the court–
> (a) that the statement of case discloses no reasonable grounds for bringing …the claim;"

43. As noted in the 2024 White Book (para 3.4.21), there is a considerable overlap between the court's powers under CPR Part 24 and r.3.4; and the court has a discretion to treat an application made under CPR 3.4 (2)(a) as if it were an application under Part 24.

44. There is, however, a distinction between the two types of application in respect of limitation claims. As explained in *Lawrence* at [74], a claim can never be struck out under CPR r.3.4(2)(a) on the basis of a limitation defence. This is because, as limitation must be raised as a defence by a defendant, the particulars of claim will axiomatically not have

failed to disclose any reasonable ground for bringing the claim on their face. Accordingly, this part of the applications must be dismissed.

Limitation – legal principles

45. Section 32 of the 1980 Act provides, so far as relevant:

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

46. The burden of proof is on the claimant seeking to rely on s.32: *Paragon Finance v Thakerar*, [1999] 1 All ER 400 at 418.

Deliberate concealment

47. The leading case on s.32 is *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679. This decision reviews and re-states the law on deliberate concealment within the meaning of s.32(1)(b).

Fact relevant to the claimant's right of action

48. As to "a fact relevant to the plaintiff's right of action", as explained in *Canada Square*, at [96], the right of action must refer to the right of action asserted by the plaintiff in the proceedings before the court, and a "fact relevant to the plaintiff's action" means a fact without which the cause of action is incomplete: see, for example, *Arcadia Group Brands Ltd v Visa Inc* [2015] Bus LR 1362.

Concealment

49. As to concealment, this means keeping something secret, by either
    (1) a positive act of concealment - taking active steps to hide, or

(2) a withholding of the relevant information - failing to disclose it: [98].

50. Although most uses of "conceal" in the active mood connote intentionality or deliberateness, the use of the word "deliberately" underlines the requirement that the relevant fact must have been "deliberately concealed": [99]. There is no requirement that the concealment must be in breach of any duty, whether that be either a legal duty or a duty arising from a combination of utility and morality: [104].

"Deliberately"

51. In order to conceal deliberately, the defendant must have considered whether to inform the claimant of the relevant fact and decided not to: [108]. Recklessness is not sufficient.

52. Lord Reed at [109] summarised his conclusions as to s.32(1)(b):

> "[The law] should return to the clarity and simplicity of Lord Scott's authoritative explanation in *Cave* (para 60):
>
> > 'A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question.'
>
> What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question."

53. As to s.32(2), the "breach of duty" referred to in that subsection has a broad meaning, including any form of legal wrongdoing which can form the subject matter of a claim: *Giles v Rhind (No. 2)* [2008] EWCA Civ 118; [2009] Ch 191. This would, in my judgment, extend to an unlawful means conspiracy, or inducement of breach of contract.

Reasonable diligence

54. The law as to reasonable diligence is helpfully summarised *in Bilta v SVS Securities plc* [2022] EWHC 723 (Ch); [2022] BCC 833 at [31], from which the following principles can be derived:

(1) The claimant must establish that they could not have discovered the concealment of the relevant facts without exceptional measures which they could not reasonably have been expected to take. The test is 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: *Gresport*

Finance v Battalagia [2018] EWCA Civ 540 at [41] approving Millett LJ's statement in *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418.

(2) Section 32 assumes that the claimant desires to discover whether or not a wrong has been committed, and that there must therefore be an anterior "something" to put a claimant on notice of the need to investigate if there has been a concealment of the wrong: *Law Society v Sephton* [2004] EWCA Civ 1627, [2005] Q.B. 1013 at [116]; *Gresport Finance v Battalagia* [2018] EWCA Civ 540 at [41].

(3) Although the question what reasonable diligence requires may have to be asked at two distinct stages:
   (i) whether there is anything to put the claimant on notice of a need to investigate, and
   (ii) 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 of the relevant facts: *OT Computers v Infineon Technologies AG* [2021] EWCA Civ 501 at [47].

(4) 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: *OT Computers v Infineon Technologies AG* [2021] EWCA Civ 501 at [47].

(5) The words "could with reasonable diligence" refer to an objective standard (i.e. what the claimant could have learned/done, not merely what s/he in fact did learn/do). That objective standard is informed by the position of the actual claimant, and not by reference to some hypothetical claimant: *OT Computers v Infineon Technologies AG*, [2021] EWCA Civ 501 at [48].

(6) The test as to when the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered the same must be referable to what is needed properly to plead out the claim: *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] WTLR 999 at [56]; *FII Group Test Claimants v HMRC* [2020] UKSC 47 at [184] to [192].

(7) What is required is an ability in the claimant to plead a complete cause of action: *Arcadia Group Brands v Visa* [2015] EWCA Civ 883 at [48] to [49]. By this is meant an ability to plead a viable claim, that is, one that will not be struck out

because a necessary element of the cause of action cannot be asserted or because the necessary particularity cannot be pleaded. A viable claim does not require the claimant to need to know or have been able to discover all of the evidence which it later decides to plead. But it does require the putative claimant to be able to plead the precise case that is ultimately alleged: *Barnstaple Boat Co v Jones* [2007] EWCA Civ 727. In a case of fraud, discovery of the alleged fraud means knowledge of the "essential facts constituting the alleged fraud": *Cunningham v Ellis* [2018] EWHC 3188 Comm at [87].

55. The fact-sensitive nature of the inquiry under s.32 was emphasised in *OT Computers* [27]:

> "… there will be cases… where discovery of the relevant facts involves a process over a period of time as pieces of information become available. In such cases it may be difficult to identify the precise point of time at which a claimant exercising reasonable diligence could have discovered enough, either to plead a claim or (as the case may be) to begin embarking on the preliminaries to the issue of proceedings. In some cases identification of that point of time may be critical. In others, such as the present, it may be unnecessary to identify it with precision. Nevertheless the uncertainty to which this exercise may give rise is inherent in the section."

56. In this case, the defendants rely upon publicly available documents of which, they contend, the trustees could, with reasonable diligence been aware. As to this, the Court of Appeal in *DSG Retail Ltd v Mastercard* [2020] EWCA Civ 671; [2020] Bus LR 1360 said:

> "[69] … The question of whether there was something to put the claimants on notice had to be determined on an objective basis, but as Lord Hoffmann explained in *Peconic* that "leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown". As Henderson LJ agreed in *Gresport Finance*, whether the claimant could with reasonable diligence have discovered the relevant concealment is a question of fact in each case.
>
> [70] In this case, the Tribunal considered some of the things that the claimants might have known about the alleged infringement, but did not ask itself what precisely had put the claimants on notice of the need to investigate a potential claim against Mastercard. … The Tribunal wrongly assumed that the claimants were aware of important press articles as I have already explained. As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the

> public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents."

57. Finally, as a matter of the construction of section 32, the acts or omissions of an agent of the claimant are not to be attributed to the claimant: *Peco Arts Inc v Hazlitt Gallery* [1983] 1 WLR 1315; because the fact that the section expressly provides that references to the defendant are to its agent means that references to the claimant are not to their agent. *Peco Arts* was approved in *Allison v Horner* [2014] EWCA Civ 117 at [15], in which it was also held that "the fact that the claimant's agent could with reasonable diligence have discovered the alleged deceit does not start the limitation period running".

Summary judgment and section 32: overview

58. DLA submitted the application of s.32 to a case, which requires the court to conduct an intensely fact-sensitive inquiry, is paradigmatically inappropriate for summary judgment. This, it submitted, is a logical extension of the principles applicable to summary judgment: it is hard to see how the court could resolve this inquiry without conducting a mini-trial, without determining disputed issues of fact, and without running the risk that relevant material may emerge during disclosure and evidence.

59. In this regard, DLA relied upon *Lawrence*, which itself concerned a summary judgment application in a s.32 case, as instructive.

60. In *Lawrence*, at [82], Nicklin J referred to the earlier *MGN* litigation in which Fancourt J had refused summary judgment on grounds of limitation, on the basis that the relevant facts pertinent to the s.32 inquiry would have to be determined at trial ([2022] EWHC 1222 (Ch)). Permission to appeal was then refused by Andrews LJ, who observed that:

> "The question whether a claimant has sufficient information to know that they have a worthwhile… claim, is dependent upon a factual investigation which is **quintessentially inapposite for summary judgment**. So too is the issue of reasonable diligence, which requires a two-stage enquiry as to whether there was anything to put a claimant on notice of a need to investigate and, if so, what a reasonably diligent claimant would have discovered upon some investigation." (emphasis added).

61. Those remarks were then cited with approval in *Lawrence* at [189] – [190], where Nicklin J also refused to grant summary judgment, and instead permitted the s.32 case to proceed to trial.

62. DLA submitted that this was sufficient to dispose of the summary judgment limb of the applications on the limitation issue: DLA's s.32 case is "quintessentially inapposite for summary judgment", and could only be disposed of fairly at a full trial.

63. The defendants relied upon *Davy v 01000654 Limited* [2018] EWHC 353 (QB) in support of several propositions, some of which are not contentious and fall within the propositions set out at para 54 above.

64. However, the administrators relied upon *Davy* for the proposition that where there is no "dispute of primary fact over the happening of an event which, if established, could be crucial in triggering the start date", but merely a dispute as to what conclusions may be drawn, then this "can properly be considered and determined in accordance with the Part 24 benchmark": *Davy* at [17]. This statement was however made in the context of section 14A(5) of the Limitation Act, and where the correspondence in evidence meant that there was no real dispute about the state of knowledge of the claimant. In this case, there are factual issues both about the trustees' knowledge and as to the matters relevant to reasonable diligence.

65. The administrators also submitted that issues over "section 32 concealment are not, at least as a matter of principle, outside the proper remit of CPR 24 and some of the recent reported decisions demonstrate as much": *Davy* at [20]. As to this, first, I note that the majority of the authorities cited above on section 32 were decisions made following a trial (*FII Group*, *Bilta*, *Seedo*, *DSG Retail*, *Canada Square*), a trial of a preliminary issue (*OT Computers*, *Gemalto*, *Law Society v Sephton*) or where summary judgment was refused (*Barnstaple Boat*).

66. In addition, *Paragon Finance v Thakerar* decided (on appeal) that the judge determining an application for permission to amend to include a claim otherwise time-barred was wrong to conclude, in summary proceedings in the absence of disclosure and without the benefit of cross examination, that the claimants could not with reasonable diligence have discovered the fraud before the relevant date – affirming the fact-sensitive nature of the decision.

67. For these reasons, to the extent that the judge's remarks in *Davy* conflict with those of Andrews LJ in *Lawrence*, I prefer the latter.

Limitation - issues

68. DLA's position is that it has a real prospect of success on the following issues, alternatively that those issues give rise to novel questions of law which should be determined at trial following full findings of fact:

(1) whether the defendants deliberately concealed the 2015 Transfer from the trustees;
(2) whether the trustees could with reasonable diligence have discovered the concealment before 8 November 2017 (6 years before the issue of the claim).

Deliberate concealment

69. There is no dispute that the defendants (which, for this purpose, I use to mean the first to fifth defendants and Mr Henshaw) did not inform the trustees of the 2015 Transfer, although they knew of it.

70. DLA's case[3] is that:
(1) the defendants' failure to disclose the 2015 Transfer was a concealment;
(2) it is to be inferred that the defendants did not disclose the 2015 Transfer with the intention of concealing it;
(3) in any event, in all the circumstances, the fact of the 2015 Transfer was unlikely to be discovered by the trustees for some time (and was therefore deliberate within the meaning of s.32(2) of the 1980 Act).

71. The administrators submitted that the fact that the 2015 Transfer was registered meant that there was no real prospect of DLA showing:
(1) the fact that the 2015 Transfer was concealed; or
(2) that the defendants intended to conceal it i.e. that the defendants considered whether to inform the trustees but chose not to do so (see [108] in *Canada Square*).

72. The second and third defendants also rely upon the registration of the 2015 Transfer as rendering it "public knowledge".

73. The Henshaw parties' pleaded position is no facts have been pleaded by DLA which would support any postponement or extension of the limitation period. In his oral submissions, their counsel sought to rely upon an article in the local press (Macclesfield Today- February/March 2016) as being inconsistent with an intention to hide the 2015 Transfer. However, the article is pleaded as publicising that Mr Henshaw had a "controlling interest" in the Land (not the fact of the 2015 Transfer), is not pleaded in relation to limitation (as to which no positive case is pleaded by the Henshaw parties). In any event, DLA have, in my judgment, a real prospect of showing that its terms do not disclose the 2015 Transfer.

[3] See Reply to Henshaw parties' Def, §21, Reply to D2 & D3's Defence, §5, Reply to administrators' Defence, §9

74. In my judgment, in determining whether the defendants concealed the 2015 Transfer, the focus must be on what they did or omitted to do. Putting something on a public register does not, in the in the natural sense of the word, amount to informing, telling or disclosing to a claimant that fact. Whether the 2015 Transfer could have come to the trustees' knowledge by some other means is not in my judgment relevant for this purpose. Thus, the fact that the 2015 Transfer was registered and therefore discoverable by searching the Register is not relevant to whether the defendants concealed it. They did not disclose it to the trustees, - that is enough for concealment.

75. The administrators submitted that this was not enough, relying on *Canada Square*:

> "98. …the word conceal means to keep something secret, either by taking active steps to hide it, or by failing to disclose it. A person who hides something can properly be described as concealing it, whether there is an obligation to disclose it or not. For example, an elderly lady who was afraid of burglars might conceal her pearls before going to bed, without any implication that she was obliged to leave them lying in plain sight. Some people use cosmetics (concealer) to conceal blemishes in their skin, without any implication that they are under an obligation to reveal the imperfections.
>
> 99. The position seems to me to be the same, as a matter of ordinary English, where concealment takes the form of the withholding of information with the intention of keeping it secret. For example, Samuel Pepys concealed the contents of his diary by writing it in code; but that does not imply that he was under an obligation to reveal what he had written. Someone who decides not to tell anyone that he has been diagnosed with cancer can properly be described as concealing his illness, without any implication that he is under an obligation to share the information."

76. The administrators' counsel submitted that putting something on a public register is inconsistent with intending to keep it secret, notwithstanding that it did not involve direct communication. As to this, the context of the passage is in my view, significant. Lord Reed is discussing whether there is a duty of disclosure inherent in the meaning of "concealment". He concludes that there is not and that what is required is an intention to keep secret. There is no discussion in *Canada Square* as to whether putting something on a public register is inconsistent with an intention to keep secret, and the authorities relied upon by the administrators (discussed below) are either obiter or inconsistent with *DSG Retail* (a Court of Appeal decision). I am not satisfied that DLA have no real prospect of showing that putting something on a public register is consistent with concealment.

77. In particular, I am not satisfied that DLA have no real prospect of showing that the act of making information available on a public register is not inconsistent with concealing it, if the claimant is unlikely to search for or become aware of it from that register.

78. As to intentionality or deliberateness, the administrators relied on the following passage in *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 at [60] per Lord Scott (approved by Lord Reed in *Canada Square* at [68]):

> "In many cases the requisite proof of intention might be difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult."

79. This general statement is of limited help. First, it does not in my judgment, preclude DLA from relying upon their inferential case as to the defendants' intention, nor on their case that the existence of the 2015 Transfer was unlikely to be discovered by the trustees for some time.

80. Secondly, it is implicit in *DSG Retail* (see para 56 above) that information in the public domain can be deliberately concealed – since, unless this has occurred, the question of reasonable diligence cannot arise. Thus, the fact that the 2015 Transfer was registered is not sufficient in itself to negative concealment or the intentionality of that concealment.

81. Thirdly, the purpose of registering the 2015 Transfer was not to inform the trustees of its existence; and the trustees were not party to or aware of it. The purpose of the registration was to enable the 2nd LLP to acquire legal title to the Land. Thus, in my judgment, registration of itself does not negate either the fact of concealment or its intentionality.

82. I turn to the cases relied upon by the administrators in support of the proposition that the public availability of a document is sufficient to prevent deliberate concealment.

83. The first is *Re Philip Powis Ltd* [1998] BCC 756. The administrators rely upon the following passage in the judgment of Morritt LJ at 799C:

> "But assuming that point in his favour I find it hard to see how concealing the resolution to wind up or the intention to dissolve the company can be the concealment of a fact relevant to Mr Harrison's right of action. Nor, given the publicity required by [the] Insolvency Act to be given to the resolution to wind up and the final meeting and accounts of the liquidator, is a case of deliberate concealment likely to be made out. In my view this point is more ingenious than sound."

84. As to this, the passage relied upon was *obiter*. In any event, DLA has in my judgment a real prospect of success in arguing that publishing a resolution to wind up a company, the

final meeting and the accounts of the liquidator is, as a matter of fact, giving a far greater degree of publicity than registering a transfer of land.

85. The second decision relied upon is *Aziz v B&S Partnership Ltd* [2023] EWHC 648 (Ch), a claim for damages in tort in respect of a share transfer which was registered with Companies House. At [121(v)], ICC Judge Mullen stated:

> "Even if it could be said that there was a claim against Mrs Bhandari based on the registration of the transfer in 2009, which there cannot as there is no reason at all to think that she was involved in the transfer or the registration in a way that was improper, such a claim is time-barred by reason of sections 2 and 21(3) of the Limitation Act 1980, which provide that a claim in tort or for breach of fiduciary duty must be brought within six years of the accrual of the cause of action. The conditions for the postponement of the running of the limitation period under section 32 of that Act cannot apply. No fraud is alleged on the part of Ms Bhandari (and I am satisfied there was none) and a plea of deliberate concealment cannot succeed given that the share ownership was a matter of public record and could be seen on the records maintained at Companies House."

86. Again, the passage relied upon was *obiter*, and not the subject of any reasoned argument. In particular, the judge was not referred to *OT Computers*. As to the third decision relied upon, *South Bank Hotel Management Co Ltd v Galliard Hotels Ltd* [2024] EWHC 2484 (Ch), the passage relied upon is at [243]:

> "Other than not positively informing Investors, no steps were taken in 2008 to hide the Annex Lease Scheme. As noted in paragraph 159, the Lease and the Underlease were registered at HM Land Registry."

87. There is no discussion or articulation of the reasons for this conclusion, and the judge was not referred to *DSG Retail* or *OT Computers*.

88. These cases are in my judgment insufficient to support the administrators' submission that the existence of publicly available documents negates concealment; and I reject that submission. In my judgment, this is a paradigm instance of a fact sensitive issue where disclosure (or cross examination) may well reveal that the defendants had an intention to hide by, for example, hoping and expecting that the trustees would not look at the Land Register. The inference of intentional concealment could, in my judgment, properly be drawn from failure to inform the trustees of the 2015 Transfer, in the context of the obligation of good faith in the Restriction (see *Canada Square* at [100] and the subsequent events (which evidence the motive for the alleged concealment). I am not therefore satisfied that DLA have no real prospect of showing that the defendants deliberately concealed the 2015 Transfer.

Section 32(2)

89. The administrators' pleaded case[4] as to whether any concealment (which they deny) was deliberate is that Mr Henshaw was not aware until May 2018 that the 2015 Transfer might amount to a breach of the provisions of the Transfer, and at all times until his death intended the trustees to receive the overage to which they were entitled under the Transfer. This is denied by DLA[5]. Plainly, the issues raised there are fact sensitive and unsuitable for summary determination.

90. In their skeleton argument, the administrators raised a new point: that DLA have not in their Reply pleaded that the defendants deliberately committed a breach of duty.

91. However, in its particulars of claim, DLA pleads that:
    (1) the defendants knew the purchaser would breach its obligations: §17.1;
    (2) they intended to induce the purchaser's breach of the transfer: §17.2; and
    (3) they did so "wrongfully and with intent to injure the trustees": §18.

    and at §8 of its Reply that
    (1) the true reason for the 2015 Transfer was to avoid the obligations to the trustees under the Transfer (referring back to §§17 and 18 of the particulars of claim);
    (2) Mr Henshaw intended at all times before the Transfer to cause the transfer of the Land to another party;
    (3) that intention was inconsistent with the obligations which the 1st LLP freely undertook to the trustees by the transfer i.e. the payment by the 1st LLP of overage;
    (4) this evidences his intention that any contractually enforceable payment of overage be avoided.

92. In addition, at §11, DLA deny that Mr Henshaw did not know he was committing a breach of duty. Implicit in this is the allegation that he was committing a breach of duty.

93. I therefore reject the submission that DLA have not pleaded that the defendants deliberately committed a breach of duty. It is true that that the Reply does not specifically refer to s.32(2), which is a deeming provision in respect of the requirements of s.32(1)(b), but the material facts on which DLA relies are in my judgment sufficiently pleaded.

Reasonable diligence

94. As to this, the administrators' case is that the trustees could with reasonable diligence have discovered the 2015 Transfer at the time it was registered, or, in any event, before 8 November 2017, given that acting reasonably and advised by DLA, they could have:

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[4] Defence, §15

[5] Reply to the administrators' Defence, §11

(1) ensured that the Restriction was entered on the registered title to the Land, as provided for by clause 11.3.19 of the Transfer;
(2) undertaken periodic checks of the Land Registry to check that there was no disposition of the Land in breach of the Transfer;
(3) set up an online property alert notifying them of any change to the registered title to the Land.

(Defence, §15)

95. The second and third defendants also relied upon the trustees' failure to check whether the Restriction had been registered, and submitted that reasonable diligence required such checking.

Whether DLA should have exercised reasonable diligence

96. DLA accepts that it is the trustees' knowledge before the Assignment that is relevant for these purposes, and that it is fixed or burdened with that knowledge.

97. In his oral submissions, the administrators' counsel submitted that reasonable diligence has to be assessed by reference to DLA (since it is now the claimant) and not to the trustees.

98. In support of this they submitted that this followed from a plain reading of the Act which refers to the "plaintiff". They also relied upon *Jackson v Thompsons Solicitors* [2013] EWHC 2578 (QB), a decision (on appeal from Master Cook) of Nicola Davies J (as she was).

99. In *Jackson*, the claimant claimed as assignee of various claims from the liquidator of a firm of solicitors referred to as "GWM". The claims concerned the failure of an application for a Group Litigation Order ("GLO") brought by GWM on behalf of a number of coal miners in respect of personal injuries suffered in the course of their employment with British Coal Corporation. The application for a GLO was opposed by the then defendants. At a hearing before Sir Michael Turner, at the time the judge in charge of the Coal Health COPD Compensation Scheme, Sir Michael dismissed GWM's application with costs in a judgment dated 18 May 2006. Subsequently, GWM went into liquidation.

100. The claimant, as assignee of GWM's claims, then sought to recover about £75 million in damages for conspiracy and other causes of action from the solicitors for the defendants in the GLO application. The claimant's case was that the defendants entered into an unlawful means conspiracy to cause the failure of the GLO by causing Templeton (the

miners' insurer) to wrongly withdraw its funding under the terms of an ATE policy. This unlawful conduct is said to have caused damage to GWM.

101. An issue in the appeal was whether the claimant could rely on section 32(1), and in particular, whether the claimant could with reasonable diligence have been aware of correspondence in March 2005 between the defendants and Sir Michael Turner. As to this, Nicola Davies J held that there was no evidence of disclosure of the correspondence to GWM around the time it was sent. She also considered whether the claimant could with reasonable diligence have discovered the letter. The judgment does not set out the date of the assignment to the claimant. However, it is clear from [36] of the judgment that the relevant events for the purpose of considering this issue occurred after the assignment to the claimant, when GWM's cause of action had passed to him.

102. This case is therefore of no help to the administrators in their argument that events and knowledge of the claimant before they acquired the cause of action are to be taken into account for the purpose of section 32(1).

103. The administrators also relied on *OT Computers*, and the emphasis in that case on whether the "actual claimant" could with reasonable diligence have discovered the alleged concealment, and not some "hypothetical claimant" (see [38], [48], [59]. These passages are not however directed to the point at hand. In *OT Computers*, it was held that a claimant which was not in fact carrying on business should not be treated as though it were at the relevant times: [61]. This in turn meant that the steps which the claimant company could reasonably be expected to take (on the facts of that case, to discover that it had been a victim of a price-fixing cartel which had been the subject of published regulatory proceedings and press coverage) were less intensive than those which might be expected of a company which was actually still trading day-to-day. For that reason, *OT Computers* also does not support the administrators' submission.

104. In my judgment, the reference in section 32(1) to "the plaintiff" refers to the person in whom the cause of action is vested from time to time. In this case, it refers to the trustees until the Assignment, and thereafter to DLA. The interpretation contended for by the administrators is in my judgment, wrong in principle, and contrary to the policy of the section as expressed in *Canada Square* at [108]:

> "[T]he defendant **must have considered whether to inform the claimant of the relevant fact and decided not to.** So construed, section 32(1)(b) strikes a balance between the interests of the claimant and the defendant, as Parliament intended. If the defendant has concealed a fact from the claimant, and has done so deliberately, **that is to say knowingly**, then he has the means to start the limitation period running by disclosing the fact. If he does not do so, but **chooses to keep the**

> **claimant in ignorance of a fact** which she requires to know in order to plead her claim, then it is just that the defendant should be deprived of a limitation defence." (emphasis added)

105. On the administrators' interpretation, the defendant would need to tell not just the person in whom the cause of action is currently vested, but everyone who might become an assignee. It would also open up an argument that the knowledge of the assignor is not to be taken into account, which would also plainly be contrary to the policy of the section.

106. Finally, and in my judgment, conclusively, the administrators have only pleaded that the trustees could have with reasonable diligence discovered the 2015 Transfer. They have not pleaded that DLA could have (see para 91 above), and this is a complete bar to their relying on it.

Whether the trustees were on notice or should have been on notice of the need to investigate

107. The administrators relied upon the facts that the trustees:
    (1) included Mr Anderson who was experienced in construction and property development; and who liaised with BNP Paribas with respect to the development of the Land even after the 2015 Transfer;
    (2) formed a "steering committee" dedicated to focussing on the sale and development of the Land;
    (3) instructed BNP Paribas as a land agent, who knew that they could access the Land Registry and in fact did so within minutes in January 2018;
    (4) instructed DLA as its solicitors.

108. These facts they submitted, justified concluding that the trustees could, exercising reasonable diligence, have carried out the steps set out in §15 of their Defence (see para 89 above.

109. DLA's position is as follows.

110. First, they say, the trustees had no reason to suspect that the defendants were conspiring to avoid the overage obligations in the Transfer by disposing of the Land without their approval, or (after April 2015) that the 1st LLP no longer owned the Land.

111. There was, they say, no reason for the trustees to mistrust the 1st LLP. In relation to the Transfer, the 1st LLP had been represented by a reputable firm of solicitors, had freely entered into the obligations in the Transfer (including the good faith obligations), and had concealed its connections to Mr Henshaw.

112. In addition, they submitted, "reasonable diligence" does not require that parties should be suspicious of their contractual counterparties. In *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 at 501, Simon Brown LJ summarised the argument, advanced by the defendant in that case, as "never trust anyone in business; always make inquiries", before continuing "I utterly reject any such principle. Such an attitude in my judgment involves 'exceptional measures', not 'reasonable diligence'".

113. DLA's case is that the trustees did not expect the overage obligations to take effect until after the finalisation of the local authority's local plan ("the Local Plan"). They rely on an email from Mr Couch to one of the trustees, Mr Anderson, on 23 September 2016, in response to a request for an update, which states that:

> "the timetable would most likely see the plan adopted next summer (2017) and if an application followed on [the Land] this might be determined by the start of 2018. So a way to go yet but I would remain positive that there will be a good outcome in the next 24 months"

114. DLA rely on the fact that the chain of events which resulted in Mr Couch discovering the 2015 Transfer was set in motion by further request on 8 January 2018 for an update on developments since the adoption of the Local Plan (which had occurred in July 2017).

115. Finally, DLA's case is that the trustees also believed until January 2018 that their interest *was* protected by the Restriction - which would have resulted in them being informed if there was an attempted disposal of the Land. They rely on Mr Couch's emails on 8 and 9 January 2018.

Ensuring registration of the Restriction

116. It is in my judgment clear that the non-registration of the Restriction is not a "fact relevant to the claimant's right of action". It is a part of the factual background. The non-registration enabled the wrongs complained of to take place, but it is not an element of DLA's causes of action. It is not therefore a fact relevant to the breach of the Transfer, nor, even more so, to the conspiracy to injure by unlawful means.

117. It follows, therefore, that a failure to ensure that the Restriction was registered cannot be a failure to exercise reasonable diligence.

Checking the Land Register and/or setting up alert

118. As to whether the trustees acting with reasonable diligence should have periodically checked the register and/or set up an alert, this is an inherently fact sensitive enquiry, which requires factual determination of the actual characteristics of the trustees. This is

particularly so where there is an issue as to whether the trustees' professional advisers were also required to exercise reasonable diligence.

Documents in the public domain

119. I am supported in the conclusion the relevance of documents in the public domain to the question of 'reasonable diligence' is inherently unsuitable for summary determination by the following authorities.

120. The first is *DSG v Mastercard*, in which the Court of Appeal allowed the appeal from a decision granting summary judgment on the basis that the claimant could with 'reasonable diligence' have discovered the relevant information via publicly available documentation. Sir Geoffrey Vos C held at [76] that the judge below

> "ought to have concluded that…those issues could not be fairly decided without disclosure and evidence, because, as the authorities make clear, the claimants' position may have some relevance to the way in which the objective test is applied. **This is particularly true where questions arise as to whether specific public domain documents and newspaper articles could with reasonable diligence have been obtained.** Here, there will also be, in due course, issues as to the availability of documents, and the claimants' actual knowledge of them."
> (emphasis added)

121. The second decision is *Allianz Global Investors GmbH v RSA Insurance Group Ltd* [2021] EWHC 2950 (Ch), in which Miles J refused an application by the defendants for summary judgment. Two of the arguments put forward by the defendants in that case were summarised at [64] as follows:
    (1) "Any reasonably attentive investor would have been aware of the published information of the Defendant": [64(iii)] and
    (2) "the Claimants could and would (acting with reasonable diligence) at least have conducted **regular internet searches** in relation to the Irish misconduct announced in 2013 and/or **set up an automatic alert** in relation to the Irish misconduct.": [64(vi)] (emphasis added)

    These arguments were both held to be not properly amenable to summary determination ([81]) and matters on which the claimants had at least a 'real' prospect of success ([84]).

122. Thirdly, *Arif v Sanger* [2021] EWHC 3475 (QB), was an appeal from the decision of Senior Master Fontaine refusing summary judgment. The claim was for misrepresentations which had induced the claimant to enter into a joint property development venture with the defendant. The Senior Master stated (as set out at [25]) that she was not satisfied that, if acting with reasonable diligence, the claimant could be expected to have made enquiries at the Land Registry or Companies House, revealing the relevant facts. She also found that it was reasonable for the claimant to have relied

on his solicitors and their report on title. She decided that oral evidence would be needed to establish what the claimant could have discovered using reasonable diligence.

123. Dismissing the appeal, Bourne J held at [80]:

> "It cannot be simply assumed, without further evidence, both that the reasonably diligent investor could then have been expected to make further inquiries, for example at the Land Registry or at Companies House, and that such inquiries would have unravelled the fraud. These questions too will be more reliably decided at trial."

Characteristics of the trustees

124. DLA made the following submissions as to the relevant characteristics of the trustees:
    (1) They are not property professionals running a property business; they are private individuals who acted as unremunerated trustees of the Land for the benefit of a number of charitable objects.
    (2) Given that the sole asset of the Trust was the Land, the best analogy for the position of the trustees following its sale is that of a company which has, like the claimant in *OT Computers*, ceased business. In those circumstances, the court should be slow to impose particularly onerous requirements to police dealings with the Land lasting for years after selling it.

125. In my judgment, as DLA submitted, this is another issue which is inherently unsuitable for summary judgment. The way in which the particular characteristics of a party affect the objective test of reasonable diligence requires disclosure and oral evidence.

126. In addition, as Miles J observed at [80] of *Allianz*, "the issue of which characteristics the Court should take into account under s.32 is a developing and difficult legal question and … it would be far better to reach findings on the basis of the facts found at trial rather than at a summary hearing."

127. The defendants have not therefore satisfied me that DLA have no real prospect of showing that the trustees, as lay people using professional advisers, were not required, in order to act with reasonable diligence, to undertake or instruct their solicitors to undertake any of the steps set out in §15 of the administrators' Defence, nor, as Mr Dean and Mr Melia allege, to ensure that the Restriction was registered.

Conclusions on limitation

128. For the reasons set out above, therefore I am not satisfied that DLA have no real prospect of relying on section 32 of the Limitation Act to postpose the commencement of the limitation period to 9 January 2018.

Validity of the Assignment

Legal principles

129. *Farrar v Miller* [2022] EWCA Civ 295[6] identifies[7] the three common law rules which impact on this case:
    (1) the rule against maintenance: a bare cause of action can only be assigned where the assignee has a "genuine commercial interest" in enforcing the claim: *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, 703C-D per Lord Roskill;
    (2) the rule against champerty: this prohibits the supporting of litigation in return for "a division of the spoils": *Giles v Thompson* [1994] 1 AC 142 at 161C;
    (3) the rule against a solicitor taking an assignment of their client's cause of action during the litigation but before judgment: see *Farrar* at [23] to [28].

Rule against maintenance: "genuine commercial interest"

130. Maintenance is the supporting of litigation in which the supporter has no legitimate interest "without just cause or excuse"[8]. *Trendtex* established that an assignee of the claim of another who has a genuine commercial interest in taking the assignment and enforcing it for their own benefit will be entitled to do so. However, the result in *Trendtex* was that the assignment was found to be champertous because it provided on its face for the future onward assignment of the cause of action to an unidentified third party.

131. In *Brownton Ltd v Edward Moore Inbucom Ltd* [1985] 3 All ER 499 (decided shortly after *Trendtex*), an assignment by a claimant to one of two co-defendants of its causes of action against the other co-defendant was held to be valid. Lloyd LJ explained at [509H-J] that

> "Anything recovered from Cossor [the other co-defendant] would to that extent have relieved EMR [the assignee]. It follows that EMR had a pre-existing interest in the success of Man's [the assignor] cause of action against Cossor. It cannot in my view be doubted that such an interest was a 'genuine commercial interest' within the principles established by *Trendtex*".

132. Lloyd LJ also emphasised that the question of whether there is a genuine commercial interest "must be looked at broadly and in the round". More recently, *in Recovery Partners v Rukhadze* [2018] EWHC 2918 (Comm); [2019] Bus. L.R. 1166 at [459], Cockerill J emphasised that

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[6] which concerned the validity of an assignment to a solicitor of their client's cause of action

[7] At [22] to [43]

[8] *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381, 399 at [32]

> "the court should not be looking to find the absence of commercial interest, but be more focused on ensuring that transactions which are genuinely contrary to public policy are weeded out."

Rule against champerty: "division of the spoils"

133. Champerty occurs where a person supports litigation and stipulates for a share of the proceeds of the claim or "division of the spoils": *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 1 WLR 2111 at [55].

134. In cases not involving solicitors e.g. third party litigation funders, the position is set out by Knowles J in *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), [2020] Costs L.R. 901 at [36]:

> "In *Sibthorpe v. Southwark LBC*, [2011] EWCA Civ 25, the Court of Appeal explained that, when considering an allegation of champerty in relation to an agreement to which the person conducting the litigation (or providing advocacy services) is not a party, the modern approach was for the court to decide whether the agreement would undermine the purity of justice or would corrupt public justice which is a question to be decided on a case-by-case basis ([35] to [36]). It formulated that approach given the views expressed by Steyn LJ in *Giles v. Thompson* (Court of Appeal decision), Lord Mustill in *Giles v. Thompson* in the House of Lords and Lord Phillips in *Factortame*. In *Davey v. Money* [2019] EWHC 997 (Ch), Snowden J held that, in determining whether an agreement with a non-party as regards the conduct of litigation would tend to undermine or corrupt the process of justice, "the crucial issue appears to be whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement" (at [78])."

Evolution of the law of maintenance and champerty

135. In parallel with, and influenced by, the statutory developments discussed at para 141 below, the common law has adopted an increasingly relaxed approach to questions of maintenance and champerty: e.g. [459] in *Recovery Partners GB Ltd* set out at para 132 above. This is because, as Danckwerts LJ observed in *Hill v Archbold* [1968] 1 QB 686 and 697:

> "the law of maintenance depends upon the question of public policy, and public policy…is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time".

136. Thus, in *Sibthorpe* at [51], when asked to apply the law of champerty to a novel fact-pattern in relation to solicitors' remuneration, Lord Neuberger MR held that "it would be inappropriate in the 21st century to extend the law of champerty" (similarly at [44]).

137. The effect is as Lord Mustill explained in *Giles v Thompson* [1994] 1 AC 142 at 153F-G:

> "In the most recent decades of the present century, maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a 'bare right of action.'"

Rule against assignment to solicitors

138. It was common ground that a solicitor who has the conduct of litigation may not take an assignment of their client's cause of action before judgment: *Farrar* at [22] (although, as will be seen, the scope of this rule is in issue). This is a separate rule, independent of the rules against maintenance and champerty. I refer to it as the "solicitor rule" although it also applies to those providing advocacy services.[9]

139. The basis of the solicitor rule is the conflict of interest which would arise between the client and the solicitor if the solicitor could negotiate for an assignment of the client's claim, bearing in mind that the solicitor owed the client fiduciary duties: *Farrar* at [28].

140. Section 59 of the Solicitors Act 1974 provides, so far as relevant:

> "**Contentious business agreements.**
> (1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.
>
> (2) Nothing in this section or in sections 60 to 63 shall give validity to—
> (a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding;"

Rule against conditional fee agreements

141. Until 1990, the established position was that the rules of champerty and maintenance prohibited solicitors from conducting litigation (or recovering their fees for doing so) pursuant to agreements under which they only recovered their fees if the client was successful, or under which they took a share of the proceeds. The Courts and Legal

[9] *Sibthorpe* at [37]

Services Act 1990 ("**the 1990 Act"**) provides for conditional fee agreements and damages-based agreements to be enforceable where certain conditions are complied with: ss 58, 58AA. Section 58 of the 1990 Act relevantly provides:

> "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.
>
> (2) For the purposes of this section and section 58A—
> (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;"

142. As DLA submitted, this provision does not create a rule. It preserves the common law position in respect of conditional fee agreements in a statute which otherwise erodes its scope. This is the analysis of Lord Millet LJ in *Thai Trading Co v Taylor* [1998] QB 781:

> "Section 59(2) merely provides that nothing in the Act shall give validity to arrangements of the kind there specified. It does not legitimise such arrangements if they are otherwise unlawful, but neither does it make them unlawful if they are otherwise lawful"

or, as it was put in *Candey Ltd v Tonstate Group* [2022] EWCA Civ 936, [2022] 1 WLR 4653, the 1990 Act created "islands of legality in a sea of illegality".

Other agreements between client and solicitor

143. In addition, it remains the case that any other agreement which is champertous or contrary to the rule against maintenance (but is not a conditional fee agreement within the meaning of the 1990 Act) remains contrary to public policy and therefore unenforceable: see *Awwad v Geraghty* [2001] QB 570 at 593F-G, and *Farrar* at [51].

144. The administrators submitted that it is well-established that an assignment of a claim to a solicitor which provides for the recovery of the solicitor's profit costs to be contingent on the claim's outcome constitutes unlawful champerty contrary to s.14(2) of the Criminal Law Act 1967.

145. Section 14 abolished liability in tort for maintenance and champerty. Section 14(2) provides:

> "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

146. As in the case of s.59(2) of the Solicitors Act 1974, this provision does not create a rule – it preserves an existing rule. The question is not therefore whether the Assignment is in breach of section 14(2), but whether it is unlawful under the existing common law rules.

147. The administrators relied upon *Farrar* (CA) at [48] – [49]. This passage records counsel's concession that the fact that an assignee has a genuine commercial interest in taking an assignment (so that it is not contrary to the rule against maintenance) is not sufficient to prevent it from being champertous. Thus, in *Trendtex* itself, the assignment was held to be void, even though the assignee had a genuine commercial interest in enforcing the claim because it was champertous for other reasons: see *Farrar* (CA) at [22]. This is uncontroversial.

148. As to the second aspect of the administrators' submission, they relied upon the first instance decision of Marcus Smith J in *Farrar v Miller* [2021] EWHC 1950 (Ch). In *Farrar*, the claimant, Mr Farrar, had entered into a Damages Based Agreement (DBA) with his solicitors on 23 October 2013, and had begun a claim against the defendant, Mr Miller, on 8 April 2014. On 12 September 2019, Mr Farrar executed an assignment under which he assigned to the solicitors his claim against Mr Miller. The assignment provided that the sums recovered by the solicitors were (after payment of any ATE premium) to be used to pay double the amount of the solicitors' incurred and future costs, subject to a cap, with a provision that the amount payable was to be reduced by any sums recovered from Mr Miller.

149. Having set out at [34] the passage at [37] to [41] in *Sibthorpe*, Marcus Smith J continued at [35]:

> "As Lord Neuberger has made clear, there is now a very hard distinction between potentially champertous transactions between non-lawyers and potentially champertous transactions involving a lawyer. The former cases are considered according to the broad and flexible standard articulated in paragraph 34(1) above. The latter cases are assessed according to an altogether different standard: they are either sanctioned by statute or they are not; and if they are not, the common law does not ride to the rescue. In this case, the Assignment is not sanctioned by the 1990 Act and – assuming it to stand alone – clearly fails as a champertous transaction."

150. In response to this, DLA relied upon *Thai Trading Co v Taylor* [1998] QB 781, in which at 788D Millett LJ (as he was) held that the recovery by a solicitor of profit costs "cannot sensibly be described as a division of the spoils", and so did not fall foul of the law on champerty.

151. This passage was said by the administrators to have been not followed in a number of cases. They relied on the proposition in *Snell's Equity* (34th edn, 2019) at §3-046:

> "So an agreement between a lawyer and a client to act in return for a share in the proceeds of an action or for a fee the amount of which depends on the outcome of the action has generally been void. The prohibition applied even if the lawyer was only to receive his ordinary fee if the action succeeded."

152. The administrators' counsel referred me to *Awwad v Geraghty* [2001] QB 570, 589B-593G, 600E; *Factortame (No.8)* [2003] QB 381 at [23], [35], [61]; *Sibthorpe* (above) at [35]-[41], [55]; and *Rees v Gateley* [2014] EWCA Civ 1351 at [33] as cases in which *Thai Trading* was disavowed.

153. In *Awwad*, a solicitor entered into an oral agreement in 1993 with the claimant in a libel claim to charge him her normal hourly rate if successful, and the lower rate of £90 per hour if he were unsuccessful. In the solicitors' claim for their fees, the judge held that the agreement was unlawful and unenforceable and that the solicitors could not recover their fees. This was upheld on appeal.

154. At page 576B-C, Schiemann LJ identified three categories of agreement providing for "reward for success", and stated that the agreement in *Awwad* was a conditional normal fee i.e. one in which the lawyer will only recover his normal fees (without an uplift) and not part of the client's winnings.

155. The statutory framework within which the enforceability of the agreement was determined is set out at page 577C-F:

> "*II. The legislation*
> The Solicitors Act 1974 contains the following relevant section:
>
> > '31(1) . . . the Council [of the Law Society] may . . . make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors ...'
>
> The Solicitors' Practice Rules 1990, rule 8(1), provided in 1993:
>
> > 'A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.'
>
> That rule has since been amended to add the following words:
>
> > 'A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to

receive a contingency fee in respect of that proceeding, save one permitted under statute or by the common law.'

Rule 18(2) is a definitions rule and defines "contingency fee" under rule i8(z)(c) as meaning:

'any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceeding . . .'

Section 58 of the Courts and Legal Services Act 1990 … as originally enacted provided: "(1) In this section 'a conditional fee agreement' means an agreement in writing between a person providing advocacy or litigation services and his client which —
…
"(b) provides for that person's fees and expenses, or any part of them, to be payable only in specified circumstances;
…
(2) Where a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased. (3) Subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement. (4) In this section 'specified proceedings' means proceedings of a description specified by order made by the Lord Chancellor for the purposes of subsection (3)." —No proceedings were so specified until the Conditional Fee Agreements Order 1995 (SI 1995 No 1674). That Order did not specify libel proceedings. The Conditional Fee Agreements Order 1998 (SI 1998 No 1675) specifies all proceedings — "(5) Any such order shall prescribe the maximum permitted percentage for each description of specified proceedings. (6) An agreement which falls within subsection (2) shall be unenforceable if, at the time when it is entered into, the percentage specified in the agreement exceeds the prescribed maximum permitted percentage for the description of proceedings to which it relates."

156. The court discussed various authorities including *Swain v The Law Society* [1983] 1AC 98. At page 598E-G, May LJ said:

"The Solicitors' Practice Rules are made under section 31 of the Solicitors Act 1974 by the Council of the Law Society with the concurrence of the Master of the Rolls. They are secondary legislation having the force of statute, as was decided in *Swain v The Law Society* [1983] 1 AC 598. The Rules regulate professional practice, but breach of the Rules is unlawful in addition to being a breach of professional practice. This court in the *Thai Trading* case unfortunately did not consider the *Swain* case. A necessary part of the decision in the *Thai Trading* case was the proposition [1998] QB 781, 78 5H that "the fact that a professional rule prohibits a particular practice does not of itself make the practice contrary to law". This means, in my judgment, that Millett LJ's conclusion, at p 790H, cannot be correct

for a breach of rule 8(1) of the Solicitors' Practice Rules 1990 as they stood in 1993."

157. At page 593F-G, Schiemann LJ, having cited from *Wallensteiner v Moir (No. 2)* [1975] QB 373 (which was concerned with the Solicitors Practice Rules in force at that time), held that "acting for a client in pursuance of a conditional fee agreement, in circumstances not sanctioned by statute is against public policy."

158. The decision in *Awwad* is therefore narrower than the administrators submitted. It is concerned only with contingency or conditional fee agreements. It is not concerned with other types of agreement. This is clear from *Wallersteiner v Moir* at 401-420:

> "A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal adviser. Moreover, where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within that particular class of maintenance called champerty."

159. There is no reference to *Thai Trading* in *Factortame*. In *Sibthorpe*, *Thai Trading* was not followed on the basis that *Swain v The Law Society* [1983] 1AC 598) was not cited. However, it is clear from the discussion in *Awwad* (at 582G to 583B) that the error made by Millett LJ was in stating that "the fact that a professional rule prohibits a particular practice does not of itself make the practice contrary to law".

160. There is also no reference to *Thai Trading* in *Rees* at [33], although in [32] it is referred to as being consistent with the proposition that at common law an agreement between a lawyer and his client to accept a contingent fee for the conduct of litigation has always been regarded as champertous, and hence contrary to public policy.

161. DLA does not contest this proposition. However, as they submit, Millett LJ's analysis that base costs are not a "division of the spoils" remains undoubted. Indeed, in *Sibthorpe*, Lord Neuberger said at [45]:

> "Although the decision itself [in *Thai Trading*] was per incuriam, the judgment represents the considered view of Millett LJ and two other members of this court. Millett LJ said at p 788:
>
> > 'It is understandable that a contingency fee which entitles the solicitor to a reward over and above his ordinary profit costs if he wins should be condemned as tending to corrupt the administration of justice. There is no reason to suppose that Lord Denning MR in *Trendtex Trading Corpn v Credit*

> *Suisse* [1980] QB 629 or any of the members of the court in *Wallersteiner v Moir* (No 2) [1975] QB 373 had in mind a contingency fee which entitles the solicitor to no more than his ordinary profit costs if he wins. These are subject to taxation and their only vice is that they are more than he will receive if he loses. Such a fee cannot sensibly be described as a 'division of the spoils'. The solicitor cannot obtain more than he would without the arrangement and risks obtaining less'"

162. I therefore accept DLA's submission that base or profit costs are not "a division of the spoils" for the purposes of the common law rules against champerty, or at least that it has a real prospect of arguing that they are not.

Issues

163. The administrators' position in their application notice, adopted by the Henshaw parties, is that the Assignment:
    (1) does not comply with ss.58 and 58AA of the 1990 Act;
    (2) is in breach of s.59(2)(a) of the Solicitors Act 1974;
    (3) is a transfer of a cause of action by a client to its solicitors;
    (4) is champertous;
    (5) is in breach of the common law rule against maintenance.

164. The second and third defendants' position in their application notice is that the Assignment is:
    (1) in breach of the common law rule against maintenance;
    (2) in breach of s.59(2)(a) of the Solicitors Act 1974;
    (3) an abuse of process because "DLA is conducting the claim of its clients which has been assigned to it after the parameters of the claim were understood and already formulated in the draft Particulars of Claim".

165. However, DLA does not allege that the Assignment is a conditional fee agreement or damages-based agreement falling within ss. 58 or 58AA of the 1990 Act; and, as noted above, s.59(2)(a) does not create a rule. The issues between the parties are therefore:
    (1) Whether the Assignment is in breach of the rule against maintenance;
    (2) Whether the Assignment is champertous;
    (3) Whether the Assignment contravenes the solicitor rule.

Discussion and conclusions

Maintenance – "genuine commercial interest"

166. DLA's case is that it has a legitimate commercial interest in the trustees' claims against the defendants. It accepts it may be liable in negligence to the trustees for its failure to ensure the registration of the Restriction. Accordingly, it submits, by parity of reasoning with *Brownton*, it will be relieved of that potential liability to the extent of any recovery

from the defendants. This, it submitted, brings it within the 'genuine commercial interest' exception.

167. The administrators and the Henshaw parties did not rely on the rule against maintenance.

168. The second and third defendants did rely on the rule against maintenance. They accept that DLA have a commercial interest in the outcome of the claim, but they characterize it as a "naked" not "genuine" interest. The Assignment, they submitted, gives DLA the power to let its own interests relegate those of the trustees. I reject that submission. In my judgment, DLA has a real prospect of showing that its and the trustees' interests are aligned in the claim. As in *Brownton,* any sums recovered by DLA will reduce the trustees' loss suffered as a result of the non-registration of the Restriction; and accordingly, DLA's liability if it is found to be responsible for that loss.

169. Accordingly, the second and third defendants have not satisfied me that DLA have no real prospect of establishing that the Assignment is not in breach of the rule against maintenance.

Champerty – "division of the spoils"

170. In their skeleton argument, the administrators relied on a number of grounds in support of their submission that the Assignment is champertous because under it:
    (1) the recovery of DLA's profit costs is contingent on the outcome of the claim;
    (2) DLA has exclusive control of the claim to eliminate/mitigate its liability in professional negligence;
    (3) DLA is enabled to incur profit costs without the possibility of any challenge or review by a client.

Recovery of profit costs contingent on outcome

171. The administrators submitted that the effect of clause 3.2 of the Assignment is that recovery of DLA's costs is contingent on the outcome of the claim. Its position is, they said, exacerbated by the fact that DLA's profit costs are not costs incurred on behalf of a client pursuant to a conditional fee agreement. They are costs incurred by DLA on its account. They would therefore, the administrators said, clearly represent a division of the spoils or share of the proceeds of the claim if the claim succeeded.

172. DLA submitted that the fact that clause 3.2 allows DLA to retain any sum awarded to it by way of costs (which, it says, must be read alongside clause 3.3, which provides for any settlement sum to be first applied towards paying damages) does not amount to it receiving a "division of the spoils".

173. Under the Assignment, DLA's entitlement to its costs is to have them paid by the defendants if a costs order is made in its favour. That, in a broad sense, is a contingency, in that it may or may not happen. However, as conceded, the Assignment is not a "conditional fee agreement" within the meaning of section 58(2) of the 1990 Act. That "contingency" does not in my judgment mean that it provides for DLA to receive a division of the spoils. First, DLA is not acting as the solicitor of the trustees; it is acting on its own account and there is no solicitor/client relationship. Secondly, the trustees will receive any damages awarded (or agreed) without any deduction in respect of DLA's costs. Thirdly, the trustees are not obliged to pay DLA's costs if the claim succeeds. Those costs will be paid by the defendants if an order is made in its favour. Fourthly, obtaining a costs order is not the same as payment of fees. DLA's costs will be assessed and it may well not receive 100% of its fees. DLA is in the same position as any other litigant.

174. Such an arrangement does not in my judgment amount to a "division of the spoils", or in any event, I am not satisfied that DLA has no real prospect of arguing that it does not.

Excessive control of the litigation

175. The second and third defendants submitted that the Assignment was champertous because it provided DLA with excessive control of the litigation. They cited *Anthony v Collins*, an unreported decision of Deputy Master Friston (27 January 2020). However, this case does not support their position, rather the opposite. At [93(iii)], the Deputy Master said:

> "Thirdly, I remind myself that not only is it permissible for legal representative to require clients to give security for unpaid fees, but such practices are commonplace. I can see nothing inherently wrong—and certainly nothing 'wanton' or 'officious'—with solicitors having a degree of control over a client's affairs in this regard. The Claimant's claim was in respect of an estate, and I can fully understand why in those circumstances (where life- changing amounts of money may be involved) the solicitors demanded a greater degree control over matters than, for example, they would have asked for had they been representing a client in a modest personal injury claim. The way they have achieved this may have been excessive and possibly even objectionable, but on the facts of this case, I am unable to say that they went so far as to offend against public policy."

176. At [93(ii], the Deputy Master said:

> "To my mind, a division of the spoils means something other than a solicitor merely taking steps to ensure recovery of his or her fees and disbursements."

177. On this basis, I accept DLA's submission that the Assignment is not champertous, or at least, that DLA has a real prospect of arguing that it is not champertous.

Absence of challenge or review by a client

178. This feature is also not objectionable in my judgment. DLA is its own client, and will have its own reasons for controlling its costs, which are the same reasons that any litigant has: the limits on its own financial resources, and the fact that excessive costs will not be recovered on assessment.

The solicitor rule

179. DLA relied upon two factual matters as, in any event, taking the Assignment outside the solicitor rule. First, as at the date of the Assignment in October 2023, the trustees were no longer DLA's clients, and had not been since April 2023. Secondly, as at the date of the Assignment, no claim had been commenced; instead, proceedings were only issued in November 2023.

180. DLA made the following submissions in support of its position that the Assignment falls outside the solicitor rule:

    (1) The public policy considerations which underpin the prohibition on a solicitor taking an assignment of a cause of action from a client – which were described in *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110 at 111 as being founded upon "the fiduciary relation between the solicitor and the client", and the "precise rules of honour" regulating the conduct of legal representatives – are not engaged where no relationship of solicitor and client exists and no claim is on foot.

    (2) This, it said, is borne out by the fact that the reported cases in which an assignment of a cause of action to a solicitor has been held to be void all appear to have involved the assignment by an existing client of an issued claim. Most cases have concerned the assignment of damages in litigation to the solicitors acting for the claimant client, presumably in order that they will continue to act for a client otherwise unable to pay for those legal services – in other words, they have really been alternative forms of remuneration. That is not the case with, as here, a genuine assignment.

    (3) It also relied on the language used in the leading cases:

        (i) In *Simpson v Lamb* (1857) 7 EL & BL 84, Lord Campbell held that it was "against the policy of the law to permit such a dealing by an attorney with the subject of a suit of which he has the conduct as the attorney, whilst the case is still undetermined by judgment".

        (ii) In *Pittman* at 111, the rule was described as follows: "a solicitor could not make an arrangement of any kind with his client **during the litigation he was conducting** so as to give him any advantage in respect of the result of the litigation" (emphasis added).

(iii) In *Farrar v Miller*, Arnold LJ referred at [22] to "a solicitor who **has** the conduct of litigation" being unable to take an assignment "prior to judgment" (emphasis added).

(4) Whilst there does not appear to be any reported case expressly discussing the validity of an assignment by a *former* client to a solicitor, the obverse situation arose in *Davis v Freethy* [1890] QB 519 in which the validity of an assignment which pre-dated the solicitor-client relationship was upheld by the Court of Appeal. Lord Coleridge said at 521, in remarks that ought to apply by parity of reasoning to the present fact-pattern:

> "The objection to its validity is founded on the decision in *Simpson v Lamb*. It is said that, inasmuch as at the time the deed came into operation the relation of solicitor and client had been established between the plaintiff the assignee and Marks the assignor, the principle of that case applies – that the purchase of the subject-matter of a suit by an attorney having the conduct of the suit is void, as against the policy of the law. The learned judge who tried this case was of the opinion that the principle was sound, but he pointed out the distinction which prevents it from applying to the present case. That distinction is that here, when the deed was made, the relation between the parties to it was not that of solicitor and client."

181. The administrators submitted that the facts identified by DLA made no material difference to the application of the rule.

Termination of the retainer

182. As to the termination of the retainer, the administrators accepted that on the evidence before the court, there was a formal termination of DLA's retainer. However, they submitted that DLA remained subject to continuing fiduciary obligations which are reinforced or confirmed by the terms of the retainer, notwithstanding its termination i.e. the formal termination of the retainer was not sufficient to end the fiduciary relationship. So, they submitted, the policy reasons for the rule still stand.

183. In particular, the administrators relied upon correspondence by DLA in relation to this matter after the termination, which they said was inconsistent with the solicitor-client relationship having ceased completely, notwithstanding the termination of a formal retainer. Their position in oral submissions was that DLA continued to correspond with the other parties on behalf of the trustees right up to when the notice of the Assignment was provided on 19 October 2023.

184. As to this, DLA did not send any correspondence to Mr Dean and Mr Melia's or the administrators' solicitors after 10 March 2023 until after the Assignment. DLA did respond to a letter dated 17 August 2023 from the Henshaw parties' solicitors (Pannone

Corporate – "**Pannone**") by a letter dated 22 August 2023 seeking to extend an undertaking given by them to hold part of the sale proceeds of the Land. The letter is carefully worded and does not refer to the trustees as "clients". DLA's explanation is that it was written in order to maintain the status quo of the protection in place, that sum being similar to the value of the claim.

185. On this point, the administrators' oral submissions were inconsistent with their skeleton argument which refers to DLA being in breach of its professional obligations to inform Pannone that they no longer acted for the trustees; and having "kept up the pretence" that they acted for the trustees in order to secure the benefit of the undertakings.

186. Both of these explanations are consistent with the correspondence. It is not the court's role on a summary judgment application to decide which is factually correct. I am not therefore satisfied that DLA have no real prospect of showing that at the date of the Assignment it was no longer the trustees' solicitor.

187. The administrators also relied upon various public policy reasons as to why there is a common law and statutory prohibition against the assignments of claims (or potential claims) to solicitors where the recovery of solicitors' costs is dependent on the outcome of the proceedings. These cannot however be conclusive on a summary judgment application. They require careful consideration in the light of the facts found at the trial.

188. Finally, the administrators relied on two passages in *Chitty on Contracts* (35th edn):

> "19-154 **Assignment of causes of action between solicitor and client** The assignment of a cause of action to the ex-solicitor of a client would also be champertous. In *Farrar and Candey Limited v Miller* proceedings had been commenced …"
>
> 19-165 **Assignment of rights to solicitors**. A solicitor cannot lawfully purchase anything in litigation of which he has had the management, nor can he purchase the fruits of such litigation before judgment, but an assignment of an action to a solicitor preceding his employment as such is good unless it would have been unenforceable as between strangers."

189. Paragraph 19-165 continues however:

> "A solicitor may lawfully take from his client a security upon property which is the subject matter of an action for advances already incurred in the action, and he may take security from his client for his costs to be ascertained by taxation or otherwise."

190. No authority is cited for the first sentence of para 19-154 in *Chitty*. In addition, it is difficult to articulate (and the administrators did not seek to do so) the relevant distinction between a solicitor who may know that they are going to be acting for a client and a former solicitor. It is also clear from the passage in para 19-165 that transactions by a solicitor such as taking a security from the client are not of themselves objectionable.

191. The proposition that the rule does not apply after termination of the relationship is supported by *Wood v Downes* (1811) 18 Ves Jun 120, 34 ER 263, cited at [24] in *Farrar*:

> "no attorney can take any thing for his own benefit from his client pending the suit, save his demand; and I add that, as a guardian cannot take any thing from his ward pending the guardianship, or at the close of it, or at any period until his influence has ceased to exist, the obligation upon an attorney to refrain from taking an extraordinary benefit is at least as strong.
> …
> It is not denied in any case that, if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his Attorney or Counsel, as to any other person; but it must go so far."

192. The administrators relied upon the fact that the self-dealing rule (which disables trustees from acquiring trust property) applies to a former trustee if the trustee has made the arrangements for the sale of the trust property concerned before her retirement or, even if no arrangements have been made, if she retires with a view to buying the trust property: see *Lewin on Trusts* (20th edn) at para. 46-020. However, I note that the fair-dealing rule (which entitles a beneficiary to set aside a purchase by the trustee of their beneficial interest in trust property) does not apply if the relationship between the trustee and the beneficiary has been actually or virtually dissolved, even if the trustee has retired for that purpose: see *Lewin on Trusts* (20th edn) at para. 46-093. Both rules are based on the principle that a trustee must not put herself in a position where there is a conflict or the possibility of a conflict between her interest and duty.

193. As to a solicitor's duty of undivided loyalty, *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 is authority for the proposition that that duty ends when the retainer ends. At 235C-D, Lord Millett said:

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

194. In this context, DLA also relied upon the fact that the trustees received independent legal advice from Pinsent Masons, who as noted, negotiated the Assignment on the trustees' behalf. I accept that this is another reason why, where the retainer has also been terminated, that the solicitor rule should not apply.

195. I am not therefore satisfied that DLA has no real prospect of showing the termination of the retainer, so that it was not the trustees' solicitor at the date of the Assignment, means that the rule does not apply.

Assignment before claim commenced

196. As to the fact that proceedings had not commenced at the date of the Assignment, the administrators relied upon the recent decision of Master McQuail in *The Commercial Practice Ltd v Atkinson Wheller Ltd* [2024] EWHC 2195 (Ch), in which at [44], she said:

> "The validity of the First Assignment must be considered in the context of the law of champerty as explained in *Farrar v Miller*. It is undoubtedly an agreement by which the solicitor first claimant has endeavoured to acquire the cause of action of its client the second claimant. That it was entered into before proceedings were issued or a letter before action was sent cannot be material to whether it falls foul of the law of champerty. It falls on the lawyer side of the hard distinction referred to by Marcus Smith J in *Farrar v Miller* and the genuine commercial interest test has no relevance."

197. Support for this conclusion is found in *Wood v Downes* at 125:

> "I have observed, that this case appears to me to be regarded in two points of views; the transaction liable to objections of two kinds: first, as bringing forward the consideration of the effect of a bargain between an attorney and his client, for the benefit of the attorney, **before**, pending, and after, suit; and not only for his benefit, but connected with the very article and subject in contest in a suit, in which he was about to be engaged."
> (emphasis added)

198. However, the rule as stated in the caselaw consistently refers to the rule applying where the claim is pending:
    (1) *Farrar* (at [22]) refers to a solicitor who has the conduct of litigation i.e. an existing claim;
    (2) *Hall v Hallett* (at 146, 1099) refers an attorney not being permitted to "buy in things in a course of litigation, of which litigation he has the management".;
    (3) In *Wood v Downes* (at 27, 265-66), Lord Eldon states: "no attorney can take anything from his client pending the suit";
    (4) In *Simpson v Lamb*, the rule is again stated as being "no attorney can be permitted to purchase any thing in litigation, of which litigation he has the management" citing *Hall v Hallet*, *Wood v Downes* and the authorities cited in those cases.

199. In addition, section 59(2) of the Solicitors Act 1974 refers to "purchase by a solicitor of the interest, or any part of the interest, of his client in any **action, suit or other contentious proceeding**" (emphasis added). All of these are apt to describe a pending claim and not apt to describe a cause of action not yet litigated.

200. Given, the conflicting wording in the authorities, I am not satisfied that DLA have no real prospect of showing that an Assignment before a claim is commenced does not fall within the solicitor rule. In any event, since I have concluded that the issue as to whether the rule applies after termination of the solicitor/client relationship should be determined at trial, I consider that this second issue should also be determined at trial when the Judge has the benefit of having made full findings of fact.

Conclusion on the Assignment

201. For the reasons set out above, therefore, I am not satisfied that DLA have no real prospect of showing that the Assignment is valid and enforceable.

Final conclusion

202. I will therefore dismiss the defendants' applications.