Neutral Citation Number: [2026] EWHC 1243 (Ch)

Claim No. CH-2025-000165

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

ON APPEAL FROM THE JUDGMENT & ORDER OF MASTER PESTER DATED 30 MAY 2025 AND 16 JUNE 2025 (REF: BL-2022-001754)

22 May 2026

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

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B E T W E E N:

FAY OF LONDON LIMITED

Claimant / Appellant

AND

AXIS SPECIALTY EUROPE SE

Defendant / Respondent

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William Flenley KC and Heather McMahon (instructed by Davis Woolfe Limited) by the Claimant / Appellant
Daniel Shapiro KC and James Sharpe (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Defendant / Respondent
Hearing date: 17 March 2026
Draft judgment circulated: 18 May 2026

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APPROVED JUDGMENT

JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

1. This appeal concerns the correct approach to be taken on an amendment application to add a new claim for fraudulent breach of trust (the **"Fraudulent BoT Claim"**) that may be time-barred and which does not arise out of the same or substantially the same facts as those already in issue in the claim.

2. Master Pester (the **"Judge"**) refused permission to the claimant (**"Fay"**) in his 30 May 2025 judgment (the **"Judgment"**), embodied in his 16 June 2025 order (the **"Order"**).

3. It is common ground that there is a reasonably arguable case that there is a limitation defence to the Fraudulent BoT Claim under section 21(3) of the Limitation Act 1980, which provides for a six-year limitation period for actions in respect of breaches of trust.

4. However, Fay contends on appeal that the Judge should have held that this should not prevent the amendment being permitted. Fay obtained permission to appeal on three grounds. In my judgment those grounds should be rejected. Two further grounds emerged during the hearing. As explained below, I consider that the first- which concerns what legal test was identified- should fail, that permission for the second should not be granted, and that in any event the second ground fails, for the reasons set out below. Listing them out, the grounds advanced before me by the end of the hearing, taking Fay's appeal documents together with Mr Flenley's oral submissions, were as follows:

    (1) Fay's application was brought under CPR 17.1(2)(b), so the question of whether the defendant has a reasonably arguable limitation defence is not material to such applications (**"Ground 1"**).

    (2) The Master failed to identify that the correct legal test focused on whether there was a reasonably arguable limitation defence in danger of being *prejudiced* by the amendment being permitted rather than Fay being required to start a fresh claim if it wished to bring the Fraudulent BoT Claim.

    This ground arose in the course of oral submissions. Fay contended that this was part of Ground 1, and- while disputing that- Axis stated that it was content to deal with it on the appeal given that it simply related to the identification of the correct legal test. For convenience I shall refer to it as **"Ground 1(a)"**. As explained below, I do not consider this was part of Ground 1.

    (3) Even if- contrary to Ground 1(a)- the Judge stated the correct test for permission to amend, he *applied* it incorrectly, because he ignored the point that permission to amend should be refused only if there was a prospect that the amendment would prejudice the defendant in respect of limitation (**"Ground 1(b)"**). I have taken this wording (with the addition of the reference to Ground 1(a)) from that put orally by Mr Flenley for Fay. The argument went on to contend that there was no prejudice and that I should decide this myself.

    This ground arose through Mr Flenley's oral submissions. Fay contended that it was entitled to run this argument as of right. Indeed, Fay contended that Grounds 1(a) and (b) were Ground 1 or part of Ground 1. However, Fay contended as a fallback that if

Fay was wrong on that it sought permission orally to amend its ground of appeal, identifying the form of words that it sought to add as a further ground. Axis contended that Fay did require permission and that such permission should be refused, failing that this ground of appeal should be rejected. Axis's primary stance was that the Judge had correctly applied the legal test, but that if he had not, they relied on some alternative grounds of prejudice to seek to uphold his judgment on alternative grounds. Fay accepted that Axis was entitled to rely on these grounds (while contesting that they showed the prospect of prejudice) without the need to serve a formal respondent's notice, given how the Ground 1(b) point had arisen.

(4) Where an amendment raises a difficult question of law the point should be allowed to go forward to trial, which on the facts means allowing the amendment (**"Ground 2"**), rather than asking whether there is a reasonably arguable limitation defence.

(5) If, contrary to both parties' submissions, I consider that the correct approach is to determine the question of whether there is an applicable limitation period, I should determine that the limitation defence fails on the ground that section 21(1)(a) of the Limitation Act 1980 applies (**"Ground 3(a)"**). The original grounds also included a **Ground 3(b)** that the presence of a real prospect of Fay defeating Axis's limitation arguments was sufficient to allow the amendment, but it was accepted orally that this replicated Ground 2 and therefore was not a separate ground. Therefore, I do not propose to deal with it separately.

5. Permission to appeal was granted by Adam Johnson J in respect of Grounds 1, 2 and 3 above by order dated 15 December 2025.

6. In my judgment, the appeal should be dismissed, for the reasons below.

<u>The facts</u>

7. The facts are set out clearly in the Judgment, so I limit myself to summarising the key elements pleaded by Fay.

8. Fay claims under the Third Party (Rights Against Insurers) Act 2010 against the defendant (**"Axis"**) as insurer of three entities, Jirehouse Partners LLP, Jirehouse Trustees Ltd and Jirehouse (together the **"Jirehouse Entities"**). The Jirehouse Entities entered insolvency well before the claim was issued. Mr Stephen Jones, who plays an important part in the events complained of and is currently in prison for fraud, was at all material times a director of Jirehouse and Jirehouse Trustees Ltd and a member of Jirehouse Partners LLP. Fay contends that the Jirehouse Entities carried out a solicitors' practice, of which Mr Jones was the principal fee earner, and that the Jirehouse Entities were retained to act on behalf of Fay as requested from time to time.

9. Fay is a corporate vehicle whose purpose was to own a flat in Eaton Square (the **"Flat"**) on behalf of a discretionary family trust settled by Vasily Peganov. The Flat was acquired through the trust purchasing the shares in Fay on 18 November 2011 for £4.9m. Fay claims that it entered into three series of loans secured against the Flat in order to borrow money: (i) from Bridging Finance Limited (**"BFL"**) in the sum of £1,633,655 including fees as agreed on or around 10 September 2014 and supplemented by further advances on or around 24 September 2014 and 16 October 2014 totalling £632,980 and further advances between 20 November 2014 and 14 September 2015 totalling £1,150,000 plus

fees and charges (taken together with the initial sum the **"BFL Loans"**); (ii) from Topland Jupiter Limited (**"Topland"**) in the sum of £3,370,840 including fees on or around 23 September 2015 (the **"Topland Loan"**), which was used to discharge the BFL Loans; and (iii) from Together Finance (**"Together"**) in the sum of £3,150,000 (the **"Together Loan"**), of which £3,081,660 was used (together with a small addition) to discharge the Topland Loan.

10. Proceedings were issued on 11 October 2022. The original particulars of claim, dated 7 February 2023, claimed that Mr Peganov did not give instructions for the BFL Loans or Topland Loan and that Mr Jones had not told Fay that he had arranged for these loans, but pleaded that no loss was suffered through this unauthorised borrowing. Rather, Fay claimed that, having sought an explanation for these loans from Mr Jones, Mr Peganov continued to repose trust in him and the Together Loan was taken out. The original claim was that the proceeds had been lost through inappropriate investment in risky and illiquid investments controlled by an entity called Silverwing Speciality Finance Ltd (**"Silverwing"**) belonging to another client of Mr Jones.

11. Following various stays of the proceedings and a change of legal team, three sets of draft amended particulars were provided to the defendant from 27 September 2024, of which the last one, the third, served on 12 February 2025 (the "**Third Draft APOC"**), is the relevant one for present purposes. The claim set out in the Third Draft APOC is that loss flows from events in relation to the BFL Loans, not the subsequent Together Loan and Silverwing investment.

12. Rather, the claim that Fay now wishes to advance includes the following Fraudulent BoT Claim:

    (1) Just over a year before the first of the loans, Jirehouse Fiduciaries Nevis Limited (**"JFNL"**), a company linked to the Jirehouse Entities, was appointed a director of Fay at the behest of Mr Jones. The documentation for the original BFL loan was signed by Collin Walwyn, a director of JFNL authorised to sign documents on behalf of Fay, following a false assurance given by Mr Jones that Mr Peganov was aware of and had approved the proposed loan.

    (2) It should be inferred that these monies were paid to Jirehouse Trustees Ltd alternatively the Jirehouse Entities. They had a duty not to release it except with Fay's express instructions.

    (3) It is inferred that they paid it away without such authorisation in breach of trust.

    (4) Mr Jones probably engaged in similar conduct in respect of the further advances made on or around 24 September and 16 October 2014.

    (5) Given Mr Jones' role in it, the breach of trust was fraudulent.

13. The Third Draft APOC also included claims for non-fraudulent breach of trust, negligence, breach of contract, breach of fiduciary duty and deceit (the **"Other Proposed Claims"**).

<u>Relevant principles concerning amendment of pleadings</u>

14. The relevant statutory and CPR provisions are as follows:

(1) A new claim brought in the course of an existing action shall as a result of section 35(1) of the Limitation Act 1980 be deemed to have been commenced on the same date as the original claim.

(2) The Court shall not allow such a new claim other than pursuant to rules of Court (or as provided by section 33 of the Act) to be made in the course of any action after the expiry of any time limit under the Act which would affect a new action to enforce that claim, and such rules of Court shall in the case of a claim involving a new cause of action require that it arises out of the same facts or substantially the same facts as those already in issue in the existing claim: sections 35(3)-(5).

(3) Those rules of Court are set out in CPR r.17.4(2). That applies where (so far as material for present purposes) "*a period for limitation period has expired under – (i) the Limitation Act 1980*" (CPR r.17.4(1)). It 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 are as already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*".

(4) In contrast, CPR r.17.1 provides for a party to amend their pleading after service with the permission of the Court (in the absence of consent from the other party), without including the requirement in CPR r.17.4(2).

15. The case-law explains how one deals with a case where there is a dispute over whether a limitation period has already expired by the time of the determination of the application. It was common ground before me that the relevant approach is set out by the Court of Appeal in *Viegas v Cutrale* [2025] 1 WLR 1467. Newey LJ, giving the leading judgment, explained that where the claimant seeks to introduce by amendment a new claim that does not arise out of the same facts or substantially the same facts:

(1) the presence of a reasonably arguable limitation defence is not itself sufficient to refuse permission: [31];

(2) rather the defendant's position must be made worse by the doctrine of relation back: [31];

(3) any real prospect of a limitation defence being prejudiced by relation back should suffice, because while the amendment should not be rejected unless there was a solid basis for thinking that a limitation defence could be prejudiced by the doctrine of relation back, the threshold could not be a high one: [40];

(4) the reason for that is that a claimant wishing to add a new claim could always issue a new claim whereas if a new claim is brought in by amendment the defendant will lose the chance ever to rely on the limitation period having expired in the interval between the date on which the claim was issued and that on which it was amended: [41];

(5) in determining whether there is a prospect of relation back prejudicing a limitation defence, the court should have regard not only to the defence, but to the claimants' pleadings and to such other materials as are before the court and may cast light on the issue: [41].

<u>The Judgment</u>

16. By its 25 November 2024 application (the **"Application"**), Fay sought permission in respect of the Other Proposed Claims under CPR r.17.4 and in respect of the Fraudulent BoT Claim under r.17.1.

17. The Judge refused the application in respect of the Other Proposed Claims on the basis that they did not arise out of the same facts or substantially the same facts as those already in issue in the existing claim, so that the requirements of r.17.4 were not made out in respect of them: Judgment [61]. No appeal is brought against those findings.

18. Turning to the Fraudulent BoT Claim, the Judge set out in introducing the issues at the outset of his judgment the following principles governing cases where there is an issue as to whether an applicable limitation period has expired:

    "*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 <u>which will be prejudiced by the new claim</u>, 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, <u>the injustice to the defendant of depriving him of an arguable limitation defence</u> 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 [[1994] 1 WLR 1409, CA], at p. 1425H; Ballinger v Mercer [2014] 1 WLR 3597, CA, at [35].*" (underlining added)

    He then went on in [8] to summarise the two issues before him, of which one was whether to allow the Fraudulent BoT Claim to be introduced, noting that Fay submitted that no limitation period applied.

19. In respect of the Fraudulent BoT Claim specifically, he

    (1) considered that the Application gave rise to difficult issues of law as to whether a limitation defence applied under section 21(3) of the Limitation Act, so

    (2) he concluded that there was a reasonably arguable limitation argument ([55]), and that

    (3) he should not permit the amendment but rather leave Fay to issue a new claim in respect of the Fraudulent BoT Claim if it wished: Judgment [73].

20. Fay does not seek to challenge (1) and (2) on the appeal. Rather the appeal relates to step (3).

21. The Judge considered the difficult issue of law to be whether the relevant limitation period for the claim was the six-year period in section 21(3) or whether- as Fay contended- there was by virtue of section 21(1)(a) no limitation period. Section 21(1)(a) provides that:

"*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 the trustee was a party or privy"

22. The Judge stated that in *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400, Millet LJ explained at 408-9 the need to differentiate between two classes of person typically described as "constructive trustees", which the Judge described as "*(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 for that transaction*". Section 21(1)(a) only applied to those in category 1, which the Judge referred to as a category 1 trustee: [51].

23. The Judge noted that Fay had pleaded the position as though the Jirehouse Entities were a category 1 trustee, and while that was consistent with the orthodox analysis of money paid into a solicitor's account (per *Twinsectra v Yardley* [2002] 2 AC 164 at 168F) and then wrongly paid away, Axis contended that those entities were category 2 trustees: Judgment [52], referring back to [50]. The Judge considered the heart of the argument made by Axis to be that the claim alleged that Mr Jones fraudulently induced the relevant BFL advances and then the monies from that fraudulently induced loans were paid away, but any status as trustee arose only from the transaction complained of, so that the trusteeship arose not as a result of any pre-existing obligation but as a result of the misapplication of assets: [52]. The Judge noted that the response of Fay to this was that Mr Walwyn had authority to, and did, agree the loan on its behalf, recognising that this was only because he was lied to by Mr Jones: [54].

24. Given the competing arguments above, the Judge considered that there was a reasonably arguable limitation defence under section 21(3).

25. The Judge considered that this was not disturbed by Fay's reliance on section 32 of the Limitation Act 1980 to seek to delay time starting to run because section 32 may in fact have caused time to start running from an earlier date than that contended for by Fay: Judgment [55]-[57]. In the draft order that it seeks if it is successful on the appeal, Fay has not sought permission to include this section 32 pleading in respect of the Fraudulent Breach of Trust claim.

26. The Judge considered that the Court should not determine a difficult question of the law of limitation on a summary procedure: [55], and that the presence of a reasonably arguable limitation defence should prevent him granting permission: [55], [59].

27. Given its relevance to Ground 1(a) and Ground 1(b), it is convenient to set out [55]-[59] in full:

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 APOC, 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."

The grounds of appeal

Ground 1

28. Ground 1 is that the Application was brought under CPR r.17.1 so the presence of a reasonably arguable limitation defence is not a matter that was relevant to granting permission in the manner that it would have been had the application been brought under CPR 17.4. Fay articulates it in its appeal skeleton as follows:

> "*3…In summary, by Ground of Appeal One, Fay submits that the Master erred in law in that he asked the wrong question. The question of whether a defendant has a reasonably arguable limitation defence is relevant in cases where a claimant seeks permission to add a cause of action outside a statutory limitation period, pursuant to CPR 17.4. But that was not the basis on which Fay asked the Master for permission to add the fraudulent breach of trust claim in this case…*
>
> *4. Fay asked for permission to add the fraudulent breach of trust claim expressly on the basis of CPR 17.1…*
>
> *5…having asked a question which was irrelevant, and decided this part of the application on the basis of the answer to that question, the Master erred in law.*"

29. While- as explained above- the appeal was put differently orally, I should deal with this ground. In my judgment, it is clear that this ground should be rejected:

    (1) It cannot make any difference that Fay couched the amendment application in respect of the Fraudulent BoT Claim as being brought under CPR r.17.1 rather than r.17.4. The reason why permission should not be granted in the face of a reasonably arguable statutory limitation defence (where there is the prospect of this prejudicing the defendant's limitation defence) is that via the doctrine of relation back this could deny the defendant of the benefit of the limitation defence in the claim, in circumstances where the claimant could issue a fresh claim instead without disadvantaging the defendant in that way. That rationale focuses on the potential detriment to the defendant in being denied the ability to run the statutory limitation defence in the claim or in being impaired in running that defence. Therefore, it does not depend on how the claimant couches its application, namely whether it states that it is brought under CPR r.17.1 or 17.4.

    (2) Consistent with (1), *Viegas* itself was a case where the claimant couched its application under CPR r.17.1, and the Court took the approach set out in (1) above.

    (3) Nor does it make any difference that (a) the claimant contends that there is *no* relevant limitation period, rather than (b) contending that there is such a limitation period but that it has not yet expired. The reason for this is that this does not alter the application of the rationale above, which focuses on the potential detriment to the *defendant* in being disadvantaged in running its limitation defence. It makes no difference to this how the *claimant* puts its case on limitation, namely in sense (a) or (b) above. Rather the focus is on the limitation defence that the defendant puts forward.

(4) Consistent with (3), in *Paragon Finance* two of the proposed amendments introduced a new cause of action in respect of which the plaintiffs contended that there was no applicable limitation period: 405a point (3). One of them was a claim for fraudulent breach of trust, which Millett LJ dealt with at 407h-414g, deciding the amendment application on the basis that the defendants had a reasonably arguable limitation defence of which they should not be deprived by amendment (414d-e).

Ground 1(a)

30. In my judgment, the Judge correctly set out in [6] the test to apply:

(1) As highlighted by the underlined wording in [18] above, he correctly identified the need to ask whether a reasonably arguable limitation defence enjoyed by the defendant *would be prejudiced by the new claim* (per the first underlined passage), because of the need to avoid injustice to the defendant by *depriving him of an arguable limitation defence* (per the second underlined passage).

(2) In turn, at least the first two of the cases he relied on for that proposition at [6] refer to such prejudice:

(a) *Paragon Finance* at 404e-g: "*leave to amend…should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim…By this means the injustice to the defendant of depriving him of an arguable limitation defence is avoided without denying the plaintiff the right to bring a fresh action to which, if he is correct, there is no limitation defence*";

(b) *Welsh Development Agency* at 1425H: identical wording to the passage from *Paragon Finance*.

(3) The following passages also make clear that he regarded the [6] test as the test to apply to considering the Fraudulent Breach of Trust claim:

(a) He explained in [6] that he was setting out the proper approach to applications to amend where there was an issue as to whether an applicable limitation period had expired. He then went on at [8], two paragraphs after [6], to identify that the first of the two issues before him was whether to permit the Fraudulent Breach of Trust claim to be added, "*where the Claimant submits that no period of limitation applies to the proposed claim*" (underlining added), thereby recognising that there was an issue in relation to this claim as to whether there was an applicable limitation period that had expired. Therefore, it is clear that he regarded the test that he had just set out at [6] as applying to the first issue identified at [8].

(b) Consistent with that, the language he used in [55] of the limitation arguments in respect of the Fraudulent Breach of Trust claim "*rais[ing] difficult questions of law*" echoes the language he used in [6] in describing applications where there was an issue of whether an applicable limitation period had expired as ones that "*frequently raise difficult issues of law and/or fact*".

(4) It is true, that in dealing at [35]-[38] of his Judgment with the principles governing applications which were made after the end of a relevant limitation period, he set out

at [37] the four stage test from *Geo-Minerals GT v Downing* [2023] EWCA Civ 648 at [25], the first stage of which was whether it was reasonably arguable that the opposed amendments were outside the applicable limitation period, without such wording mentioning expressly at least any requirement of possible prejudice to the defendant's limitation defence in granting the amendment. However:

(a) There is nothing in [37] to suggest that the Judge was intending to depart from the test he set out in [6] by reference to authority.

(b) On the contrary the points in (3) above make clear that he regarded the [6] test as applicable to the Fraudulent Breach of Trust Claim.

Accordingly, I do not consider that the Judge was by [37] intending to depart from the test he had set out in [6] and apply a different test to the Fraudulent Breach of Trust Claim to that explained in [6].

(While I do not rest my judgment on this, I should mention for completeness that [37] and [38] of the Judgment were taken from the principles set out in Fay's skeleton before him on the principles to apply under CPR r.17.4 in respect of the Other Proposed Claims: [43]-[46], not the Fraudulent Breach of Trust Claim. In those passages of Fay's skeleton it was accepted that the first and second limbs of the test were satisfied and that the questions were whether the third and fourth limbs were satisfied in respect of the Other Proposed Claims.)

Ground 1(b)

31. In my judgment, despite Fay's contention to the contrary, Ground 1(b) is plainly a fresh ground of appeal different from Ground 1. Ground 1 argues that whether Axis has a reasonably arguable limitation defence is *irrelevant* to whether permission should have been allowed given that Fay brought its application under CPR r.17.1, whereas ground 1(b) contends that having concluded that there was a reasonably arguable limitation defence, the Judge should have *but failed to go on to ask himself whether there was any real prospect of such limitation defence being prejudiced by giving permission for the amendment.* Therefore, permission to bring such ground is needed. This coheres with the way that Adam Johnson J understood Ground 1 when considering whether to grant permission to appeal, namely that Fay's argument was that where a claimant contended there was no limitation period at all, it was sufficient to grant permission that it had a real prospect of making that good.

32. The principles governing whether permission should be granted were not in dispute. I was taken to Haddon-Cave LJ's summary of the principles in *Singh v Dass* [2019] EWCA Civ 360 at [16]-[19] set out in the White Book at [52.21.1]:

(1) an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court;

(2) an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b) had it been run below would have resulted in the trial being conducted differently with regards to the evidence at the trial;

(3) even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs.

33. In my judgment, permission should not be granted for Ground 1(b).

34. Taking principle (1), I do not consider that this point was raised before the Judge. Mr Flenley KC accepted that he had not put to the Judge orally or in written submission that if the Judge considered that there was a reasonably arguable limitation defence, Fay argued that there was no real prospect of prejudice so that the Master should go on to resolve any dispute over that. This is reflected in [50] of the Judgment, which sets out the argument advanced by Fay before the Judge, namely that there was no limitation period.

35. Even if this had been a pure point of law, I do not in any case consider that Axis did have adequate time to deal with the point, taking limb (3)(a) of the *Singh v Das* principles set out above. Effectively it had over the lunch break to consider that and any other points made by Mr Flenley orally in his half day submissions. Mr Shapiro sought to deal with it as best he could and stated that he wished to conclude the appeal in its allotted time slot rather than for example seek an adjournment, but that is very different from having adequate time to prepare to deal with it, and Mr Shapiro made clear that Axis objected to permission being granted for this ground.

36. Further, and tied to that, I do consider that Axis acted to its detriment on the faith of the earlier omission to raise it, taking limb (3)(b) of the *Singh* principles. It did not come to the appeal hearing expecting that a key argument would be that the Judge failed to consider whether there was prejudice to Axis and that there was no such prejudice. Mr Shapiro made this clear when Fay's oral argument developed in this direction.

37. An important aspect of this is that Axis would have wished to decide whether to file a respondent's notice upholding the judgment on additional or different grounds as a fallback to contending that the Master's reasoning was right on the point, and what to include in such notice. CPR r.52.13 requires a respondent who wishes to uphold a judgment on additional or different grounds to file such a notice. Fay did not object to Axis taking respondent's notice points orally, and Axis sought to raise them. However, even assuming that is permissible under the CPR in the absence of *any* respondent's notice (e.g. under the appeal court's powers under CPR r.52.21(5) to allow points not raised in an appeal notice to be taken), the inability of Axis to put in a proper written respondent's notice in advance of the hearing and have proper time to determine what should go in it is in my judgment a good illustration of the unfairness to Axis of allowing ground 1(b) to be taken.

38. Moreover, the point goes beyond a pure point of law. Fay's oral submission on ground 1(b) was that [i] the Judge failed to make a finding on the facts as to whether there was any real prospect of prejudice *and* [ii] *that I should consider for myself whether there is any prejudice if Fay was allowed to amend in the terms of the order they seek on appeal and that I should find that there is no real prospect of prejudice,* [iii] so the amendment should be allowed. The basis of contention [ii] was that 11 October 2022- the date on which the *original claim* was issued- was (Fay argued) more than six years from time starting to run to so that allowing the amendment and thereby engaging the doctrine of

relation back would not prejudice Axis's six-year limitation defence. Therefore, step [ii] would open up a new terrain of factual debate.

39. Still further, if Fay had run the positive argument *before the Judge* that there was no prejudice, then the debate before the Judge would likely have proceeded differently, and Axis may well have wished to put in further evidence to deal with the question of why there was a danger of its limitation defence being prejudiced, as Mr Shapiro contended. Therefore, I do not consider that Fay can overcome the requirements of limb (2) of the principles set out in *Singh* either.

40. I should also mention that Fay contended that Ground 1(b) had arisen from the argument in [38] of Axis's appeal skeleton (of 24 February 2026) that granting amendment would have potentially deprived Axis of its ability to defend Fay's argument under section 32 of the Limitation Act for postponing the date from which time ran on the ground that Fay could with reasonable diligence have discovered the fraud at the time. However, in my judgment Fay could have sought to run Ground 1(b) irrespective of whether Axis had taken that point in its skeleton because the argument that the Master wrongly failed to address the need for prejudice (whatever its merits) could have been raised whatever Axis did or did not contend on prejudice on its appeal. Further, Fay appears to have had the skeleton for a significant period before the hearing and did not identify the new point beforehand. For completeness, while I do not consider that it matters for present purposes, I read [38] as setting out Axis's account of the position when the matter was before the Judge and the context in which the Judge considered the question of whether there was a reasonably arguable limitation defence, which question was the subject-matter of Ground 1.

41. Therefore, I do not grant permission for Ground 1(b). None of this stops Fay bringing a fresh Fraudulent Breach of Trust Claim, but it cannot be introduced by amendment.

42. For completeness, had I given permission for Ground 1(b) to be run, I would have upheld the Master's judgment. Mr Shapiro argued, and Mr Flenley did not dispute, that there was a real prospect that the payments out of the Jirehouse Entities of the proceeds of the BFL advances occurred on or after 11 October 2016, so that if the amendment was allowed in the terms sought in the draft order sought by Fay in its appellant notice, the six-year limitation defence would not avail Axis because time would stop running on 11 October 2022 as a result of relation-back. Therefore, even if I had given permission to run Ground 1(b) and accepted that the Master should have but failed to grapple with whether there was a prospect of prejudice to the reasonably arguable limitation defence (despite no specific argument being put to him that there was a lack of such prejudice), I would have upheld his judgment on that ground. Mr Flenley sought to meet Mr Shapiro's prejudice argument at the end of the hearing by stating that Fay would seek to alter its proposed particulars so that they only ran the Fraudulent Breach of Trust Claim if the Court found at trial that there was no limitation period applicable to the claim at all, and that if the Court found that there was a limitation period then the Fraudulent Breach of Trust claim would not be run, leaving the other claims left intact in the pleading. However, as Mr Shapiro argued in response, (i) I consider that it is far too late to seek to amend the pleading further for the fourth time in order to seek make good a new ground of appeal, (ii) I had no further draft of it before me to consider, and (iii) (although I would have considered (i) and (ii) sufficient on their own) I should not assume that such an amendment would be acceptable in circumstances where there were a significant number of paragraphs of the pleading relating or potentially relating to the Fraudulent

Breach of Trust claim, including allegations of fraud, so I should not assume it was satisfactory or acceptable for Fay to run a claim based on fraud at trial that would then fall away depending on what result the Court found on limitation.

43. Given all of the above, I do not need to determine the other main grounds that Mr Shapiro advanced- necessarily briefly- in favour of upholding the Master's decision if ground 1(b) was run, but I set them out for completeness. Both of them related to section 32. The Master dealt at [55]-[57] in some detail with whether Fay's section 32 argument would if accepted only cause time to run from 4 April 2019 (less than 6 years before the date of the hearing before the Judge) or whether it could run from an earlier period. He considered that there was at least a reasonably arguable case that it ran from an earlier date but that he could not tell what it was on the evidence before him.

44. Mr Shapiro's first argument was that it was therefore clear from the Judge's judgment that he did consider that Axis would be *denied* a reasonably arguable limitation defence by allowing the amendment, having identified the correct test at [6], there having been no dispute before him as to whether there was potential prejudice to Axis if there was a reasonably arguable defence. I took the argument in part to be that it flowed from the Judge's reasoning that Axis would have been prejudiced had the Judge allowed the amendment, because causing time to stop earlier (11 October 2022 rather than some point in 2025) would make it easier for Fay's section 32 argument to defeat Axis's argument based on a six-year limitation period (the **"Section 32 Prejudice"**). Second, I also took Mr Shapiro to contend that (i) in circumstances where Axis had put forward a prima face limitation defence, the burden was on Fay to demonstrate that there was not a reasonably arguable limitation defence that has been prejudiced, and/or (ii) in circumstances where it was not put to the Judge that Axis would suffer no prejudice to its reasonably arguable limitation defence, the Judge was not in any event required to consider this question himself expressly. Mr Shapiro's other argument was that even if the Judge did not- in circumstances where no objection on the grounds of prejudice was taken- deal expressly with whether there was prejudice, there was such prejudice before him by virtue of the Section 32 Prejudice. Mr Flenley's responses to these points were that the Judge did not deal with prejudice, that he should have, and any Section 32 Prejudice no longer existed because of the fact that Fay did not seek any more permission to introduce section 32 arguments (as explained in [25] above).

45. I do not need to get into these grounds, although I do consider that is plain that the Section 32 Prejudice was present on the facts as they stood before the Judge. The Judge explained that there was a serious debate between the parties as to when time would start running for the purposes of section 32, including whether it started running at some point in October 2016. It if did so, that could be slightly under 6 years before 11 October 2022 such that relation back would deny Axis the benefit of a limitation defence.

<u>Ground 2</u>

46. Ground 2 is that the amendment should be allowed because where an amendment gives rise to a difficult point of law, that point should be determined at trial, and the amendment therefore allowed to proceed to trial. Fay relies on the general approach taken to interlocutory injunctions in *American Cynamid* in aid of this submission. Here, Fay argues, its argument that section 21(1)(a) of the Limitation Act applies raised difficult questions of law, so the matter should have proceeded to trial.

47. In my judgment, that is not the correct test, because it is insufficient for the claimant to show that there is a real prospect of it *overcoming* a limitation defence. Rather, it follows from the reasoning on Ground 1 and Ground 1(a) that the presence of a reasonably arguable limitation defence suffices to stop the amendment being permitted (at least where there is a real prospect of prejudice being caused to that defence by the amendment), whether or not the correct answer to the question of which limitation period applies to a claim gives rise to difficult questions of law.

48. Therefore, I reject Ground 2.

<u>Ground 3(a)</u>

49. Ground 3(a) only arises if I consider that, contrary to both party's cases, I should determine the substantive limitation question now of whether section 21(1)(a) applies or whether section 21(3) applies to the Fraudulent BoT claim.

50. I do not consider that I should determine this. As set out above, the test is whether there is a reasonably arguable limitation defence (that could be prejudiced by the granting the amendment). Here it is common ground that there is a reasonably arguable limitation defence so I should not go further into the substance of the limitation defence at the amendment stage.

51. Further, in my judgment it was perfectly acceptable for the Master not to seek to determine the limitation point finally one way or the other. It is not a straightforward point. Millett LJ explained in *Paragon Finance* at 408j-409a that one needed to distinguish a case "*where the defendant, though not expressly appointed as a trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff*" (a category 1 trustee) from "*cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff*" (a category 2 trustee).

52. The allegation that the breach of trust is fraudulent is based in significant part at least on the allegation that Mr Jones brought about the first BFL advance by making a representation that he knew was false or was reckless as to the truth of, namely that Mr Peganov had approached and authorised the loan: [25DD(b) and (c)] of the Third Draft APOC. Therefore, effectively Axis's argument is that the transaction was an unlawful one, brought about by the fraud of Mr Jones (a key director of the Jirehouse Entities), and Fay cannot escape the conclusion that this fraud- if proved- produces a constructive trust of the advances in the hands of the Jirehouse Entities rather than a trust of the ordinary kind on which a solicitor holds money for a client as part of a lawful transaction. This, they argue, explains what trust the Jirehouse Entities held the advances on, whether or not Fay contends that there was a constructive trust of his sort.

53. Fay responds to that by contending that the transaction was a lawful one for these purposes because it was a valid loan agreed to by Mr Walwyn with authority to bind Fay, and that it makes no claim that the trust is generated by the fraud at all, so it is only claiming a category 1 trusteeship and that cannot be turned into a category 2 trusteeship by *Axis* arguing that the trust was a response to a fraud when the ordinary solicitor trust of client monies can exist without the need for such fraud.

54. There are therefore reasonable arguments both ways, and this is the sort of still-developing area of law best not ruled upon definitively as part of an amendment application, but rather determined with the benefit of, among other things, a greater investigation of and more detailed submissions on the authorities relevant to the above.