

Neutral Citation Number: [2025] EWHC 1334 (Ch)

Case No: BL-2022-001754



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

BL-2022-001754

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

Date: 30 May 2025

Before :

MASTER PESTER

Between :

FAY OF LONDON LIMITED
- and -
(1) AXIS SPECIALITY EUROPE SE
(2) JIREHOUSE (UNLIMITED BODY
CORPORATE)
(3) JIREHOUSE PARTNERS LLP
(4) STEPHEN DAVID JONES

Claimant

Defendants

William Flenley KC and Heather McMahon (instructed by **Davis Woolfe Limited**) for the
Claimant

Daniel Shapiro KC and James Sharpe (instructed by **CMS Cameron McKenna Nabarro**
Olswang LLP) for the **First Defendant**

The other Defendants did not appear and were not represented.

Hearing date: 25 March 2025

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 4pm on 30 May 2025.

Master Pester:

Introduction

1. This is my judgment on the Claimant's application, dated 25 November 2024 ("the Application"), for permission to amend the Particulars of Claim. There are two sets of proposed amendments. The first introduce a proposed claim for fraudulent breach of trust ("the Fraudulent Breach of Trust Claim"). The second relate to claims for (i) (non-fraudulent) breach of trust (ii) negligence (iii) breach of contract (iv) breach of fiduciary duty and (v) deceit ("the Other Proposed Claims").
2. The Claimant is a BVI registered company. The First Defendant ("the Defendant") is an insurance company. By its claim form dated 11 October 2022, the Claimant started these proceedings against the Defendant pursuant to the Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act"). The Defendant issued a policy or policies of insurance which indemnified a group of now insolvent entities known as "Jirehouse". The Jirehouse Entities included an incorporated body known simply as Jirehouse (which was the second defendant named in the claim form), Jirehouse Partners LLP (the named third defendant) and Stephen David Jones (the named fourth defendant). Mr Jones was a solicitor, a person who at the material time was a member of the LLP and had significant control over all the Jirehouse Entities.
3. The Defendant is the only defendant on which the claim has been served and is now the sole defendant to the claim. The Defendant's position, in outline, is that none of the amendments should be permitted. The new claims are statute-barred under the primary limitation period. The Claimant cannot avoid the effect of the

primary limitation period either by relying on s. 32 of the Limitation Act 1980 (“the LA 1980”), or by advancing a claim for fraudulent breach of trust.

4. I heard submissions from the parties on 25 March 2025. In the week following the hearing, the parties with my permission exchange a further round of written submissions. An amendment authorised under s. 35 of the LA 1980 is not made before, at the earliest, the date when permission to amend is given: *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409, CA, per Glidewell LJ at 1421C-E. As the Claimant accepts that it might have had the knowledge to begin the running of time under s. 32 of the LA 1980 by 4 April 2019, the parties sensibly have agreed to enter into a standstill agreement for a three month period from 1 April 2025, to allow the court the time to prepare this judgment.

The Issues

5. For the purposes of the LA 1980, any new claim made in the course of existing proceedings which involves the addition or substitution of a new cause of action is treated as a separate action commenced on the same date as the original proceedings: ss. 35(1) and (2) of the LA 1980. Where permission to amend the statements of case is granted after an applicable limitation period has expired, the effect is to deprive the defendant of an accrued limitation defence, because of the doctrine of relation back in s. 35(1) of the LA 1980.
6. Applications to amend where there is an issue as to whether an applicable limitation period has expired frequently raise difficult issues of law and/or fact. The proper approach to an application for permission to amend in such

circumstances is generally to refuse leave, and require the claimant to issue a new claim, unless the claimant can show (the burden being on the claimant) either that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim, or that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which he has already claimed relief. By this means, the injustice to the defendant of depriving him of an arguable limitation defence is avoided without denying the claimant the right to bring a fresh action to which, if he is correct, there is no limitation defence: see *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, CA, at p. 404; *Welsh Development Agency v Redpath Dorman*, at p. 1425H; *Ballinger v Mercer* [2014] 1 WLR 3597, CA, at [35].

7. More recently, an apparent “gloss” on the requirement for a new claim to be issued where there is an arguable limitation defence has emerged. Instead of requiring a new claim to be issued in which the defendant can raise its limitation defence, the court may give permission to amend but specify that the relevant date of the new claim for limitation purposes is not the date of issue of the claim form but a later date (for example, the date when the application for permission to amend under CPR Part 17, r. 17.4 is made). That approach has been described as the *Mastercard* basis, following the decision of Field J in *WM Morrison Supermarkets plc v Mastercard Inc* [2013] EWHC 3271 (Comm): see the helpful review of the authorities by Fancourt J in *Duke of Sussex v New Group Newspapers Ltd* [2024] EWHC (Ch) 1208, especially at [71] – [90].
8. The two principal issues on the Application are whether to permit:

- (1) the Fraudulent Breach of Trust Claim under CPR r. 17.1(2)(b), where the Claimant submits that no period of limitation applies to the proposed claim, pursuant to the LA 1980, s. 21(1)(a); and
- (2) the Other Proposed Claims pursuant to CPR r. 17.4(2), because the new claims have a real prospect of success and the facts contained in the Claimant's proposed amended case arise out of substantially the same facts as were in issue in the existing proceedings; alternatively, the Claimant submits that the court should nonetheless permit the Other Proposed Claims on terms that they should only relate back to the date on which the application to amend was issued, or some other date, on a *Mastercard* basis.

The Original Claim

9. I begin by considering the key elements of the Claimant's claim as originally pleaded in its claim form dated 11 October 2022 and the subsequent Particulars of Claim dated 7 February 2023 (together, "the Original Claim"). The Particulars of Claim were drafted by Leading Counsel and signed with a statement of truth on behalf of the Claimant by Abdou Amadou, a managing director of Baobab SA, which in turn is a corporate director of the Claimant.
10. The Claimant is a single purpose corporate vehicle which owns the leasehold of Flat A, 1 Eaton Square, London, SW1 9DA ("the Property"). The Claimant is beneficially owned by a discretionary family trust ("the Trust"), settled on 31 March 2008 by Vasily Peganov, a Russian businessman: see paragraph 2.
11. The Defendant underwrote a policy of insurance providing professional indemnity cover to the Jirehouse Entities ("the Policy"): paragraph 4.

12. The principal fee owner with responsibility for the work of the Jirehouse practice was Mr Jones: paragraph 7.
13. On 3 May 2019, the Solicitors Regulation Authority (“the SRA”) intervened in the legal practice of the Jirehouse Entities: paragraph 9. The Jirehouse Entities are now in liquidation: paragraphs 10 - 12. Mr Jones was declared bankrupt on 6 March 2020: paragraph 13.
14. Paragraph 14 pleads that the Claimant claims declaratory relief against the Defendant, pursuant to section 2 of the 2010 Act, that (i) the Jirehouse Entities are liable to the Claimant for negligence, breach of contract and breach of fiduciary duty, and (ii) the Defendant is liable to indemnify the Claimant under the insurance policy or policies which it issued.
15. Paragraphs 15 – 18 plead the retainer. The Jirehouse Entities were retained to act on behalf of the Claimant to advise from time to time in relation to matters of taxation and generally as requested by the Claimant. There were the usual implied terms of the retainer, that the Jirehouse Entities would use the care and skill reasonably to be expected of a solicitor acting on behalf of its client and that the Jirehouse Entities would not undertake any transaction on the Claimant’s behalf, without express instructions to do so. It is also pleaded that the Jirehouse Entities stood in a fiduciary position as regards the Claimant, and owed the Claimant fiduciary duties, including a duty of loyalty and a duty not to prefer the interests of a third party to the interests of the Claimant.
16. Paragraphs 19 and 20 plead that the Property was acquired by the Trust on 18 November 2011, when the Trust acquired 100% of the shares in the Claimant.

The purchase price paid by the Trust for the shares was £4.9 million. The Trust acquired the Property with the assistance of a loan obtained “through Mr Peganov from a Russian lender”, which loan was not secured on the Property.

17. Paragraphs 24 – 39 plead that Mr Jones caused the Claimant to enter into three loans, secured over the Property, as follows:

(1) In September 2014, the Claimant borrowed £1,633,655 from Bridging Finance Limited (“BFL”) which was then followed by further sums paid in various advances (“the BFL Loan”).

(2) The BFL Loan was repaid in September 2015, when Topland Jupiter Limited (“Topland”) lent the Claimant £3,542,000 (“the Topland Loan”).

(3) On 25 November 2016 Together Finance Limited (“Together”) advanced £3.15 million to the Claimant (“the Together Loan”). There were two extensions to the Together Loan in November 2017 and November 2018, for a fee of £157,000 on each occasion. The Claimant has been unable to repay the Together Loan.

18. The Original Claim sets out that the Jirehouse Entities were obliged to act in the best interests of the Claimant, Mr Peganov, and the Trust (although neither Mr Peganov nor the trustees or beneficiaries of the Trust are parties to these proceedings). It pleads that Mr Peganov did not give instructions for the BFL Loan and the Together Loan, and was ignorant of them until he discovered the Topland Loan in October 2016. As set out in the Particulars of Claim, Mr Peganov discovered the Topland Loan in the following circumstances:

- (1) In October 2016, Mr Peganov was considering raising funds against the Property. He was being advised on this by his bankers (Julius Baer). On or about 10 October 2016, Mr Peganov was surprised to be informed that the Property was already charged to secure lending, namely the Topland Loan: paragraph 29.
- (2) When Mr Peganov sought an explanation from Mr Jones, Mr Jones explained that the Topland Loan had been taken out as part of a strategy to avoid Annual Tax on Enveloped Dwellings, or “ATED”: paragraphs 30 - 31.
- (3) Because his bankers were satisfied with the “technical explanation” provided by Mr Jones, and because Mr Peganov reposed trust and confidence in Mr Jones, Mr Peganov proceeded with that strategy and authorised the payment of loan interest on the basis that the loan arrangements were in the interest of the Claimant, Mr Peganov, and the Trust: paragraph 33.
- (4) By letter dated 14 October 2016 Mr Jones gave a written undertaking, on behalf of the Jirehouse Entities and in his capacity as a solicitor (“the Undertaking”) in relation to the investment of the funds borrowed: paragraph 34.
- (5) On 25 November 2016 Together advanced the sum of £3.15 million, which loan was then extended twice, on 25 November 2017 and 2018: paragraphs 37 – 38.

19. In the Original Claim, the Claimant alleged that the proceeds of authorised borrowings against the Property had been lost through being inappropriately invested in risky and illiquid investments controlled by an entity called Silverwing Speciality Finance Ltd (“Silverwing”). Silverwing is said to be an entity belonging to another client of Mr Jones: paragraph 41(ii). The Claimant alleged that it had suffered loss and damage being (i) the fees payable for the Together Loan extensions; and (ii) the sums lost through the inappropriate Silverwing investment.
20. In the Original Claim there is an express plea that no loss was suffered by the Claimant through the unauthorised borrowing in relation to either the BFL Loan or the Topland Loan: paragraphs 25 and 28.
21. The Original Claim includes a claim in deceit against Mr Jones, on the basis that it is alleged that Mr Jones did not tell the Claimant that he had arranged for it to take out the BFL Loan and the Topland Loan: paragraph 43. The Original Claim, however, did not allege that Mr Jones was fraudulent or dishonest in any other respects, and does not make any allegation of fraud or dishonesty against anyone other than Mr Jones.
22. No defence has yet been filed to the Particulars of Claim. The Defendant does not necessarily admit anything pleaded in the Original Claim. Between March 2023 and July 2024, the proceedings were repeatedly stayed, pursuant to various orders made by consent. I understand that the basis for the extended stay was because the parties were awaiting the outcome in other proceedings, where the Defendant was being sued by another defrauded client of Mr Jones, Discovery Land Co LLC (“Discovery Land”). The Defendant was held liable to Discovery

Land at first instance. The Defendant appealed that decision but the Court of Appeal dismissed the appeal. The decisions are reported at [2024] Lloyd's Rep IR 17 (the first instance decision) and [2024] PNLR 16 (the decision of the Court of Appeal).

The Proposed Amended Particulars of Claim

23. Thirteen months after the Particulars of Claim were served, on 23 May 2024, the Claimant changed solicitors, which appears to have led to a change in counsel.
24. In September 2024, the Claimant provided a first draft Amended Particulars of Claim dated 28 September 2024 (“the First dAPOC”). The First dAPOC advanced a new claim, alleging loss and damage for the sums advanced by BFL (although in the Original Claim, the Claimant had expressly stated that no loss had been suffered on the BFL Loan). In the First dAPOC, no complaint was made in relation to the Silverwing investment. The Defendant refused its consent to the amendments, on the grounds that the new draft amended claims were statute barred, the alleged breaches and/or loss having occurred in 2014, more than six years prior to the issue of the claim on 11 October 2022.
25. The Claimant then issued the Application. Accompanying the Application was a further revised version of the Particulars of Claim (“the Second dAPOC”). The Second dAPOC sought, for the first time, to introduce a claim for fraudulent breach of trust. The Defendant consented to certain of the amendments in the Second dAPOC (largely to matters of clarification and the correction of minor errors) but refused consent for others. In particular, the Defendant was not

prepared to consent to the proposed amendment which advanced a new claim for breach(es) of trust in relation to the BFL Loan.

26. On 12 February 2025, the Claimant served a further revised draft Amended Particulars of Claim (“the Third dAPOC”). The claim which the Claimant now wishes to advance goes as follows:

- (1) Correctly conceived, its loss flows from events in relation to the BFL Loan in 2014, and not to the subsequent Together Loan and Silverwing investment.
- (2) On or about 29 August 2013, Jirehouse Fiduciaries Nevis Limited, a company incorporated in St Kitts and Nevis (“JFNL”), which (as the name suggests) was linked to the Jirehouse Entities, was appointed as the Claimant’s director, at the behest of Mr Jones. At all material times, Collin Walwyn was a director of JFNL and was authorised to sign documents on behalf of the Claimant: see paragraph 23A.
- (3) There were three separate advances from BFL, made between 10 September and 16 October 2014, for a total sum of £2,232,980. The Claimant lost the total sum of £2,232,980, comprising the first, second and third advances from BFL, together with the interest that it would have received on such sums had they remained available to the Claimant: paragraph 28E(a). The Claimant also pleads that it lost the further sum of £1,150,000 which BFL had advanced to the Claimant in various tranches between 20 November 2014 and 14 September 2015 (plus interest) but no claim is made against the Defendant in respect of those

sums, because it is accepted that Mr Jones was the only director in respect of the Jirehouse entities at this time, and it is likely that Mr Jones acted dishonestly in relation to these matters: paragraph 28E(b). For those reasons, the amount of those further instalments cannot be claimed from the Defendant.

- (4) Mr Jones procured the Claimant to enter into “at least” the first BFL advance (and probably all three of them), by misleading the Claimant’s agent, Mr Walwyn. The Claimant contends that Mr Walwyn agreed or probably agreed to the advances from BFL because he was assured by Mr Jones that Mr Peganov knew and approved them, but that representation was false. The new case further pleads that Mr Jones knew that that representation was false or made it recklessly, without regard to whether it was true or false, because there was no legitimate reason for the Claimant to enter into the BFL Loan, given that it had not been approved by Mr Peganov: see in particular paragraphs 25, 25A, 25DD, 25F to 25G.
- (5) Regardless of the way in which the BFL Loan was approved, the Claimant should still have had the benefit of the BFL advances which BFL had lent to it. However, the Claimant does not know what happened to these advances. It infers that these advances were paid to Jirehouse Trustees Limited, alternatively to the Jirehouse Entities, by or at the behest of Mr Jones, and were then paid away. A number of primary facts are pleaded which are said to support this inference: see paragraph 25C.

- (6) If, as the Claimant contends, the inferences are correct, then Jirehouse Trustees Limited, or alternatively the Jirehouse Entities, held the BFL advances on trust for the Claimant, but the monies were paid away in breach of trust: see paragraph 25D.
- (7) There is then a further plea that such breach of trust was fraudulent: see paragraphs 25B to 25DD, 25H to 25JJ.
- (8) In support of its allegation that Mr Jones acted in fraudulent breach of trust, various other findings in relation to Mr Jones are pleaded: see paragraph 44A(de). In August 2019, Zacaroli J (as he then was) sentenced Mr Jones to 14 months in prison for contempt of court, on the basis that he had breached undertakings to return a client's misappropriated money or to explain what had happened to it (the client being Discovery Land). Mr Jones is currently in prison having been convicted in 2022 of two counts of fraud by abuse of a position of trust in relation to the misappropriation of monies belonging to Discovery Land, and has been sentenced to 12 years in prison.
- (9) Although the subsequent Topland Loan was used to discharge the Claimant's indebtedness to BFL, this did not extinguish the liability of the Jirehouse Entities to the Claimant in respect of the BFL advances. The Topland Loan was replaced in turn by the Together Loan. The Claimant's proposed amended case is that no further loss which can be claimed against the Defendant resulted from either the Topland Loan or the Together Loan. It is inferred, however, that Mr Jones arranged both these loans because he could not or would not repay the BFL advances

to the Claimant, and in order to conceal from the Claimant that these monies had been paid away. It is also pleaded that Mr Jones caused the interest on the BFL Loan and Together Loan to be paid, for substantially the same reasons. The proposed amended claim is put on the basis that the need to renew the Together Loan flows from the events complained of in 2014: see paragraphs 25E, 25J, 28A, 28B(a), 28E, 37 to 37A and 38.

(10) The Claimant says that it did not know, and could not with reasonable diligence have discovered, that the BFL advances were not available to it until at least 4 April 2019. That was the date when Mr Jones sent an email to the Claimant's agent Mr Amadou stating that the Claimant's mortgage was "not as it should be". (The Claimant adds that, contrary to what Mr Jones said in that email, the funds realised by the Together Loan were not invested with Silverwing or anyone else, because they were in fact used to repay the Topland Loan.) The Claimant pleads that, apart from the Fraudulent Breach of Trust Claim, to which on the Claimant's primary case no limitation period applies at all, time started to run against it for the purposes of the majority of its case from 4 April 2019 "at the absolute earliest": see paragraphs 38A to 38C, and 44A(f).

(11) None of the monies made available to the Claimant as a result of the unauthorised borrowing, and which were paid away, have ever been repaid to the Claimant: see paragraph 38D.

27. Finally, it is said that Mr Jones stopped paying interest on the loan in about March 2019. The Claimant, through its agent Mr Amadou, paid the arrears of

interest on the loan on 27 August 2019, and also paid interest for the period from 4 November 2019 to 28 February 2022. However, neither the Claimant nor Mr Peganov have been able to pay interest on the loan thereafter as a result of “the political difficulties between the UK and Russia, and in particular restrictions imposed on the movement of funds between those countries”: see paragraphs 38E to 39.

28. I understand that the Third dAPOC has now been approved by Petr Peganov, a director of the Claimant and Mr Peganov’s son. Except for the Fraudulent Breach of Trust Claim, the Application is made under CPR r.17.4(2), on the basis that the facts set out in relation to the Other Proposed Claims arise out of substantially the same facts as are already in issue in the proceedings: see paragraph 44B. In the alternative, the Claimant submits that the Court should allow the amendments to operate only prospectively, adopting the *Mastercard* approach.

The Evidence

29. The following evidence was before me:
- (1) three witness statements from Guy Marshall Davis, the Claimant’s solicitor;
 - (2) two witness statements from Zoe Michele Burge, the Defendant’s solicitor;

- (3) one witness statement from Mr Amadou, a director of JFNL at all material times from early 2015, which was in turn a director of the Claimant; and
- (4) two witness statements from Mr Walwyn (“Walwyn1” and “Walwyn2”).
30. Mr Walwyn’s evidence is particularly important, for at least two reasons. First, because on the Claimant’s case, Mr Walwyn approved the BFL Loan, but on what the Claimant says was a false basis, and second, because it is the Claimant’s knowledge in relation to the matters referred to in s. 32 of the LA 1980 which is relevant, and in relation to the BFL Loan that is the knowledge of Mr Walwyn, the agent of the Claimant’s director.
31. The Defendant has complained of the “egregious” failure to obtain Mr Walwyn’s evidence before the Third DAPOC. In Walwyn1, Mr Walwyn explains he was contacted by the Claimant’s solicitors, in January 2025, and sent a copy of what I understand was the Second dAPOC. He states that the Second dAPOC “made a number of inferences about what I did, or did not know, at various points which appeared to me to be correct. ...”. He explains that he has also been shown a version (there is some debate between the parties as to how different that version was from the Third DAPOC as served) of what would become the Third dAPOC. He confirms, that in so far as matters pleaded relate to him, and what he knew or did not know at various times, “... they are true and reflect my recollection and understanding.”
32. In response to various complaints raised by Ms Burge on behalf of the Defendant, including that Mr Walwyn’s evidence was vague, the Claimant

obtained Walwyn². This clarifies that Mr Walwyn “... *did not know that any of the loans (including the BFL advances at issue in this matter) were not made available to the Claimant, and were apparently paid away, at any time prior to the collapse of Jirehouse in May 2019*”. He adds that he did not see the email dated 4 April 2019 from Mr Jones until he was shown a copy in about February 2025. He also says, regarding the alleged representations made to him by Mr Jones:

“.... The events at issue took place in 2014. I cannot now recall precisely what was said, but I believe that Mr Jones or another solicitor at the Jirehouse office would have told me that Mr Peganov had given instructions for the loan to be taken out. I understood Mr Jones and/or the various Jirehouse Entities were acting on behalf of the Claimant on such matters. I also understood the Claimant to be under the control of Mr Peganov and his family. I would not have authorised the loan if I had known that Mr Peganov did not know about it, and had not asked for it be taken out. This is because I understood that Mr Peganov and his family were Jirehouse Entities’ clients, and Mr Peganov was entitled to give instructions to the Jirehouse Entities on the Claimant’s behalf.”

33. The Defendant submitted to me that this further evidence of Mr Walwyn remains very unsatisfactory. It is common ground that the Claimant had no bank account. Therefore, following the making of the BFL Loan, the Defendant says that it must have been apparent that the monies advanced were never made available to the Claimant, but Mr Walwyn does not explain where he thought the monies had gone. The Defendant also complains that there is no clear explanation from Mr Walwyn as to why Mr Peganov’s approval with regard to the making of the loan mattered. I will consider these criticisms of Mr Walwyn’s evidence and their effect on the application to amend further below.

Legal Principles

34. The principles applicable to an application to amend were not in dispute and are familiar:

(1) Amendments under CPR Part 17, r. 17.1(2)(b) must show a “real prospect of success”. This reflects the test on applications for summary judgment pursuant to CPR Part 24, r. 24.2. The court is being invited to consider whether the proposed amendments are “realistic” rather than “fanciful”: see *Swain v Hillman* [2001] 1 All ER 91, p. 92J. A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

(2) The Court should avoid conducting a “mini-trial”. Factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable: *Okpapi v Royal Dutch Shell plc* [2021] 1 WLR 1294, at [107], per Lord Hamblen. That guidance was given in the context of an application to serve out of the jurisdiction, but that involves the same test of showing that the claimant has a real (as opposed to fanciful) prospect of success.

(3) Once an amendment clears the hurdle of prospects of success, it is generally not appropriate to still consider the strength or weakness of the claim as a factor relevant to the residual exercise of discretion: *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480 at [49] and [69] - [77]. See more generally the notes in the White Book 2024, vol 1, para 17.3.6 at pp.518-519.

35. Applications which are made after the end of a relevant limitation period involve additional considerations. Such claims must still, of course, establish a real prospect of success. In addition, s. 35 of the LA 1980 provides that: “Rules of court may provide for allowing ... a new claim ... to be made ... but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.” Subsection (5) provides:

“The conditions referred to in subsection (4) are the following – (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action.”

36. This is reflected in CPR r. 17.4, where sub-section (2) provides that the court:

“... may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

37. In *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648, at [25], it was said (following existing authority) that there is a four stage test to be applied when considering amendments which are outside a statutory limitation period as follows:

- (1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

- (2) Did the proposed amendments seek to add or substitute a new cause of action?
- (3) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
- (4) Should the court exercise its discretion to allow the amendment?

38. As to what constitutes “the same or substantially the same” set of facts, guidance was given in the case of *Niprose Investments Ltd v Vincents Solicitors Ltd* [2025] EWHC 14 (Ch), at [31], as follows:

- (1) Whether a new claim arises out of the same, or substantially the same, facts as an existing claim is not a matter of discretion or case management but is a substantive question of law, which depends on analysis and evaluation to arrive at the correct answer.
- (2) It is of critical importance to carry out a careful, comparative evaluation of the scope and nature of the facts in issue in the existing claim and the facts alleged in the new claim.
- (3) If, on evaluation, the new facts are of an entirely different character from the existing facts in issue, the threshold for permission will not be met. Broadly similar facts, implicitly raised or understood, will not do.
- (4) ‘*Same or substantially the same*’ is not synonymous with ‘*similar*’.
- (5) Whilst, in borderline cases, the answer to this question may be substantially a ‘*matter of impression*’, in others it must be a question of analysis.

(6) The purpose of the requirement at stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiry of the limitation period, to investigate facts, and obtain evidence of matters, completely outside the ambit of, and unrelated to, the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

(7) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate. At stage 3 the court is concerned at a much less abstract, more granular, level than at stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial....

39. Claims in fraud are treated with particular care by the court and fraud is one of the matters which must be specifically pleaded (CPR Part 16, PD para. 8.2). Further important guidance regarding pleading fraud was given in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, at [161], per Lord Hobhouse:

“The judge’s assessment has to start with the relevant party’s pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party’s case is hopeless. ... The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to prepared to particularise it and, if he is unable to do so, his allegation will be struck out ... it is normally to be

assumed that a party's pleaded case is the best case he can make (or wishes to make) ..."

40. In *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [12] – [23] Flaux J (as he then was) summarised the principles that apply to a plea of fraud/dishonesty as set out in *Three Rivers DC v Bank of England* as follows:
- (1) The use of the word “fraud” or “dishonesty” is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.
 - (2) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.
 - (3) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable prima facie case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justifies the inference is a matter for the trial judge.
 - (4) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty.

41. See also per Birss J (as he then was) in *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), at [7]. However, the Claimant referred me to *Persons Identified in Schedule 1 to the Re-amended Particulars of Claim v Standard Chartered plc* [2024] 1 WLR 4589, where the Court of Appeal warned that although the need for proper particularisation was especially important where an allegation of fraud or dishonesty was concerned, the courts needed to beware of imposing such onerous pleading requirements as to make it impractical to bring meritorious fraud claims, particularly given the limited information that might initially be available to a victim. I have that warning well in mind.

Discussion and Analysis

42. I will consider, first, the Defendant's objections to the Fraudulent Breach of Trust Claim, including on limitation; second, whether the Other Proposed Claims arise out of the same or substantially the same facts already pleaded in the Original Claim, as well as the Defendant's submission that the Claimant has no real prospect of postponing the running of the applicable limitation periods under s. 32 in relation to these claims in any event; third, I will consider whether (depending on my findings on the first two issues) it would be appropriate to permit the Claimant to amend on a *Mastercard* basis.

(1) Fraudulent breach of trust

43. The Defendant advances three reasons why the amendments to plead the Fraudulent Breach of Trust Claim should be refused: (i) the allegation is inadequately pleaded and has no prospect of success; (ii) the claim is subject to

a limitation period and s. 32 of LA 1980 is not applicable; and (iii) in any event the Defendant can rely on a defence of laches.

44. I reject the submission that the claim is inadequately pleaded. The Defendant complains that the core of the claim is Mr Jones' false representation to Mr Walwyn that Mr Peganov was aware of, and had approved the BFL Loan (see Third dAPOC, at paragraph 25), without any pleading as to why that matters. The Defendant also complains that the Fraudulent Breach of Trust Claim relies on a series of inferences, which it is said cannot be drawn, and which are unsupported by evidence, particularly given that this is a claim in fraud. Finally, the claim relies on the same particulars as are relied upon in respect of the Claimant's case for non-fraudulent breach of trust, which it is said demonstrate that the Claimant is relying on matters "equally consistent – on its own case – with negligence".
45. As to these complaints, the Claimant says that, regardless of the way in which the BFL Loan was procured, the Claimant should still have the benefit of the BFL advances. The Claimant, however, says it never had the benefit of those advances, not least because it did not have its own bank account. The Claimant points out that the inferences it seeks to draw – in particular the inference that the monies were paid either to Jirehouse Trustees Limited, alternatively to Jirehouse Entities, and then paid them away - are similar to the way that Mr Jones acted in relation to Discovery Land, relying on *Axis Speciality Europe SE v Discovery Land Co LLC* [2024] PNL R 16. As has been found by other judges, it is likely that Mr Jones was dishonest and prone to stealing client money.

46. Moreover, it is permissible to advance a claim in fraud on the basis of inferences, provided that the primary facts on which the inferences are drawn are more consistent with dishonesty than not: see *Bank of Moscow v Kekhman*. Even if the Claimant at the same time chooses to advance a claim for non-fraudulent breach of trust does not mean that its primary case, that the breach of trust was fraudulent, is unarguable. It also seems to me that the Claimant is entitled on an application to amend to rely on known facts about Mr Jones, including the fact that he has been convicted of stealing client monies, and that he is a struck-off solicitor who has been found in contempt of court: see paragraph 44A(de). See in this context *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWHC 2437 (Ch).
47. Finally, I have considered the Defendant's complaint that the pleading does not explain why Mr Peganov's approval of any loan mattered. Mr Walwyn does provide an explanation, in a witness statement signed with a statement of truth, that "... Mr Peganov was entitled to give instructions to the Jirehouse Entities on the Claimant's behalf". It is true that he does not go on to explain why that is, or what was the source of his understanding, but it is not possible to reject this evidence on an application to amend.
48. Overall the criticisms levelled at the Fraudulent Breach of Trust Claim go too far. The core allegation is that the Claimant should have the benefit of the monies from the BFL Loan. The inference that these monies were wrongly paid away by the Jirehouse Entities is properly pleaded. The claim may face real difficulties, but that is different from concluding that the claim does not have a real prospect of success. The general rule is that (apart from the case of "very

late” amendments, which this is not) unless it can be seen that a claim lacks real prospects of success, the merits are a matter for trial: *CNM Estates v Carvill-Biggs*, at [77]. Much of the Defendant’s complaints were an invitation for the court to engage in a mini-trial.

49. Next, the Defendant submits that, contrary to the Claimant’s position, the Fraudulent Breach of Trust Claim is subject to a limitation period, which has expired. S. 21(3) of the LA 1980 provides a six year limitation period for actions in respect of breaches of trust. However, that must be read subject to s. 21(1)(a) of the LA 1980, which provides that:

“21(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

- (a) In respect of any fraud or fraudulent breach of trust to which trustee was a party or privy; or*
- (b) To recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”*

50. The Claimant’s position is that no period of limitation applies to the Fraudulent Breach of Trust Claim. Its case is that the BFL advances were paid to Jirehouse Trustees Limited (or any of the Jirehouse Entities), and therefore it follows that the relevant entity held them on trust for the Claimant, as monies held by a solicitor on its client account are held on trust for the client: *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 168F, per Lord Hoffmann. The Claimant submits that this is a claim in respect of the unauthorised release of the Claimant’s monies, which the Jirehouse Entities held on trust, and to which the Jirehouse Entities were privy. Further, the Claimant pleads that Mr Jones’ behaviour which caused, constituted or facilitated the breach of trust was dishonest: see

paragraphs 25DD and 25II of the Third dAPOC. The case falls with s. 21(1)(a), and the Defendant can be in no better position than the Jirehouse Entities.

51. The Defendant disputes the categorisation of the claim as a true claim for breach of trust to which there is no applicable limitation period, relying on *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400 (“*Paragon*”). In a well-known passage, at pp. 408 – 409, Millett LJ (as he then was) explained that there was two different classes of persons described as “constructive trustees”, namely (1) those holding on trust by virtue of taking possession of property on trust for or on behalf of others before the occurrence of the transaction impeached and (2) those to whom the description applies only by reason of that transaction. S. 21 of the LA 1980 has not abrogated that distinction and is intended to apply only to trustees of the first description. The limitation period applicable to those in the second category is six years, although the start of the period may be deferred under s. 32 in such cases. This distinction has been approved at the highest level: see *Williams v Central Bank of Nigeria* [2014] UK SC 10; [2014] AC 1189, at [7] – [11], and [13] – [15], where Lord Sumption explained that the second category of so-called trusteeship does not reflect any pre-existing obligation. Instead, it is purely remedial, and comes about solely because of the misapplication of the assets.
52. In this case, the Claimant has pleaded the position as though the Jirehouse Entities were a category 1 trustee: see paragraphs 18A, 25D and 25J. Whilst that is consistent with the orthodox analysis of money paid into a solicitor’s client account and then wrongfully paid away, the Defendant submits that this is not correct and that the Jirehouse Entities were not true category 1 trustees at all.

The claim alleges that Mr Jones fraudulently induced the loan and then the monies from that fraudulently induced loan were paid away, but any status as trustee arises only from the transaction complained of. The trusteeship arises, not as a result of any pre-existing obligation, but as a result of the misapplication of assets: see Third dAPOC, paragraphs 25, 25DD(b), 25F and 25G.

53. In reply, the Claimant submits that *Paragon* is distinguishable on the facts. In *Paragon*, the plaintiffs were mortgage lenders, the defendant solicitors acted for both the plaintiffs as well as the borrowers. The defendant solicitors were obliged by their instructions to the plaintiff lenders to report sub-sales but, in breach of duty, failed to do so: *Paragon*, at p. 403F-G. The plaintiffs applied for leave to amend their pleadings to allege fraud, conspiracy to defraud, fraudulent breach of trust and intentional breach of fiduciary duty, at p. 403J. The plaintiffs alleged that the defendants were guilty “of a fraudulent breach of trust”, and that the defendants obtained the mortgage advance

“dishonestly by statements (in the report on title) which they knew to be untrue and consequently held the money on constructive trust to return it to the plaintiffs immediately on receipt. Payment of the money to or by the direction of the borrower of the completion of the sub-purchase instead of to the plaintiffs was a breach of this constructive trust. As counsel for the plaintiff acknowledged, it was not a breach of trust which would have arisen in the ordinary way from the receipt of the advance money for payment of the amount due on completion. That trust was discharged according to its terms, but its existence assumes that the defendants acted honestly; on the plaintiffs’ case it never came into being but was displaced ab initio by the constructive trust in their favour”. (at p. 408B-C)

54. The Claimant says that in *Paragon* the plaintiffs accepted that there was no breach of the category 1 trust. The present case is different, because the Claimant’s case is that Mr Walwyn had authority to, and did, agree the loan on its behalf (albeit that the Claimant’s case is that Mr Walwyn did so only because

he was lied to by Mr Jones). The Claimant infers that the money was then supposedly paid into one of the Jirehouse Entities' client accounts and was paid out of that account without the Claimant's instructions. Hence, the Claimant contends, its case is indeed for the breach of a category 1 trust, and no limitation period applies.

55. These arguments raise difficult questions of law, which the court should not determine on a summary procedure: see *American Cyanamid Co v Ethicon Ltd* [1975] 1 AC 396, 407 and the frequent warning against deciding controversial points of law in a developing area on assumed or hypothetical facts rather than on the basis of actual findings: see *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7. However, the Defendant has at least a reasonably arguable case that it has a limitation defence to the Fraudulent Breach of Trust Claim. On the other hand, even if there is a six year limitation period in respect of the Proposed Fraudulent Breach of Trust Claim, the Claimant is nonetheless entitled to argue that the running of any period of limitation would be postponed, due to the effect of ss. 32 of the LA 1980: see Third dAPOC, paragraph 44A. Within the limits of that section, the effect of fraud, concealment and mistake is to postpone the running of time until the fraud, concealment or mistake was discovered, or could with reasonable diligence have been discovered, by the claimant.
56. The Claimant submits that it did not know, and could not with reasonable diligence have discovered, that the BFL advances were not available to it until at least 4 April 2019 "at the absolute earliest". The Defendant disputes this. It submits that the Claimant has no prospect of taking advantage of the

postponement of the limitation period, because all the relevant facts were known, or could with reasonable diligence have been known, to the Claimant either in 2014, or in October 2016, when Mr Peganov discovered the existence of the charge on the Property to secure lending from Topland.

57. It is not possible to decide this issue, on the material available to the Court. The arguments on limitation depend on the Claimant establishing what Mr Walwyn knew in 2014, and then what Mr Peganov knew in 2016, and what reasonable steps could have been taken to discover the true position. Both parties appear to accept that it is Mr Walwyn's knowledge which is key. While evidence has been filed from Mr Walwyn, it does not deal with the point. Mr Walwyn says almost nothing about the nature of the relationship between the Claimant and Mr Peganov, and nothing at all about what (if any) communications or discussions were held between Mr Walwyn and Mr Peganov in October 2016. The Defendant must have at least a reasonably arguable defence on limitation.

58. Finally, the Defendant relies on a defence of laches. The Defendant hardly pursued this argument at the hearing. Laches is an equitable doctrine, "under which delay can bar a claim to equitable relief": see *Fisher v Brooker* [2009] 1 WLR 1764, at [64], per Lord Neuberger. Lord Neuberger held that whilst it might not be an "immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion". Laches normally only applies where the lapse of time has given rise to circumstances which mean that it would now be inequitable to the party against whom relief is sought to be denied a defence. Mere delay, even extremely lengthy delay, is not enough: *Snell's Equity*, at para. 5-012. Despite several rounds of evidence, the Defendant

did not suggest that it had suffered any detriment as a result of any delay on the part of the Claimant. In the skeleton argument prepared for the hearing of the Application, it was suggested, for the first time, that there has been prejudice to the Defendant, in the form of making it more difficult for the Defendant to investigate and defend the claim now sought to be made against it. There is no evidence to support this. In any event, the extent of any detriment suffered by the Defendant, and whether it would be truly inequitable to allow the Claimant to pursue the claim, given the lapse of time, is a matter for trial. It is certainly not something which can be ruled on at this stage.

59. In summary, my decision in relation to the Fraudulent Breach of Trust Claim is that the Claimant has set out a case that is more than merely arguable, but that the Defendant has established a reasonably arguable defence on limitation.

(2) The Other Proposed Claims

60. I turn now to the other set of amendments. These seek to plead claims for (non-fraudulent) breach of trust, negligence and breach of contract, breach of fiduciary duty and deceit. The Claimant relies on CPR r. 17.4(2). It submits that the Other Proposed Claims, unlike the Fraudulent Breach of Trust Claim, arise out of the “substantially the same facts” as the existing claim.
61. I do not think that the Other Proposed Claims arise out of “substantially the same facts” as the Original Claim. This is not a matter of discretion or case management, but involves a substantive question of law, which depends on analysis and evaluation to arrive at the correct answer: see *Niprose v Vincents* [2025] EWHC 14 (Ch), at [31]. In this case:

- (1) The effect of the amendments in the First, Second and Third dAPOC is, practically speaking, to abandon the Original Claim. The particulars of negligence and breach of contract have been struck through in their entirety. The claim for breach of undertaking has been removed. Two of the three particulars for the claim in deceit have been removed, and the focus of both the claim in deceit and the claim in breach of fiduciary duty has changed.

- (2) The Original Claim pleads that the Claimant's loss arose from the undertaking given by Mr Jones in October 2016, and the failed Silverwing investment. The Other Proposed Claims instead focus on events relating to the BFL Loan in 2014. The Original Claim expressly pleads that no loss was suffered as a result of the BFL Loan. The Claimant says that this does not matter, because even when faced with the Original Claim, the Defendant was required to investigate the alleged unauthorised entry into the BFL Loan; the alleged unauthorised entry into the Topland Loan; and misrepresentations made by Mr Jones to Mr Amadou in relation to the Topland Loan. In other words, the Claimant says that the Proposed Other Claims require the Defendant to investigate facts and issues which the Defendant has already investigated.

- (3) I do not think that it is so simple. When considering the Original Claim, the Defendant was required to investigate the alleged unauthorised entry into the Together Loan in 2016; consider the alleged strategy to save ATED; consider the terms of the Undertaking provided by Mr Jones, the investment with Silverwing and whether this was held in readily realisable investments; and deal with the allegation that Mr Jones did not inform the Claimant of

the earlier loans from BFL and Topland. In contrast, under the Third dAPOC, the focus has firmly shifted to the BFL Loan and events in 2014. It is a very different case.

(4) In support of its contention that the Other Proposed Claims arise out of the substantially the same facts as are already in issue on the Original Claim, the Claimant relies on a letter, dated 27 March 2024, where the Defendant's solicitors indicated that, with the consent of the SRA, the Defendant had searched and identified some 20,000 documents on the Jirehouse server which were responsive to key word searches relevant to the claim. The letter goes on to say that the Defendant had "to date" received some 2,000 documents and that further documents were being released by the independent counsel team. The Claimant says that the letter indicates that "it is highly likely that the facts which are likely to have been explored at trial would have been very broad indeed, even on the existing case." This is, however, not part of the statutory test. In any event, the Claimant is placing far too much weight on that letter. The letter says nothing about to which issues the documents relate. The Defendant cannot be reasonably expected to have been investigating matters which were not said to have given rise to any loss suffered by the Claimant.

(5) In determining whether a claim arises out of the same or substantially the same facts, one returns to the statements of case. In this case, one may contrast the "Particulars of Negligence and Breach of Contract" as pleaded in the Original Claim with those set out in the Third dAPOC: see at paragraph 40 in both. The Original Claim pleaded (among other things) the

failure to advise fully and accurately as to the purpose of the proposed strategy to save ATED, implementing a strategy to save ATED without instructions from the Claimant/Mr Peganov, and causing or permitting the proceeds of the Together Loan to be invested in risky and illiquid investments. The Third dAPOC instead pleads that the Jirehouse Entities caused or permitted Mr Walwyn and Mr Amadou to believe that the BFL advance had been approved by Mr Peganov, when it had not; caused or permitted the Claimant to enter into the BFL Loan; and then causing or permitting Mr Amadou to believe that the Topland Loan had been approved by Mr Peganov. The entirety of the particulars set out in the Original Claim have been struck through, to be replaced with entirely new ones.

- (6) There are two sub-paragraphs in the particulars which, at first glance, might be said to arise out of the same or substantially the same facts to the Original Claim: see at paragraph 40(vii) (causing or permitting the Claimant to enter into the Together Loan) and (viii) (causing or permitting the Together Loan¹ to be extended on two occasions). However, the reason why these particulars of negligence or breach of contract are pleaded is because the Jirehouse Entities are alleged to have been covering up the fact that there were no monies available to repay Together Loan. As I understand it, this is because on the Claimant's case Mr Jones had diverted the monies raised from the BFL Loan. These sub-paragraphs also do not arise out of substantially the same facts as are already in issue on the Original Claim.

¹ The pleading before the Court refers here to the Topland Loan, but it was clarified that this was a typographical error and the Together Loan was intended.

(7) I received almost nothing by way of separate submission on the claim for breach of fiduciary duty. The core of the complaint appears to be entering into unnecessary borrowing, now specified to include all three loans from BFL, Topland and Together. There is also a new plea, that in so far as any monies lent to the Claimant by BFL and/or Topland were paid to Silverwing, then Mr Jones and the Jirehouse Entities preferred the interest of Silverwing above those of the Claimant. While the arguments in relation to the breach of fiduciary duty claim are more finely balanced, ultimately this plea also does not arise out of “substantially the same” facts.

(8) I remind myself that “same or substantially the same” does not mean “similar”. The Other Proposed Claims plead a different loss, arising out of a different and earlier loan and relying on different particulars. It cannot be said to arise out of “substantially the same” facts. It does not arise out of even similar facts.

62. I note that this particular objection to the amendments did not feature, save in passing, in the skeleton argument prepared by the Defendant. It did, however, appear as one of the many grounds of objection to the Application in the witness statement filed by the Defendant’s solicitor, Ms Burge. I am satisfied that the Claimant had a proper opportunity to address me on this point, both in their skeleton argument and in oral submissions.

63. Because I have held that the Other Proposed Claims do not arise “out of the same or substantially the same facts”, on one view, I need say no more about the amendments to plead these claims. However, in case I am wrong on my conclusion on CPR r. 17.4(2), and because the matter was fully argued before

me, I will consider the Defendant's further submission that the amendments to plead the Other Proposed Claims ought to be refused in any event because the Claimant has no prospect of establishing that it has even an arguable case on postponing of the limitation period under s. 32 of the LA 1980.

64. The Defendant's argument goes as follows:

- (1) The Claimant is a company whose only purpose is to hold the Property: see Third dAPOC, paragraph 2.
- (2) Mr Walwyn signed or likely signed the loan documentation: Third dAPOC, paragraphs 25 and 25G. Both parties agree that it is the Claimant's knowledge, through its directors, which is relevant, and not the knowledge of Mr Peganov. In this context, it is Mr Walwyn's knowledge which is material, and the Defendant has criticised the Claimant for wrongly eliding what Mr Peganov knew with what Mr Walwyn knew (or could with reasonable diligence have discovered).
- (3) Mr Walwyn must have been aware, given that the Claimant had no bank account, that monies from the BFL Loan had not been made available to the Claimant and had been paid elsewhere. It is said that with reasonable diligence Mr Walwyn could and should have established where the monies had been paid, or that the monies were not where they were intended to be. In this regard, the Claimant has no real prospects of establishing that it was unaware that monies were not available when Mr Walwyn proceeded to sign any documentation in respect of the further advances (of which there were two).

- (4) Mr Walwyn's two witness statements (the second produced in response to criticisms raised by the Defendant) are silent on where the monies are supposed to have gone.
- (5) The Defendant says that where these matters could have been pleaded but have not, or could have been explained in evidence in support of the Application, but were not, the court should conclude that the Claimant has no further material which will be forthcoming.
65. The difficulty I have with this submission is that the Defendant is asking the court to infer matters about Mr Walwyn's knowledge solely on the basis of two short witness statements, both from what is said and what is not said. Mr Walwyn is not an employee of the Claimant, but a former employee of the Jirehouse Entities. I do not accept the submission that because Mr Walwyn has not said more does not mean that there is not more that he could say, particularly at a stage when only limited disclosure has been provided. However, the Defendant certainly has a reasonably arguable defence on limitation in respect of the Other Proposed Claims.
66. The Defendant further submitted that, quite apart from any point on limitation, the proposed new claim in deceit has no real prospect of success. Part of the claim in deceit relies on Mr Jones' failure to tell Mr Peganov (as opposed to the Claimant) that he was arranging the BFL and Topland Loans, but this is not an allegation of deceit as against the Claimant. Another allegation is based on the inference that Mr Jones represented to Mr Walwyn that Mr Peganov had approved or authorised the second and third BFL advances. The Defendant points out that earlier in the Third dAPOC, at paragraph 25G, there is a plea that

“Due to the passage of time, Mr Walwyn cannot now recall whether he knew of those advances, but if he did, then in accordance with his usual practice, Mr Walwyn believes that he would have arranged them following an assurance by or on behalf of Mr Jones to the effect that Mr Peganov was aware of, and had approved the same ...”

67. At the moment, it is not explained how an inference can be drawn that a fraudulent misrepresentation was made, given that Mr Walwyn cannot even recall whether he knew of these two further advances, let alone what he was told about them by Mr Jones. Quite apart from the fact that the new claim in deceit does not arise out of substantially the same facts as the Original Claim, I would have been minded to refuse permission to amend in relation to deceit, at least without the claim being further reformulated to focus on allegations of deceit against the Claimant (as opposed to Mr Peganov).

(3) Allowing the amendments on a Mastercard basis?

68. Given that there is a reasonably arguable case that the Proposed Fraudulent Breach of Trust Claim is statute-barred, and given that the Other Proposed Claims do not arise out of the same or substantially the same facts as the Original Claim and that, in any event, the Defendant has a real prospect of establishing a limitation defence to Other Proposed Claims, normally the Court would refuse the Claimant permission to amend, and require it to issue a new claim form. The Claimant says that there is another course open to me, which is to permit the amendments to be made, but provide that they only relate back to 12 February 2025, when the Third dAPOC was served, or some other date. The Claimant relies on what was said in *Duke of Sussex v NGN*, at [83]:

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

69. Fancourt J indicated, however, that where there are contested issues of limitation, requiring the claimant to issue a new claim provides the defendant with the opportunity to seek to strike it out summarily on limitation grounds, or seek a trial of a preliminary issue, without the need to prepare for a full trial on the merits. Such early determination of a limitation issue is usually desirable because, if the defence succeeds, it saves the parties from the costs of investigating the merits of a stale claim.

70. I decline to make an order on a *Mastercard* basis, for the following reasons:

(1) I do not read Fancourt J’s decision in *Duke of Sussex v NGN* as suggesting that a *Mastercard* approach has somehow become the default position. Indeed, Fancourt J expressly indicated that it was “a power that should be exercised with caution, given its potential to subvert the purpose underlying the Limitation Act”: see at [88].

(2) Even in the *Duke of Sussex* case, Fancourt J did not give permission to introduce all the proposed amendments on such basis: see at [182] – [190]. The discretion to permit an amendment on a *Mastercard* basis must be exercised with regard to any prejudice likely to be caused to the defendant, the extent to which in a particular case the purposes of the Limitation Act would be undermined by it, and the consequences for the future management of the trial, both as regards the existing claims and

the new claims. Further, whether it is appropriate to make such an order is likely to depend on the stage that the unamended proceedings have reached and other associated matters. Fancourt J also highlighted that, when the court was considering whether to make a *Mastercard* type order, a relevant consideration was whether the respondent had a strong case for summary (or prior) determination of the limitation issue: see at [89].

- (3) In this case, the proceedings are still at an early stage. No trial date has been fixed. There has been no case management. The Claimant says that it would be “more convenient” to make a *Mastercard* order, rather than requiring the Claimant to issue a new claim and apply for it to be consolidated with the present action. It says that such a course of action will only cause unnecessary work for the Claimant and the Court and, possibly, the Defendant.
- (4) The course of action proposed by the Claimant seems to be an implicit suggestion that the Claimant must be allowed to take its case to trial. That would be to disregard the strength of the Defendant’s case on limitation. It would be preferable, in my view, to require the Claimant to start a new claim, if it wishes to pursue the claims as set out in the amendments. That allows the Defendant, if it so wishes, to apply for summary judgment on that claim, or seek the trial of a preliminary issue.
- (5) Refusing permission to amend and requiring the Claimant to issue a new claim is particularly appropriate where the effect of the Claimant’s proposed amendments would be, in effect, to abandon the Original

Claim either entirely, or almost entirely, and to substitute what are in my view clearly new claims based on different facts. It is wrong in principle to allow new claims to be added to an existing claim, where in substance the existing claim is being abandoned. That would be to subvert the purpose underlying the LA 1980.

71. After the hearing before me concluded, the parties (with the court's permission) exchanged a further round of written submissions. The Defendant drew my attention to the case of *Frontiers Capital I Partnership v Thomas Flohr* [2025] EWHC 687 (Ch), a decision of Master Brightwell. In that case, Master Brightwell considered whether to make a *Mastercard* type order, but ultimately rejected this. At [167], Master Brightwell indicated that the "general rule" in these situations, namely, that the claimant should be required to commence a new claim where there is an arguable limitation defence, should be followed.
72. Some of the features of the case before Master Brightwell differed from that before me. In particular, Master Brightwell had determined to grant the defendant summary judgment on the existing claim before him. However, in the present case, the Claimant is abandoning its existing claim and seeks to replace it with the Fraudulent Breach of Trust Claim and the Other Proposed Claims. The Original Claim, in very large measure, is being pleaded away. The right way to deal with the proposed amendments is to require the Claimant to issue a new claim, rather than allow what is in effect a new claim to be added by way of amendment, particularly where the Defendant has an apparently strong defence on limitation.

Disposal

73. Accordingly, for the reasons set out in this judgment, I will dismiss the Application and refuse the Claimant permission to amend. The Defendant has a reasonably arguable defence on limitation in respect of both the Fraudulent Breach of Trust Claim, and the Other Proposed Claims, and the Other Proposed Claims do not arise out of substantially the same facts as are already in issue on the Original Claim. Should the Claimant wish to pursue these claims, it must issue a new claim in the normal way.