IN THE HIGH COURT OF JUSTICE No.BL-2017-000097

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

BUSINESS LIST (ChD)

[2021] EWHC 3514 (Ch)

Rolls Building

Fetter Lane

London, EC4 1NL

Tuesday, 14 December 2021

Before:

MR JUSTICE MILES

BETWEEN:

EUROPEAN REAL ESTATE DEBT FUND (CAYMAN) LIMITED (In Liquidation)

Claimant

- and -

(1) ANOUP TREON

(2) ARUNDEL GROUP LIMITED

(3) DR DORAISWAMY SRINIVAS

Defendants

MR C. PARKER QC and MR E. MEULI (instructed by Gateley Plc) appeared on behalf of the Claimant.

MS B. LUCAS QC and MR D. KESSLER (instructed by DMH Stallard LLP) appeared on behalf of the First Defendant.

MR S. LEMER (instructed by Taylor Wessing LLP) appeared on behalf of the Second and Third Defendants.

JUDGMENT

MR JUSTICE MILES:

I gave judgment on 27 October 2021 after a 13-day trial. I concluded that the claim was statute-barred and must therefore be dismissed, but that the claims would have otherwise have succeeded. I now deal with consequential matters. A reader of this judgment is assumed to be familiar with my main judgment ([2021] EWHC 2866 (Ch)) and unless I say otherwise, references below to paragraph numbers are to those in the main judgment. I have had the benefit of helpful and full written and oral submissions from counsel for the parties.

Costs

2
There is a gulf between the parties' positions. The claimant contends that the defendants should pay 80 per cent of its costs on the indemnity basis. The defendants contend that the claimant should bear their costs. They accept that some reduction might be appropriate to reflect their conduct and the issues on which they lost, but they say that it should be limited. Neither party invites me to make an issues-based order in the sense of an order for one party to pay the assessed costs of certain issues, and the other(s) to pay the assessed costs of other issues. Each side invites me to make a single overall order along the lines I have already indicated.

3
The court's discretion as to costs is governed by CPR 44.2:

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings – [these are not applicable here]

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

4

The relevant authorities were recently helpfully reviewed and summarised by Joanna Smith J in TMO Renewables v Timothy Yeo [2021] EWHC 2773 (Ch) at [7] to [15]:

"7. As Gloster J emphasised in HLB Kidsons v Lloyds Underwriters [2008] 3 Costs LR 427, '[t]he aim always is to "make an order that reflects the overall justice of the case"…', a point also emphasised by Briggs J in Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS [2010] 5 Costs LR 657 at [4] by reference to the overriding objective: 'Besides taking due account of the specific provisions of Part 44, the court must in framing an appropriate order for costs bear constantly in mind the need to comply with the overriding objective, that is to deal with cases justly.'"

8. The general rule set out in CPR 44.2(2) was described by Lord Woolf MR in AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507 (at 1522-1523) as a 'starting point from which the court can readily depart'. However, the Defendants emphasise that whilst the court may depart from the general rule, 'it remains appropriate to give "real weight" to the overall success of the winning party' (per Gloster J in HLB Kidsons at [10]) and they draw my attention to the warning given by Jackson LJ in Fox v Foundation Piling [2011] 6 Costs LR 961 at [62] to the effect that '[t]here has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in CPR r. 44.3(2)(a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates…'. In addition, the Defendants remind me that commercial litigation is complex and that, in almost every case, the winner is likely to have failed on some issues, as Nugee J recognised in R (Viridor Waste Management Ltd) v HMRC [2016] 4 WLR 165 at [9]. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues (see HLB Kidsons at [11]).

9. In deciding whether to depart from the general rule, the court must have regard to all the circumstances of the case, including ‘(a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply’ (CPR 44.2(4)). Insofar as relevant for the purposes of this judgment, conduct of the parties includes conduct before and during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended its case or a particular allegation or issue (CPR 44.2(5)(a)-(c)).

10. The various orders which the court may make are set forth in CPR 44.2(6), and I note the terms of CPR 44.2(7) to the effect that before the court considers making an order for costs relating only to a distinct part of the proceedings (i.e. an issue-based order) it will consider whether it is practical to make an order for a proportion of another party's costs or for costs from, or until, a certain date only. As was pointed out by Jackson J in Multiplex Constructions v Cleveland Bridge [2009] EWHC 1696 at 72(iv)-(v), the court will hesitate before making an issue-based order ‘because of the practical difficulties which this causes’ (amongst other things the additional time and expense that may then be spent on assessment) and because of the steer provided in CPR 44.2(7). In many cases ‘the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order’.

11. In circumstances where it is appropriate to make an issue-based order ‘there is…no exceptionality principle or threshold that has to be applied before deciding in any given case, whether the winner of a particular issue should not only be deprived of his own costs, but should pay the other side's costs’ (see PCP v Barclays [2021] EWHC 1852 per Waksman J at [21] and also Summit Property Ltd v Pitmans [2001] EWCA Civ 2020, per Longmore LJ at [16]-[17]). In Summit, a case on which TMO places considerable reliance, the Court of Appeal upheld the decision of the Judge at first instance (described as an ‘exceptional order’) who approached the costs on an issue by issue basis, ordering the unsuccessful claimant to pay 30% of the successful defendant's costs and the successful defendant to pay 65% of the unsuccessful claimant's costs.

12. On the specific issue of the effect on costs of dishonesty being established against the winning party, TMO drew my attention to Bank of Tokyo-Mitsubishi Ufi Ltd v Baskn Gida Sanayi Va Pazarlama AS [2009] EWHC 1696, where Briggs J identified the principles derived from the cases to which he had been referred at paragraph [19]:

‘(i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced. I leave on one side cases such as Molloy and Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167, where the conduct in question is so grave that the entire case of the party can properly be described as amounting to an abuse of process. In such cases it is difficult to conceive how that party would ever be the successful party in the litigation…

(ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.

(iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy: see per Waller LJ in Ultraframe at paras 33 to 34.

(iv) 'There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing that dishonesty, however disproportionate they may be': per Waller LJ in Ultraframe at para 36."

13. Thus, a finding of dishonest conduct by the successful party is not a ‘trump card’ and there is no general rule that such a finding replaces the usual starting point (see PCP at[26] and at [29]: ‘there is no principle that says dishonesty in any particular form must trump all other considerations, or that it must lead in any given case to an order on a net basis where the winning party, who has been found guilty of dishonesty, must end up paying a proportion, or all, of the costs of the other side’). In PCP, a case in which the defendant lost on liability and was found guilty of deceit but successfully defended the claim on the grounds of causation and loss, Waksman J made no order as to costs.

14. Every case will, inevitably, turn on its own facts and I remind myself that, accordingly, there is only limited assistance to be gained from looking at the findings made in other cases on different facts.

15. In Hutchinson v Neale [2012] EWCA Civ 345 Pitchford LJ formulated the guiding principle informing which (if any) of the range of orders available to the court should be made in a case involving dishonest conduct at [28]: ‘What is required is [1] an evaluation of the nature and degree of the misconduct, [2] its relevance to and effect upon the issues arising in the trial, and [3] its tendency to create an unwarranted increase in the costs of the action’. He went on to note that, as Briggs J observed at [19] of his judgment in Bank of Tokyo ‘the full range of measures is available to ensure that a dishonest but successful party does not gain, and an honest but unsuccessful party does not lose, in consequence of the wrongdoing established’. On the facts of that case, Pitchford LJ observed at [31] that ‘…the judge's starting point should have been an order for costs in the [successful] defendants' favour subject to adjustments to ensure that they did not recover any costs which may have been incurred in advancing a dishonest case’.”

5

The claimant also referred to McKeown v Langer [2021] EWCA Civ 1792. That case was concerned with an unfair prejudice petition. There was a trial of all issues other than valuation, and the judge gave judgment at the liability stage in favour of the petitioner. There was a question whether Part 36 offers should be taken into account when allocating the costs. The Court of Appeal was therefore considering the question whether a costs order should be made at the first stage rather than awaiting the full outcome of the proceedings. The claimant in the present case relied on [36] to [38] of the judgment of Green LJ, and argued that it showed that there is a salutary rule that costs follow the issue rather than the event, and also emphasised the policy reasons underlying that rule, namely that an overly robust application of the principle that costs should follow the event discourages litigants from being selective as to the points they take in litigation and encourages a “no stone unturned” approach. I do not think McKeown is of particular significance in the present context. Here we are dealing with a single trial rather than a split one and I take the relevant principles about the approach to issue based orders from the summary in TMO at [8]. I do not think that the Court of Appeal in McKeown meant to depart from those principles.

6

The claimant submitted in outline as follows:

(a) Although the claims were dismissed for limitation, they would otherwise have succeeded. The defendants advanced a plethora of legal and factual contentions on which they lost at trial.

(b) In relation to the main claims, including the normalisation claim and the projected figures claim, the court held that the defendants had knowingly deceived ERED into investing in the loan notes. That conduct led to the proceedings and it was tortious. The defendants denied any wrongdoing and the claimants were put to the costs of establishing it. The defendants success is based only on their limitation defence.

(c) The court also found that much of the defendants' evidence was contrived, embellished or invented. This involved a number of findings that the defendants had lied and this amounted to a cynical abuse of the process by the defendants.

(d) Though the claimant failed on the bank covenant compliance claims, this took only a relatively small part of the proceedings, perhaps 3 per cent.

(e) In relation to limitation, most of the evidential material was concerned with the position of Duet and ERED rather than that of the defendants, and the issue could have been resolved without the need for a prolonged or extensive cross-examination. It did not require expert evidence. Indeed, the issues could have been decided without the defendants even giving evidence. The portion of the proceedings properly attributable to the limitation issues was no more than about 10 per cent. This calculation is based on an analysis of the number of paragraphs and pages devoted to the limitation issues in the judgment and the opening and closing written arguments.

(f) The starting point when determining a just costs order is that the defendants should not be awarded any of their costs of the proceedings as this would reward them for advancing a dishonest defence.

(g) Moreover, the defendants advanced a number of issues which they abandoned at trial or on which they lost, including the defence based on the normalisation of the projected figures, the alleged invalidity of the assignment of the claim to the claimant, and a contractual estoppel argument.

(h) The court should follow an issue-based approach (albeit one that ends up with an overall proportionate award of costs in the claimant's favour). The limitation defence was separable from the other defences. Had the defendants admitted liability subject to the limitation defence, the trial would have been much shorter.

(i) The claimant says that the court should not only disallow the defendants' costs of the dishonest defence of the proceedings but should award the claimant the costs of disproving that defence and exposing the defendants' lies. Overall, the circumstances justify an order for indemnity costs and the claimant says that it should receive 80 per cent of its costs.

7

The first defendant submitted in outline as follows:

(a) The defendants are clearly the successful parties. The claims have been dismissed in their entirety. There is no general rule that a losing party who can establish dishonesty must receive all of their costs or that a successful party who has been found to be dishonest will be deprived of all of their costs. It depends on the facts of the particular case.

(b) A limitation defence is not a mere technicality. The legislature has struck a balance between the interests of claimants in being given a reasonable time to bring claims and the interests of defendants in certainty and not being faced by stale claims. The limitation defence was a real defence, and the effect of the court's decision is that the claim should not have been brought at all or persisted in.

(c) There is a range of degrees of misconduct. The court should only depart from the general rule where it is appropriate to do so and, even then, real weight is to be given to the overall success of the winning party. The question is whether a different order should be made and, if so, what other order.

(d) The first defendant accepts that the judgment makes strong criticisms of his conduct both concerning the underlying events and his evidence during the trial. The current case does not, however, involve a cynical abuse of process or the proffering of forged documents.

(e) The criticisms of the first defendant must be seen in their proper context. The court was highly critical of the first defendant but also recognised that hindsight and interest have a very real influence on the testimony of witnesses, and that it is commonplace for their evidence to be moulded and biased by the forensic process. Moreover, some of the claimant's witnesses were also criticised in the judgment. The evidence of Mr Korat and Mr Lattanzio was not accepted in full and on some points the evidence of the first defendant was preferred.

(f) As to the underlying complaints of fraud, the court did not conclude that the first defendant was motivated by a desire to harm ERED. It concluded that he misled ERED but did so believing that the loan notes would be repaid in full and that the business was likely to survive.

(g) The first defendant said that the claimant's calculation of the proportion of the trial and earlier processes in the proceedings attributable to the limitation issue is flawed, and the position is rather more nuanced. There was a much greater overlap between the limitation issues and the other issues than the claimant suggests. Counting the pages and paragraphs of the forensic documents and the main judgment does not capture the true position.

(h) The first defendant argued that the court must also take account of the claimant's conduct. The claimant failed to comply, he says, with the pre-action protocol. It failed to engage properly with ADR. The claimant refused to provide material disclosure to the first defendant in advance of the formal deadline for disclosure in the middle of 2020. The first defendant repeatedly asked, in letters from 2014 onwards, to see documentation concerning the claim but was rebuffed. The documents were therefore not disclosed until some seven years and more after the events in issue. That affected the first defendant's ability to give a detailed and accurate recollection of events. More generally, the claimant delayed issuing its claim until the end of 2017, despite having written a letter before claim in 2014. That again impaired the parties' ability to prepare the case and their evidence for trial.

(i) As to the suggestion that 10 per cent of the proceedings only were concerned with limitation, the "page count" approach ignores some parts of the judgment which set out the background or involved issues going both to liability and limitation. It also ignores those parts of the case on which the claimant did not succeed and those where the court rejected the claimant's factual witnesses' evidence. The limitation issues overlap closely with those concerning liability. The claimant is wrong to suggest that the trial would have been dramatically shortened by the admission of the case on liability. The defendants would have had to give evidence about the information they provided to the claimant and third parties. The witnesses who would not have been necessary on a more truncated trial of that kind were fairly limited. The claimant's witnesses would still have had to give evidence.

While there would have been no need for expert evidence, in fact the expert evidence played relatively little part in the trial itself.

(j) The first defendant also made an offer on 8 June 2021 by telephone to drop hands. The claimant rejected this offer.

(k) Overall, the first defendant says that the claimant should pay its costs, subject possibly to an appropriate reduction.

8

The second and third defendants submitted in outline as follows (as well as adopting the submissions of the first defendant):

(a) The defendants were plainly the successful party. Limitation is a real defence. The second defendant was not alleged to be dishonest other than through the third defendant. Though Dr Srinivas was found to have deceived ERED, it does not follow that he was subjectively dishonest in the sense of having an intention to cheat or injure ERED. On the spectrum of deceitful behaviour, Dr Srinivas' conduct was at the less serious end. The findings about his evidence are consistent with his having imagined or developed his evidence rather than cynically and deliberately inventing it from scratch. It is possible that he has convinced himself of something that is not true, and that is consistent with the court's findings. The problems that Dr Srinivas had in recollecting what happened have been amplified by the claimant's decision to bring the proceedings so late in the day. The judgment also treats the evidence of Mr Korat and Mr Lattanzio with some caution.

(b) The claimant's calculation of the time and work spent on the limitation issue must be treated with care, essentially for the reasons given by the first defendant. The claimant is wrong to suggest that the limitation issue could have been dealt with on the basis of limited witness evidence and cross-examination.

(c) The reason there have been proceedings at all is because the claimant did not accept that the defendant had a valid limitation defence. The whole trial could and should have been avoided.

(d) Various aspects of the claimant's own conduct are relevant, including that the claimant alleged that Dr Srinivas was liable in relation to the banking covenant representation and only withdrew the allegation at trial. There was never a proper factual basis for that allegation. The claimant did not pursue its claims based on misrepresentation under the LNA against Dr Srinivas. Again, it did not withdraw its claims in that regard because of new evidence but because it belatedly accepted that Dr Srinivas could not have been liable in relation to those representations. The claimant also withdrew the fraud claim based on the interim accounts. The claimant made substantial changes at the trial to the representations on which it relied and by closing relied on just three. The claimant's disclosure was defective in a number of ways which led to a number of applications either being threatened or made, and led to supplemental disclosure on three occasions.

(e) It would be wrong for the defendants to be required to pay any proportion of the claimant's costs. It was the claimant's choice to bring these proceedings and they should never have been commenced because they were time-barred. The court should not make an issues-based order but should give an overall order reflecting the justice of the case. If there is to be any deduction, it should be comparatively small.

9

I have carefully considered the various submissions of the parties, including some more detailed points not summarised in this survey. I have reached the following principal conclusions.

10

First, it is clear that the defendants are the successful parties; the claims were entirely dismissed. It follows that the general rule applies unless the court decides to make a different order, but the court should still give real weight to the overall success of the defendants as the winning parties, even if a different order is appropriate.

11

Secondly, this is to my mind plainly a case where the conduct of the parties in relation to the issues and allegations and their respective success on parts of the case justify a departure from the general rule that all of the costs should follow the event. In the main judgment I found that both sets of defendants were guilty of deceiving Duet/ERED in 2011. They induced ERED to enter into the loan notes and, as a result, ERED suffered substantial losses. Nonetheless, there is some force in the defendants' submission that I did not find that the defendants were subjectively motivated by an intention to harm ERED. That is not a necessary element of the tort of deceit, and I found that the defendants believed, no doubt over-optimistically, that the business would survive and the loan notes would be repaid. This is not, therefore, a case of the most serious form of tortious wrongdoing. It is nonetheless a case where fraud has been established. The claimant submitted that once misconduct of this kind has been established and there is no similar misconduct on the other side, the position is black-and-white: the court simply asks whether there has been dishonesty or not. I am unable to accept that submission. It is contrary to the authorities, including the case of Hutchinson v Neale [2012] EWCA Civ 345, as summarised in TMO at [15]. That shows that the court must evaluate the nature and degree of the misconduct; its relevance to, and effect upon, the issues arising in the trial; and its tendency to create an unwarranted increase in the costs of the action. I have followed this approach.

12

As to the defendants' conduct during the litigation, they contested all of the issues raised in the particulars of claim. As I have already explained, they lost on many of these issues. I also found that the evidence of the first defendant and Dr Srinivas were to be treated with extreme caution. I found that they were very poor witnesses and in various respects I found that they had invented evidence. In this regard, their evidence went beyond mere confusion or lack of recollection. They were prepared to give sworn evidence that various conversations had taken place which I found not to have happened. I also found that, at least in the case of some instances, there were recent inventions. In relation to Dr Srinivas in particular I found his evidence to be confused and inconsistent, indeed at times incoherent. However, again, I think in some respects the flaws in his testimony went beyond mere confusion or mis-recollection.

13

But I do not consider that this was a case where the defendants decided at the outset to fabricate their whole story. I take into account that they were both asked to give evidence about the events occurring many years before. They may have persuaded themselves of the core of their story. They did not have all the documents needed to recall what had happened until relatively late in the day. I concluded in my main judgment that their evidence did contain a number of significant lies, but I think these were attempts to improve or embellish their case at the trial. They were putting forward new stories to bolster their defence. I do not think that the entire defence was a cynical abuse of the process, and therefore I do not think that the case falls within the description given by Briggs J in the

second part of [19(i)] of the Bank of Tokyo-Mitsubishi case: where “the entire case of the party can properly be described as amounting to an abuse of process”. The defendants have told a number of lies, but I do not think their entire case can be described as an abuse of process.

14
Nonetheless, the court must reflect the serious misconduct of the defendants in the events that led to this litigation and the lies that they told when giving evidence. I consider that on any view I should at least make a substantial reduction from the costs that would otherwise be payable to the defendants to the reflect this conduct. It would not be right to require the claimant to bear those costs. I shall return to the question whether there should also be an allowance for the claimant’s own costs of proving the underlying fraud case and uncovering the lies told by the defendants.

15
Thirdly, there are some elements of the case on which the claimant did not succeed. I have listed these when reciting the submissions of counsel. It is hard to put a precise or even approximate figure on how much of the proceedings were devoted to these other issues, but they probably accounted for about 5 per cent of the forensic documents.

16
I consider there is some force in the defendants’ complaint that the delay by the claimant in bringing this action, which has never been explained, and has contributed to the difficulties of the witnesses in giving accurate recollections to the court. As explained above, some of the evidence of the claimant’s witnesses was found to be unreliable as well as that of the defendants. That includes the evidence going to the bank covenant compliance claims on which the claimant lost.

17
On the other hand, I do not think that most of the other points raised about the claimant’s conduct carry much weight. It is not possible, it seems to me to reach any real conclusion about the adequacies or otherwise of the disclosure process or the need for expert evidence. On the latter point, while at the trial the expert evidence did not play much of a part, that was largely because the experts had sensibly been able to reach agreement on many of the issues. The defendants’ complaints about ADR are capable of cutting both ways. Either party to litigation may propose and press for ADR, and it does not seem to me that either party made any sustained effort for there to be an alternative dispute resolution process in this case. It seems to me that that is a factor of relatively little weight.

18
Fourthly, there is the question of how much of the costs are properly to be allocated to the limitation issues. Neither party has come up with a particularly compelling calculation of the time and costs properly attributable to the limitation issues. Neither has attempted a scientific exercise by seeking to allocate the underlying costs of the steps in the litigation to the various issues. The claimant’s approach is based on the number of pages and paragraphs in the judgment and the skeleton arguments devoted to the limitation issue. There are a number of obvious flaws with that approach. First, there were numerous common background matters that had to be gone into in any case. In terms of the judgment, it seems to me that that would include the parts concerning the background, the parties and the agreed statement of facts. Secondly, since the legally principles concerning deceit were common ground, it would also be necessary to exclude those from the page and paragraph count when working out the proportions. With those parts excluded, the sections of the judgment which concern limitation come to around 14 or 15 per cent of the judgment, but even that calculation is of no real assistance. By the time it came to the limitation defence in the judgment, it was possible for

the court to cross-refer to earlier parts of the judgment, including those parts covering the analysis of the claims, and deal with things in a fairly shorthand way. Had the judgment only been concerned with limitation, it would have had to have been expressed at somewhat greater length than the section concerning limitation in the actual judgment. Thirdly, I also think that the claimant has exaggerated the extent to which it would have been possible for the trial to be shortened. I think the defendants are right to say that there would still have been some evidence from their witnesses to explain what they told the claimant and what information was provided to third parties and when. On the other hand, I think that the defendants have overegged the extent to which it would have been necessary for there to be extensive cross-examination of the defendants. The claimants may also fairly say that they did at least attempt a calculation of the amounts of time attributable to the limitation defence, and the defendants have not themselves come up with any alternative basis of calculation. It seems to me, doing the best I can, applying a fairly broad brush, that it would be fair to say that about 15 per cent of the time at least at trial was devoted to the limitation issues, and it seems reasonable (in the absence of any other yardstick) to apply that to the proceedings as a whole. That is a very broad brush and is not based on any scientific or detailed process.

19

Fifthly, much of the time at the trial and space in the judgment was devoted to issues on which it cannot be said that the defence was in any way infected by dishonest evidence. These include issues concerning inducement and loss, which took up reasonably substantial parts of the trial and the judgment. Though the defendants lost on those points, they were properly arguable and they cannot be said to be tainted by any wrongdoing on the part of the defendants in the conduct of the proceedings.

20

Sixthly, while I think it right to make an allowance to reflect those parts of the evidence where the defendants gave false evidence, I am not persuaded that this is a case where I should require the defendants to bear in full the costs of the claimant in relation to the underlying allegations of wrongdoing. The claimant decided to bring the claim. I have concluded it was statute-barred and it has been dismissed in full. I have to give appropriate weight to the fact that the defendants are the successful party when framing a just costs order, and not merely in deciding whether to depart from the general rule. I also agree with the defendants that the limitation defence cannot be regarded as a mere technicality. However, I do think that some allowance should be made in favour of the claimant for their costs of demonstrating that the defendants' witnesses were giving untruthful evidence. They had to incur costs to uncover the defendants' lies. But that does not go, for the reasons I have already given, to those elements of the claimant's case such as inducement, loss, mitigation etc., about which there were no lies. Moreover, I do not think that all of the defendants' evidence was knowingly false, even on the main points.

21

Seventhly, I take into account the offer to drop hands. It has some relevance. I do not think that the claimant is right to say that it would only be relevant if I had otherwise decided to make an order in favour of the claimant. It seems to me that it is a factor to take into account in deciding what order I should make. However, the offer was made very late in the day, on the eve of trial, when the great bulk of the costs had already been incurred.

22

Eighthly, there would, in any event, have been common costs of the litigation, and one is not merely looking at the costs of the trial itself. There were costs of procedural steps including the CMC, the

PTR, arguments about security for costs, arguments about disclosure, the preparation of bundles, the preparation of witness statements and other steps. These were steps that would have had to be taken in any case.

23

Ninthly, I have already mentioned the question of the parties' relative success and failure on the various issues. I do not consider it appropriate in this case to make an issues-based order under CPR 44.2(6)(f) in the sense of requiring the court on a detailed assessment to undertake a separate assessment of the costs of the different issues, and indeed neither party invited me to make such an order. Each sought instead an overall order taking into account, amongst other things, the outcome on the various issues and the conduct of the parties. I do not think that it is as straightforward as the claimant suggests, to tease the limitation issues out of all of the other issues, but I do think there is some force in their overall submission that they won on most of the points and the defendants lost on most of the points. However, that needs always to be balanced against a point that I have made several times already, that even where the court departs from the general order that costs follow the event, it should still give weight to the fact that the defendants are the overall winners.

24

I have ultimately to reach a just costs order taking into account all the relevant circumstances. I have enumerated my principal conclusions above but it may be helpful here to pick out the points that seem to me to be of particular importance. First, the defendants are the overall winners and would not have been put to any costs had the claimant recognised the validity of the time-bar defence. That goes not merely to the starting point but is an important consideration when deciding any appropriate alternative order. Secondly, I do not think this is a case where the entire case of the defendants may be regarded as an abuse of process. Thirdly, the defendants were, on my findings, guilty of deceit. The court should reflect this in its order. Fourthly, the defendants' main witnesses were not merely poor witnesses but at times invented evidence. That led to the defendants denying the claims in deceit, and that undoubtedly led to more prolonged proceedings at the trial. The court should reflect this in its order by depriving the defendants of part of their costs. Fifthly, however, not all of the evidence on the main issues of liability was affected by the lies told by the defendants' witnesses. There were issues of inducement, causation and loss which did not depend on that. Sixthly, the claimant lost on some aspects of the case as well as the limitation part of it, albeit those aspects were relatively small in the overall picture. Seventhly, on a broad brush calculation, the limitation issues probably took up about 15 per cent of the trial process, and the other issues on which the claimant lost took up perhaps 5 per cent. Eighthly, some allowance should be made in the claimant's favour to reflect the additional costs it was put to in exposing the false evidence given by the defendants. Ninthly, there was an offer to drop hands shortly before the trial but it was late in the day. It would have reduced the overall costs, but would not have obviated the great bulk of the costs of the proceedings. Tenthly, some elements of the claimant's conduct, particularly its delay in issuing the proceedings, are of some relevance but I do not overall think they have great weight. Finally, I consider that some of the costs set out in the claimant's costs schedule appear to be high and it is possible that some of them may be disproportionate, though on the information before me I say no more than that.

25

I have carefully taken into account all of the features of the case including all of the submissions made so forcefully to me by the parties. I have decided that the just order in this case is that there should be no order as to costs.

Permission to appeal

26
The claimant seeks permission to appeal. It has helpfully set out a number of grounds arranged under nine main heads with various subparagraphs. As is now fairly commonplace, these appear to me to be over-elaborate and repetitive, and in what follows I shall seek to summarise the principal challenges to the judgment and give my views about them before reaching an overall conclusion.

27
Generally when considering the draft grounds of appeal it is important to bear in mind that my decision under section 32 of the Limitation Act was based in part on my assessment and evaluation of the totality of the evidence. Some of the draft grounds of appeal involve points of principle but a number of them are essentially factual, and on these the claimant faces the high hurdle of persuading the appellate court that it should interfere with the trial judge's conclusions.

28
The first group of challenges concerns the proper interpretation of section 32. The claimant contends that events occurring before the cause of action accrued (namely when loss was suffered) are irrelevant and that the claimant cannot be regarded as subject to the requirement of reasonable diligence until that point. I do not consider that there are real prospects of these grounds succeeding. As I explained in the main judgment, on my factual findings a person in the position of the claimant who acted reasonably would have known about the fraud. In those circumstances, the claimant cannot rely on the fraud exception to exclude the operation of the otherwise applicable limitation period. That is a natural application of the words of section 32. I addressed the argument concerning the proper interpretation of section 32 at [770] to [774] of the main judgment. I do not think there is a real prospect of the claimant succeeding in its favoured interpretation. The section postulates the reasonable person in the position of the claimant going about their ordinary business. As Males LJ explained in para.52 of OT Computers: "If the claimant knows about or could with reasonable diligence have discovered the wrong at the time when it is committed, section 32 will have no application and the primary limitation period will apply."

29
For the reasons given in my main judgment, the court is required to consider all relevant circumstances, including the conduct of the putative reasonable person in the position of the claimant and the information actually or constructively available to that person. To my mind there is nothing in the wording of the section to suggest that the court must disregard conduct, events or information occurring or available before the date when any loss has been suffered. The claimant cites a number of cases which refer to loss being the trigger for enquiries, but those cases (which simply turn on their own facts) do not say (unsurprisingly) that the section cannot apply until loss has been suffered.

30
The claimant referred to various parts of the legislative history and legislative background to section 32, but none of this material, to my mind, even arguably supports its contention that the court must disregard conduct, events or information occurring or available before the date when loss has been suffered.

31
There is in any event a second reason why I consider that this group of grounds of appeal lacks reasonable prospects of success. In the main judgment at [810]ff., I found not only that the claimant could have known about the fraud due to events that occurred prior to the fraud, but that the claimant could also have known about the fraud due to events that occurred after 24 June 2011 but before 6

years before the issue of the claim. The claimant therefore needs to succeed both on the point of principle and in relation to ground 3, which covers post 24 June 2011 events, to which I return below.

32

The claimant has also raised, for the first time, the contention that prior to the LNA being executed, the knowledge of Duet and ERED are to be distinguished. I do not consider that this ground has real prospects of success for the following reasons. First, Duet was appointed to act as ERED's investment adviser, pursuant to the investment advisory agreement. The services to be provided included performing due diligence. Duet's knowledge is to be attributed to ERED. Secondly, ERED invested based on the recommendation of Duet that was made before the LNA was executed. Thirdly, this point was not raised at the trial, and had it been there may well have been further and different cross-examination about the relationship between ERED and Duet. Fourthly, the claimant accepts that after the LNA was entered into, ERED had all the knowledge of Duet. That would necessarily include all of its pre-LNA information and knowledge. Fifthly, the claimant appears to conflate the (wrong) question of what would have happened had the representations not been made, with the (right) question of what the claimant actually knew or could have known in the real world in which the representations were made. In the real world, Duet recommended the investment to ERED, and ERED entered into the LNA.

33

The next group of challenges is based on the argument that the claimant's conduct before the representations were made is irrelevant for the purposes of section 32. I do not think that these challenges have a reasonable prospect of success. In my judgment this challenge suffers from the same shortcomings as the first set of challenges concerning the position before loss was suffered. To repeat, the section requires the court to determine whether a person in the position of the claimant who acted reasonably would have known of the fraud, and this requires the court to examine the full history. There is, to my mind, no warrant in the wording of the section or as a matter of principle for artificially excluding parts of the history by reference either to the accrual of the cause of action or, if earlier, when the relevant representation was made. The claimant's argument suggests that the court should ignore what was known or would reasonably have been known by the putative claimant before the relevant representation was made. To my mind that is unjustified by the words of the section but it is also inconsistent with the point made in [774] of the main judgment, that in Thakerar, Millett LJ referred to events occurring before the transactions giving rise to the claims.

34

I also consider that in this part of its argument, the claimant has misunderstood [52] of OT Computers, which I have already mentioned. The claimant relies on that paragraph to argue that Males LJ could not have been saying that there could be a case in which a claimant could have discovered the fraud before it took place because, if the fraud had been discovered, the transaction would not have occurred. But that ignores the fact that Males LJ was not merely referring to a case where the fraud was actually discovered, but to one where it <u>could</u>, with reasonable diligence, have been discovered. In the latter case, the fraud would have occurred but been discovered.

35

The next group of challenges concerns the projected figures claim. The claimant contends that in the judgment there is no finding that ERED could have discovered that the projected figures were not ECG's current expectation of its likely financial performance, and that the defendants knew this. The claimant says that this was an essential element of the cause of action which it would not have been able to plead. The claimant relies on [779] of the main judgment to the effect that Duet believed that

Mr Treon and Dr Srinivas were honest and straightforward, and that the second defendant was a reputable adviser. The claimant says that while there is a finding that it could reasonably have discovered that the projected figures were implausible, that does not lead to the conclusion that it could reasonably have concluded that the projected figures were not ECG's current projections, and that Mr Treon and Dr Srinivas knew this.

36

I do not consider that this challenge has reasonable prospects of success. First, the challenge is based on a misconception. I did in fact find that Duet/ERED could and would have discovered the facts giving rise to the projected figures claim at about the same time as it could and would have discovered the elements of the forecasted figures claim: see [818]. That necessarily included the finding that Duet/ERED could and would have discovered the defendants' guilty state of mind and that they could and would have discovered that the projections were not ECG's actual expectations. In [818] that conclusion was tied to the steps that a reasonable investor would have taken in relation to the forecasted figures claim, as set out in [805] and [813] to [814]. Had the reasonable investor taken those steps, it would have discovered that the projected figures (which were part of the January Figures) were not just erroneous but had been presented fraudulently by the defendants. Duet would have discovered that the defendants had knowingly and deliberately inflated the 2010 balance sheet figure in the January Figures, to present an overly optimistic picture of the business, and that this was a material misstatement. The original iteration of the projected figures for 2011 to 2013 were contained in the same January Figures as the 2010 forecasted figures: see [817]. The January Figures were in a very short document. The figures complained of in the projected figures claims were then repeated in later documents provided in February/March 2011.

37

The claimant's own case is that had the true figures been provided for 2010, they would have challenged or rejected the projected figures: see [817]. But given the way that the figures were being presented in one document, the link between the projected figures and the forecasted figures is stronger still. The numbers were originally set out in the same short document. A reasonable investor who would, with reasonable diligence, have concluded that the forecasted figures were deliberately fraudulent, would naturally have concluded that the projected figures which used the forecasted figures for 2010 as their base point were also probably fraudulent, i.e. known by the defendants to be inflated and not be the company's genuine projections. My conclusion in [818] of the judgment was therefore a factual one, and it was fully supported by the documentary record.

38

The grounds of appeal operate on the artificial fiction that the projected figures claim is somehow to be assessed in isolation from the history of events concerning the forecasted figures, which were contained in the same documents, and the steps that a reasonable investor would have taken in relation to the information being provided in that format. While each separate claim has to be separately considered for the purposes of section 32 (a process undertaken in the main judgment), the claimant now invites the court to ignore the actual history, including all of the information that was in fact provided by the defendants. That is the exercise I have undertaken in the main judgment.

39

Secondly, I found that a reasonable investor would have been provided with the same projections as were provided to Colliers. Those were in fact provided to Colliers at some point before 17 February 2011, and were based on the January Financial Projections: see [643]. The January Financial Projections are described in [147]. I found that the defendants would have provided a copy of the

document or a similar document to that which they provided to Colliers at [821]. A reasonable investor who was provided with the January Financial Projections, or a version of them, would have seen that they differed from the projected figures in material respects. The reasonable investor would have concluded that the January Financial Projections were ECG's actual projections, and what had been presented in the January Figures and then repeated by Mr Treon and Dr Srinivas in February and March could not have been its real expectations. A reasonable investor would also have understood at the same time that other numbers presented by the defendants in the January Figures were not just wrong but were fraudulently presented. This is for the reasons addressed above. A reasonable investor would therefore have had sufficient material to plead a claim that the defendants were also fraudulent in providing the projected figures. In this regard it is clear from the authorities that what constitutes discovery, actual or constructive, of a fact under section 32 is knowledge sufficient to enable the claimant to make an allegation of fraud, not certainty that the claim is a good one or even that the claim is likely to succeed.

40

Thirdly concerning this group of challenges, I also found in [819] of the main judgment that a reasonable investor would have sought and read the management accounts for Q1 2011. The reasonable investor would have realised from that document that the projected figures were implausibly optimistic, as I explained in the judgment. That does not merely mean that they were over-optimistic, it means that they lacked a plausible basis. The reasonable investor would also by that time have realised that the defendants had deliberately provided it with material information about the 2010 numbers, which also provided the starting point for the projected numbers (see above). That too would have provided the reasonable investor with a sufficient evidential basis for concluding that the defendants had presented projected numbers which they knew did not represent the company's actual expectations but were part of the same over-cooked presentation of its financial position and prospects.

41

The claimant contends that the reasonable investor might have thought that these Q1 management accounts were simply a later projection and that they had replaced the projected figures, so that the reasonable investor would not have realised that the projected figures when presented did not represent its expectations, at least to the knowledge of the defendants. But that ignores the full history as set out above. On the findings I have made, the reasonable investor would have concluded that the defendants had already deliberately misled it in relation to the 2010 figures. The reasonable investor, armed with the Q1 management accounts as well, would have concluded that it was probable that the defendants had deliberately misled it about the 2011 to 2013 figures too.

42

In this regard it is also important to recall that the claimant's case was that the first defendant was at the heart of all the information provided to Duet. It was also its case that Duet considered that all of the representations were being made by both the defendants and that Duet believed that the second and third defendants were heavily involved in the preparation and review of the material which was provided to Duet by ECG. This included the January Figures and the model provided with RPC's letter of 18 February 2011. It follows that a reasonable investor in Duet's position would have concluded that all of the defendants must have known that the projected figures were not the true expectations of ECG.

43

For these reasons, the finding in [818] concerning the projected figures claim was an evaluative judgment based on an assessment of a long and complex factual history. I do not consider that the appellate court would upset the factual finding I made in [818] of the main judgment about that part of the claim.

44
The next group of challenges concerns the outdated 2010 figures claim. I conclude again that this ground lacks real prospects of success. Many of the same points apply to this claim as to the projected figures claim. In short, once it knew that the forecasted figures were fraudulently misstated, a reasonable investor would have questioned the extent to which any new 2010 figures had been produced. In the main judgment at [785] to [806] I concluded that the 2010 numbers were unreliable and had been provided by the defendants knowing them to be untrue. A reasonable investor could and should have asked for more up-to-date figures which would have been provided, on my findings of fact: a reasonable investor could, with reasonable diligence, have known that the forecasted figures were not ECG's latest figures - that would have been shown by the further figures that would have been produced - and would have known that the defendants had the necessary mental element for deceit (at least to the standard required to plead a claim).

45
Again, it seems to me that the claimant's challenge depends on the fiction that the particular claim, namely the outdated 2010 figures claim, has to be considered in isolation from the full history. I do not think that is right. In considering any of the various claims, the court is required to consider the entire history. On my findings of fact, the reasonable investor would have realised that the 2010 balance sheet that was presented to it as part of the January Figures was a fraudulent deceit, and that would have coloured and influenced its approach to all of the information provided by the defendants.

46
The final group of grounds of challenge concerns the normalisation claims. This group of challenges presupposes that the claimant is correct in its argument that the court should disregard events and information occurring or being provided before the accrual of the cause of action. I have already explained that why I do not think that argument has realistic prospects on appeal. That is enough to dispose of the final group of challenges. But even if I am wrong about that I do not think that these grounds have a reasonable prosect of success.

47
The claimant contends that the main judgment is wrong or contrary to the evidence. I do not consider this has a real prospect of success. As to the finding about the audited accounts in [813], I concluded that any reasonable investor having a right to call for audited accounts would have exercised that right. I also concluded that Duet itself normally sought accounts as and when they became due. The criticism made by the claimant concerns the second of these points. The broader finding of fact that I reached that any reasonable investor having the right to call for audited accounts is untouched by its criticism. I do not think that the appellate court would displace that finding. In any event, my finding about Duet's own practice is a factual one and I do not think it is likely that the appellate court would upset it.

48
The claimant contends, secondly, that the court's approach somehow does away with the need for a trigger event. I disagree. I simply found, as a matter of fact, that a reasonable investor would have requested information which in turn would have resulted in a person in the position of the claimant

having the necessary knowledge. In any event, as I explained in my judgment, the notion of a trigger has to be seen in the light of the discussion in OT Computers at [47] (set out in [769(iv)] of the main judgment).

49
The claimant also argues under this head that had it sought the audited accounts, these would not have been provided before 16 October. My decision in that regard is a factual one based on the totality of the relevant evidence. I do not consider that there is a reasonable prospect of that finding being upset on appeal. In any event, I concluded in [815] that in addition to seeking accounts, a reasonable investor would have asked questions and made the information requests set out in [805], and that the responses would have allowed the claimant to plead the normalisation claims. For these reasons, I do not think that there is an arguable ground of appeal on this point.

50
I have now covered all the grounds of appeal, albeit not in the same order or under the same heads as set out in the draft grounds of appeal (which are as I say repetitive). I consider that there is no real prospect of an appeal succeeding and I see no other compelling reason why permission to appeal should be granted. I therefore refuse permission to appeal.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by **Opus 2 International Limited**

Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

This transcript has been approved by the Judge