



Neutral Citation Number: [2021] EWCA Civ 501

Case No: A4/2020/0658, A4/2020/0672, A4/2020/0675 & A4/2020/0674

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE HIGH COURT**

**QUEEN'S BENCH DIVISION**

**COMMERCIAL COURT**

**Mr Justice Foxton**

**[2020] EWHC 415 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/04/2021

**Before:**

**LORD JUSTICE PETER JACKSON**

**LORD JUSTICE COULSON**

and

**LORD JUSTICE MALES**

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**Between:**

**OT COMPUTERS LIMITED (IN LIQUIDATION)**

**Respondent**  
**/Claimant**

- and -

**1) INFINEON TECHNOLOGIES AG**

**2) MICRON EUROPE LIMITED**

**Appellants/**  
**Defendants**

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**Sarah Ford QC & Tim Johnston (instructed by Slaughter & May) for the First Appellant**  
**Daniel Jowell QC, Emily Mackenzie & Richard Howell (instructed by Allen & Overy LLP)**

**for the Second Appellant**

**Paul McGrath QC, David Scannell QC & Stefan Kuppen (instructed by Osborne Clarke LLP) for the Respondent**

Hearing dates: 24<sup>th</sup> & 25<sup>th</sup> March 2021  
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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14<sup>th</sup> April 2021 at 10.30 a.m.

**Lord Justice Males:**

1. This appeal is concerned with the words “until the plaintiff has discovered the ... concealment ... or could with reasonable diligence have discovered it” in section 32(1) of the Limitation Act 1980. Specifically, how does that section apply when the defendant deliberately conceals a relevant fact so that (1) it cannot reasonably be discovered by the claimant at the time of the concealment, (2) by the time it could be discovered by a person carrying on business of the relevant kind (here, the assembly and sale of computers), the claimant is in administration, and (3) the matters which would have put a person who continued to carry on such a business on notice of the need for further enquiry would not have come to the notice of a reasonably diligent insolvency practitioner?
2. Foxton J held that, in those circumstances, the fact in question (the existence of a price-fixing cartel to which the appellants were party) could not with reasonable diligence have been discovered by the claimant respondent (“OTC”), so that the running of time for limitation purposes continued to be suspended until such time as it was discovered or could have been discovered by a reasonably diligent insolvency practitioner. As that had only occurred within six years before the commencement of proceedings, OTC’s claim was not time-barred. The position of OTC was contrasted with that of other claimants who were also victims of the cartel (“the Granville Companies”) but who remained in business at the time when facts began to emerge sufficient to put them on notice of the need to investigate, such that if they had exercised reasonable diligence they could have been in a position to plead a viable claim. Their claims were therefore time-barred.
3. The appellants (“Infineon” and “Micron”) now appeal with the permission of the judge, contending that he was wrong to take account of OTC’s insolvency in considering whether it could with reasonable diligence have discovered enough about the existence of the cartel to enable it to plead a viable claim.
4. The factual framework in which this issue arises is as follows:
  - (1) The judge found that the Granville Companies had or could have had a sufficient basis on which to plead a claim by (at latest) July 2005 and the Granville Companies were refused permission to challenge this conclusion.
  - (2) The judge held that, if he was wrong to take account of OTC being in administration, it would have been in the same position as the Granville Companies and its claim would therefore have been time-barred. OTC seeks, if necessary, to argue by way of a Respondent’s Notice that it was in a different position, but that issue will only arise if the judge’s approach to section 32(1) was mistaken.
  - (3) Infineon and Micron were refused permission to challenge the judge’s conclusion that a reasonably diligent insolvency practitioner could not have discovered the relevant facts.
  - (4) Leaving aside the Respondent’s Notice, therefore, the issue on the appeal is one of law, and arises on the basis that a time came more than six years before the commencement of proceedings (in fact by July 2005, almost 11 years beforehand)

when a person continuing to carry on business could, but an insolvency practitioner exercising reasonable diligence would not, have discovered the relevant facts.

5. These questions arose on the hearing of preliminary issues whether the claims of the Granville Companies and OTC were barred by limitation. For this purpose it must be assumed that those claims were otherwise valid although, if the appeal fails, there remain further issues to be determined between the parties.

### **The facts**

6. The detailed facts are set out in the judge's judgment. For the purpose of this appeal the following summary will suffice.
7. The Granville Companies and OTC were engaged in the assembly and sale of desktop personal computers and notebooks. For this purpose they purchased dynamic random access memory ("DRAM") from Micron and may have done so from Infineon, which are registered in England and Germany respectively. Between 1<sup>st</sup> July 1998 and 15<sup>th</sup> June 2002 these companies and others operated a price-fixing cartel which was eventually the subject of findings by the European Commission in its Decision COMP/38511 adopted on 19<sup>th</sup> May 2010 and announced in a press release, as a result of which fines amounting to €331 million were imposed on the participants for infringements of Article 101 of the Treaty on the Functioning of the European Union. One day short of six years later, on 18<sup>th</sup> May 2016, the Granville Companies and OTC (both by now in liquidation) commenced these follow-on proceedings, claiming damages or restitution arising from the infringements established by the Decision.
8. The first publicly available information about the cartel emerged in June 2002. By this time, however, OTC had entered into administration, which it did in January 2002, at which time it sold its business and assets (as it happens, to the Granville Companies, previously competitors). From January 2002, therefore, OTC was no more than a shell company in administration, with no business and assets, although it is OTC's case (disputed by the appellants) that it retained its cause of action, of which at that time it was ignorant, against the appellants. In February 2004 OTC went into liquidation, and has remained in liquidation ever since without being finally dissolved. The Granville Companies continued to trade until they went into administration in July and August 2005, followed by liquidation in January 2007. It has never been suggested that the failure of any of these businesses was caused by the unlawful activities of the cartel.
9. On 17<sup>th</sup> June 2002 Micron's parent company in the United States received a subpoena from a Grand Jury and, two days later, there were press reports that it was being investigated by the United States Department of Justice for anti-competitive practices in sales of DRAM. These were soon followed by reports, including in the London editions of the Financial Times and The Times, that other companies were also under investigation.
10. After these initial reports in June 2002, further information about the cartel entered the public domain, including (1) a report in the London edition of the Financial Times in December 2003 that Micron's parent company was prepared to admit its involvement in a price-fixing conspiracy, (2) press reports from July 2004 referring to the fact that the European Commission was investigating the conduct of the same

companies in relation to DRAM pricing, (3) an article in the Financial Times on 21<sup>st</sup> July 2004 referring to price-fixing investigations in the United States and Europe and to an increase by Infineon in its provision for fines resulting from such investigations to €212 million, (4) reports of Infineon's agreement in September 2004 to plead guilty to involvement in a cartel to fix prices in the United States and elsewhere and to pay a fine of US \$160 million, (5) a press release by Micron in November 2004 stating that it was "cooperating fully and actively" with the Department of Justice pursuant to the Department's Corporate Leniency Policy, which was reported in the United Kingdom trade press, and (6) a press release issued by the Department of Justice in December 2004 referring to guilty pleas by four Infineon executives, two of whom worked in its Munich headquarters, in relation to an "international conspiracy to fix prices in the DRAM market", reported in the London edition of the Financial Times.

11. The judge found that the Department of Justice investigation was a topic of interest to purchasers of DRAM from Micron which was frequently raised by them in conversations with Mr Ballard, Micron's European regional sales manager, who was responsible for the sale of DRAM to the Granville companies. He found that reasonable diligence on the part of the Granville Companies (as companies who continued as active purchasers of DRAM) would have involved (1) enquiries as to whether there was any similar investigation in Europe, (2) ascertaining what the key DRAM manufacturers were saying about the issue of market fixing in their corporate filings, and (3) making at least some attempt to see what material relevant to the price-fixing cartel was available on the internet. In addition, the Granville Companies had expressed interest in, and had been invited to join as claimants in a United States class action ("the Centreprise class action") on behalf of purchasers outside the United States which was commenced in May 2005. The judge said:

"81. On this basis, I am satisfied that with the exercise of reasonable diligence, the Granville Companies could have discovered not simply the US developments which Mr Scannell acknowledges they had constructive knowledge of, but also the fact and progress of the Commission investigation, and the significant provisions which Infineon had made for a fine resulting from that investigation."

12. That was sufficient to start time running under section 32 of the Limitation Act 1980 because the Granville Companies had, or could with reasonable diligence have discovered, sufficient information to plead a viable claim under Article 101 TFEU. The judge did not identify the precise date when the Granville Companies had this information so as to start time running, but it was before July 2005 when they went into administration; the fact that they then went into administration and subsequently liquidation did not stop time from running.
13. The position of OTC, however, was different. OTC had ceased trading and gone into administration nearly six months before reports of the Department of Justice investigation began circulating and never received an invitation to join the Centreprise action. In those circumstances two points arose.
14. The first was whether there was a sufficient volume of available material to alert a reasonably diligent insolvency practitioner to the possibility of a claim, such that further investigation would have identified sufficient material for a claim to be

pleaded. The judge rejected that case as a matter of fact. For example, even though an administrator's role included identifying claims which the company might have, a reasonably diligent administrator of a company which had sold its assets (as OTC had) would not be expected to follow the trade press for the market in which the company had previously traded six months and more after it had ceased trading. Nor would an administrator have the same contacts and exchanges of information with others engaged in the business as a company which continued to trade. Accordingly a time would come when, even exercising reasonable diligence, an administrator would only be expected to acquire whatever information it might learn from mainstream news, including what was published in newspapers such as the Financial Times and The Times. However, the "press reports relevant to these claims were infrequent, episodic, and in many cases appeared in sections of the newspaper or under headlines which, on their face, would not have been of any obvious interest to the administrator of an English computer company which had gone into administration in January 2002". They were not, therefore, sufficient to put the administrator (or after February 2004, the liquidator) on notice of any need to investigate further. As I have indicated, the appellants have been refused permission to challenge this finding.

15. The second point was whether, in ascertaining whether OTC could have discovered sufficient material to enable it to plead a claim, it had to be assumed – as a matter of law and contrary to the fact – that OTC was still trading, with the means of knowledge and the engagement with others which a trading computer manufacturer still involved in the acquisition of DRAM would have had. The judge rejected that submission, holding at [54] to [56] that "it is permissible when applying section 32 to take account of the fact that the claimant is in administration or liquidation, and that the issue of what constitutes 'reasonable diligence' and what constitutes an 'exceptional measure' fall[s] to be addressed in that context". The issue on this appeal is whether he was right to do so.

### **Section 32**

16. A special limitation period applies to follow-on claims in competition cases pursuant to section 15 of and Schedule 4 to the Enterprise Act 2002, together with rule 31 of the Competition Appeal Tribunal Rules 2002. That enables a claimant to bring a follow-on claim in the Competition Appeal Tribunal within two years from the date when a Commission Decision becomes final. However, these proceedings were not brought within that period and, when they were commenced, were commenced in the Commercial Court. It is therefore common ground that this special limitation period does not apply and that the question of limitation must be determined in accordance with the provisions of the Limitation Act 1980.
17. It is also common ground that at the material time the primary limitation period for the claimants' action was six years from the date when the cause of action accrued, in accordance with section 2 and/or section 9 of the Act. The cause of action accrued when the cartel was in existence between 1998 and 2002. The primary limitation period therefore expired, at latest, in 2008. However, section 32 of the 1980 Act postpones the running of the limitation period when a fact relevant to a claimant's right of action has been deliberately concealed by the defendant:

"(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

18. It is in the nature of an unlawful price-fixing cartel that it is deliberately concealed from its victims and, in any event, operating such a cartel amounts to deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time. Accordingly the section was engaged and the running of time was postponed until such time as OTC discovered the relevant facts or could with reasonable diligence have done so. OTC has accepted that time began to run from 19<sup>th</sup> May 2010 when the Commission published its Decision, although there may be arguments that it only discovered, or could with reasonable diligence have discovered, that it had a claim at a slightly later date. However, as these proceedings were commenced within six years from the date of the Decision, albeit on the last possible day, those arguments need not be considered further.
19. There has been some debate in the cases about the approach which should be taken to the construction of section 32(1)(b). For example, it has been suggested that, as a derogation from the primary limitation periods contained in Part 1 of the 1980 Act, it should be construed narrowly (see for example the judgment of Simon J in *Arcadia Group Brands Ltd v Visa Inc*, cited when the case reached this court [2015] EWCA Civ 883, [2015] Bus LR 1362 at [17]). However, that approach to the construction of the subsection as a whole was rejected in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339. Rose LJ said:

“29. Mr Kimmins, appearing for Canada Square, argued as a general point that section 32 of the LA 1980 should be interpreted restrictively because it is an exception to the running of time. The courts should not encourage or facilitate the trial of stale actions. I do not accept that as a matter of general principle. The LA 1980, like the many Limitation Acts before it, strikes a balance between the competing aims of

protecting defendants from stale claims but allowing claimants to overcome the expiry of the ordinary time limit where the statute so provides. This was explained recently by the Supreme Court in describing the rationale behind section 32(1)(c) in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2020] 3 WLR 1369 (*FII*):

‘228. ... First, section 32(1)(c), like the equitable rule which preceded it, necessarily qualifies the certainty otherwise provided by limitation periods. It means that the 1980 Act does not pursue an unqualified goal of barring stale claims: its pursuit of that objective is tempered by an acceptance that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action.’

30. That in my view applies equally to section 32(1)(b) and section 32(2).”

20. See also my judgment at [167]:

“167. The first step is to identify the facts which are relevant to the claimant’s right of action. That expression has been narrowly interpreted to refer to a fact without which the cause of action is incomplete (*Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, [2015] Bus LR 1362). It is in accordance with the statutory purpose that there should be such a narrow interpretation: if the claimant can plead a claim without needing to know the fact in question, there is no good reason why the primary limitation period should not apply. But it does not necessarily follow that the section as a whole should be narrowly interpreted. It should be given its natural meaning without a predisposition to interpret it either narrowly or broadly.”

21. The *FII* case to which Rose LJ referred loomed large in the submissions before us. It was concerned with whether a mistake of law as distinct from fact fell within section 32(1)(c) of the 1980 Act, which postpones the running of time for an “action for relief from the consequences of a mistake”. The particular limitation issue was whether a claimant who had paid money under a mistake of law in reliance on what appeared to be settled authority would only be able to discover its mistake when a subsequent case overruled the previous case law, a proposition which the majority (Lords Reed, Hodge, Lloyd-Jones and Hamblen) rejected and which the dissenting minority (Lords Briggs, Sales and Carnwath) did not need to decide because they held that the section did not apply to a mistake of law at all. Both parties before us mined assiduously the lengthy judgment of the majority for whatever nuggets they could find to support their submissions on this appeal. Both parties were able to find isolated sentences or phrases which appeared to do so. However, it is apparent that the issue in the *FII* case was far removed from that which arises here and that the Supreme Court did not have the present issue in contemplation at all. That approach was therefore of no real value.

22. Nevertheless the case is of interest for what it says about the general approach to be adopted in interpreting section 32. It demonstrates that the true rule as to the interpretation of the section is not that it must be given either a broad or a narrow interpretation, but that it must be interpreted in a way which gives effect to, rather than defeats, its statutory purpose:

“155. ... It is the duty of the court, in accordance with ordinary principles of statutory construction, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it.”

23. The purpose of limitation statutes in general was described by the majority in these terms:

“155. ... The fundamental purpose of limitation statutes is to set a time limit for the bringing of claims. As the Law Reform Committee stated at para 7 of its Report, ‘the purpose of the statutes [of limitation] goes further than the prevention of dilatoriness; they aim at putting a certain end to litigation and at preventing the resurrection of old claims, whether there has been delay or not’.”

24. However, the specific purpose of section 32(1)(b) is different, as the majority went on to explain:

“193. The purpose of the postponement effected by section 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake. ...”

25. As the majority explained at [228] in the passage cited by Rose LJ in *Canada Square*, the Act strikes a balance. Section 32 (like the other provisions of Part 2 of the Act) qualifies the certainty otherwise provided by the primary (or ordinary) limitation periods set out in Part 1. This means that the 1980 Act does not pursue an unqualified goal of barring stale claims. Rather, its pursuit of that objective is tempered by a principle of fairness, “in particular that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action”. The purpose of section 32 is to avoid that unfairness. It is therefore necessary to interpret the section so as to give effect to this purpose and not to defeat it.

26. The state of knowledge which a claimant must have in order for it to have “discovered” the concealment (or as the case may be, the fraud or the mistake) has been considered in the cases. For the most part the “statement of claim” test has been applied: that is to say, a claimant must have sufficient knowledge to enable it to plead a claim (e.g. *Law Society v Sephton & Co* [2004] EWCA Civ 1627, [2005] QB 1013; *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667; *Arcadia v Visa*; and *DSG Retail Ltd v Mastercard Inc* [2020] EWCA Civ 671, [2020] Bus LR 1360). This was the test which the judge applied in the present case and his approach is not challenged on appeal. More recently, in the *FII* case, where the issue was from



what point it can be said that the claimant has discovered a mistake of law, the Supreme Court suggested that time should begin to run from the point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. This may mean that time begins to run somewhat earlier than under the statement of claim test, but this is a point which need not be explored in the present case.

27. Whichever of these tests is applied, there will be cases, including the present case, where discovery of the relevant facts involves a process over a period of time as pieces of information become available. In such cases it may be difficult to identify the precise point of time at which a claimant exercising reasonable diligence could have discovered enough, either to plead a claim or (as the case may be) to begin embarking on the preliminaries to the issue of proceedings. In some cases identification of that point of time may be critical. In others, such as the present, it may be unnecessary to identify it with precision. Nevertheless the uncertainty to which this exercise may give rise is inherent in the section.
28. Time will begin to run, not only if the claimant does in fact discover the concealment (or as the case may be, the fraud or the mistake), but also if “the plaintiff ... could with reasonable diligence have discovered it”. These are the critical words in the present case. They make it clear that the question is what “the plaintiff” (in the present case, OTC) could have discovered, but that the test is objective, to some extent at least, applying a standard of reasonable diligence. How this standard is to be applied has also been considered in the case law.
29. An early case was *Peco Arts Inc v Hazlitt Gallery Ltd* [1981] 1 WLR 1315, where the claimant art dealer purchased what was believed to be an Ingres drawing without having it authenticated. Webster J held that not having the drawing authenticated was not a failure of reasonable diligence as it was consistent with the conduct of an ordinary, prudent buyer:

“... I conclude, first of all, that it is impossible to devise a meaning or construction to be put upon those words which can be generally applied because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them, in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not even necessarily the doing of anything at all; but it means the doing of that which an ordinary prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.”
30. It is probably more accurate to say that the application, rather than the meaning, of the words “could with reasonable diligence have discovered it” must depend upon the context in which the issue arises, but it is undoubtedly correct that what reasonable diligence requires in any situation must depend upon the circumstances.

31. The claimant in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 was a mortgage lending company which sought to amend its pleadings to allege a case of fraud after the expiry of the primary limitation period of six years. Millett LJ formulated a test which has been repeatedly applied in the later cases:

“The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.”

32. This passage was cited with approval by Neuberger LJ in *Law Society v Sephton*, who described it at [110] as “authoritative guidance”. He continued:

“116. ... the judge was right in his conclusion that it is inherent in section 32(1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, that there must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word ‘could’, as emphasised by Millett LJ, of much of its significance. Further, the concept of ‘reasonable diligence’ carries with it, as the judge said, the notion of a desire to know, and indeed, to investigate.”

33. I note that Neuberger LJ went on immediately at [117] to acknowledge “that one must be very careful about implying words into a statutory provision”.

34. *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 is a further case in which the *Paragon Finance* test has been applied. Henderson LJ suggested at [49] that another way of making the same point as Neuberger LJ had made was that, rather than making an assumption that the claimant desires to discover whether there has been a fraud, “the concept of ‘reasonable diligence’ only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be)”. He emphasised at [50] that it is a question of fact in each case whether the claimant could not with reasonable diligence have discovered the relevant fraud, concealment or mistake.

35. After citing these cases, Foxton J identified two aspects of the “reasonable diligence” requirement which merited further consideration. The first was whether it has to be

assumed, as a matter of law, that the claimant is on notice that there is something to investigate. At [44] to [47], in a passage expressly approved by Sir Geoffrey Vos C in *DSG Retail v Mastercard* at [65] and [66], he held that it does not. In summary, when there has been deliberate concealment of a relevant fact, “reasonable diligence” will not require a claimant to take steps to discover that fact unless there is something (referred to in the cases as a “trigger”) to put it on notice of the need to investigate. Whether there is such a trigger must be determined objectively as a question of fact. This was the ratio of *DSG Retail v Mastercard*, reversing the decision of the Competition Appeal Tribunal that it had to be assumed that the claimant was on notice of the need to investigate.

36. The second aspect of “reasonable diligence” identified by the judge was “how far the test of reasonable diligence falls to be qualified by the particular circumstances of the claimant, and in particular by the fact that OTC went into administration in January 2002 and into liquidation in February 2004 ...”
37. In the Hong Kong case of *Peconic Industrial Development Ltd v Lay Kowk Fai* [2009] HKCFA 17, (2009) 11 ITELR 844 Lord Hoffmann NPJ preferred to leave open the question of “the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown”, noting that “It does not follow that because an objective standard is applied, he must be assumed to have been someone else”.
38. Commenting on this decision in *Hussain v Mukhtar* [2016] EWHC 424 (QB), Mr Martin Chamberlain QC (sitting as a Deputy High Court Judge) suggested that this did not mean that personal characteristics such as naïveté and inexperience in financial matters should be taken into account as to do so would involve a departure from the objective standard which the cases require. I would agree that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, uncurious or ill informed, are not relevant. But it does not necessarily follow, as Lord Hoffmann said in *Peconic*, that the claimant must be assumed to be someone or something which he is not.
39. In this jurisdiction, as I have indicated, the *Paragon Finance* test has been applied in a number of subsequent cases. It has been described as “authoritative guidance”, not only by Neuberger LJ in *Law Society v Sephton*, but more recently by the Supreme Court in the *FII* case at [203]. The Supreme Court affirmed also that:

“255. ... Equally, the answer to the question arising under section 32(1)(b) does not depend upon the characteristics of the particular claimant: whether, for example, it was inclined to await further developments, and to allow other taxpayers to make the running. The standard is ‘could’ ...”
40. It was the *Paragon Finance* test which led the judge in the present case to conclude that the Granville Companies were on notice of facts which ought to have triggered further investigation, which in turn would have led them to discover sufficient facts to enable them to plead a claim. That was because they were carrying on a business of the relevant kind (the assembly and sale of personal computers and notebooks), and they could be taken to have acquired the knowledge of the Department of Justice

investigation which a reasonably diligent company carrying on that business could be expected to learn as reports of the investigation (the “trigger”) became known to those in the business and became a topic of discussion among them.

41. In contrast, OTC was no longer carrying on any business when the “trigger” information began to emerge from June 2002 onwards. In a passage also cited by Sir Geoffrey Vos C in *DSG Retail v Mastercard*, the judge held that it was not necessary to assume that OTC was still a trading company buying and selling DRAM and it should not therefore be assumed to have acquired the knowledge which such a trading company would have acquired:

“56. Given the stringency of the s.32(1) test – which involves an enquiry into what the claimant could rather than should have discovered – the fact that the claimant is a company in liquidation is likely to be most significant in determining whether it can be said that the claimant was reasonably put on enquiry that there was something which merited investigation (rather than when determining whether a claimant who had been put on enquiry had exercised reasonable diligence in following matters up). Certainly, this is the context in which the issue arises most acutely in this case. In this regard, I am not persuaded by Mr Jowell QC’s submissions that in determining whether the Claimants were reasonably on notice of the need to enquire into whether they had suffered loss from a price-fixing cartel, I am required (for example) to assume that OTC was still a trading company buying and selling DRAM in and after June 2002 when in fact it had ceased to trade in January of that year. In my view, this is to read too much into Millett LJ’s statement that the reasonable diligence test is to be measured in a business context by considering ‘how a person carrying on a business of the relevant kind would act’. However, I accept that when it comes to considering the ability of a claimant to investigate matters of which, objectively, it has been put on notice, the question of what constitutes reasonable diligence is unlikely to admit of any substantial distinction between companies which are, and are not, in liquidation.”

42. I read the citation of this passage in *DSG Retail v Mastercard* as indicating approval, although it is fair to add that the status of the claimant as a company which had ceased to trade was not an issue in the latter case.

### **The parties’ submissions in outline**

43. Mr Daniel Jowell QC for Micron (whose submissions were adopted by Ms Sarah Ford QC for Infineon) submitted that the enquiry under section 32(1) involved two stages, the first being whether OTC ought reasonably to have been on notice of the need to investigate, while the second was concerned with what an investigation exercising reasonable diligence would then have revealed. He submitted that the test of reasonable diligence had to be applied at both stages and that in applying that test, in particular at the first stage, the judge was wrong to treat as relevant the fact that OTC went into an insolvency procedure after the tort was committed and the concealment

commenced. Rather, OTC had to be treated as having the means of knowledge which a trading computer manufacturer involved in the acquisition of DRAM would have. He submitted that this was necessary in order to apply the *Paragon Finance* test which has repeatedly been held to be authoritative, most recently by the Supreme Court in the *FII* case, and is binding upon us. That test requires an assumption, at least in a commercial case, that the claimant is “a person carrying on a business of the relevant kind”, here the business of computer manufacture. Further, the test had to be applied at the time when the wrong was first committed and the concealment commenced, with no account to be taken of changes in the claimant’s status or characteristics thereafter. He submitted that this was inherent in the fact that the legal burden is on the claimant from the outset to prove that it did not know and could not by exercising reasonable diligence have discovered the concealed facts; that it promotes the objective of limitation statutes of achieving finality in litigation; and that it achieves consistency and clarity as between different claimants and thereby justice for defendants.

44. Mr Paul McGrath QC for OTC submitted that the appellants’ case involves reading into section 32 a requirement to treat the claimant as something which it was not (i.e. a company which was continuing to trade), a requirement for which there was no support either in the terms of the section or in the case law. While the test of reasonable diligence is objective in the sense that personal traits must be ignored, that does not mean that its status as a company in administration or liquidation must also be ignored. The *Paragon Finance* test was formulated in a context where the status of the claimant as a company carrying on the business of mortgage lending had not changed at any stage and it has no application in a case like the present. To make the assumption that the claimant in the present case was continuing in business as information about the cartel began to emerge would be artificial and unjust. It was after all the appellants by their wrongful conduct and concealment of that conduct which had created the problem. The purpose of section 32 was to ensure that the claimant – i.e. this claimant and not some hypothetical claimant which was continuing in business – was not disadvantaged by that concealment.

## Discussion

45. I begin with the terms of section 32 itself. The issue is whether “the plaintiff ... could with reasonable diligence have discovered” the concealment of a price-fixing cartel which distorted competition within the European Union, affecting trade between member states and causing loss and damage to OTC. The following considerations are relevant.
46. First, as Mr Jowell submitted, the same issue arises whether a case is concerned with fraud, concealment or mistake, so that any test of “discoverability” by the exercise of reasonable diligence must be capable of being applied in all three circumstances.
47. Second, although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the “trigger”), it is more

accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section.

48. Third, while the use of the words “could with reasonable diligence” make clear that the question is objective, in the sense that the section is concerned with what the claimant could have learned and not merely with what he did in fact learn, the question remains what the claimant (or in the terminology of the section, “the plaintiff”) could have learned if he had exercised such reasonable diligence. That must refer to the actual claimant, in this case OTC, and not to some hypothetical claimant.
49. Fourth, the section applies to all kinds of claim where there is fraud, concealment or mistake. There is no warrant in the language of the section for a different test to be applied in certain kinds of case, such as cases where the claimant is carrying on business. The application of the test will differ according to the circumstances, but there is a single test.
50. Fifth, it follows that it is the appellants who need to read into the section a requirement that a claimant which is not in fact carrying on business at the time when facts begin to emerge which would lead to the discovery of the concealment should be treated as if it were. It is not easy to find that requirement in the language of the section, which says nothing about whether the claimant is carrying on business at all, let alone whether it is continuing to do so.
51. Mr Jowell seeks to find that requirement, not in the statutory language but in the burden of proof, the submission that the status and characteristics of the claimant are fixed once and for all at the date when the concealment occurs, and the *Paragon Finance* test. I deal with these in turn.
52. The first two can be taken together. It is common ground that the burden lies on the claimant to prove not only that it did not know but that it could not have known the relevant facts and that this burden falls to be discharged from the outset when a wrong is committed. 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. In order for the section to be engaged, therefore, the claimant must prove that it did not know about and could not have discovered the wrong from the outset, which in this case means that OTC could not have discovered that it was suffering loss as a result of purchasing DRAM at artificially inflated prices between 1998 and 2002 when it was still in business. Mr Jowell submitted that this serves to fix the status and characteristics of the claimant at the time of the wrongdoing and that later changes, such as going into administration, are irrelevant.
53. To my mind this conclusion does not follow from the premise. It is for the claimant to prove that it did not know about and could not have discovered the wrongdoing at the time when it was committed, but this does not mean that at all subsequent times the

claimant must be treated as if it were still carrying on the same business as it was when the wrong was committed. Before January 2002 OTC was an active purchaser of DRAM, engaged in the assembly and sale of computers. Any consideration of what it could have discovered with the exercise of reasonable diligence would therefore depend upon what could reasonably have been discovered by a company carrying on that business and acquiring the information which such a company could reasonably be expected to acquire from contacts in the business and from trade publications. In the case of a corporate claimant such as OTC, the question will be what could reasonably have been discovered by the officers and employees of OTC whose knowledge was to be attributed to the company. But from January 2002 onwards OTC was in administration and had sold its business and assets. It is not, therefore, a case where the administrators were seeking to rescue the company and the business continued to be carried on under the auspices of the administrators. If it had been, different considerations would have arisen. But as it was, OTC had no remaining officers or employees other than the administrators. Consideration of what OTC could have discovered from January 2002 onwards (in circumstances where it is not suggested that it had acquired any relevant information about the cartel up to that date) must depend upon what information would have been acquired as a result of the exercise of reasonable diligence by its administrators. It could not learn anything in any other way. There is nothing in the fact that it was carrying on business at the time when it suffered the wrong (or while the appellants succeeded in suppressing all relevant facts) which requires it to be treated as if it was still carrying on business at the time when facts about the cartel began to emerge. Section 32 says nothing of the kind.

54. Ultimately, therefore, Mr Jowell was forced to take his stand on the *Paragon Finance* test and its approval as “authoritative guidance” in later cases, culminating in its approval by the Supreme Court in the *FII* case. For convenience I set out again the test stated by Millett LJ:

“The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.”

55. Mr Jowell submitted that it was necessary to identify the “business of the relevant kind” being carried on by the claimant and that in this case that meant the business of assembling and selling computers. In my judgment, however, it is a mistake to read this passage as creating a special test applicable to business cases (whatever precisely

those may consist of), and a still greater mistake to treat the phrase “a business of the relevant kind” as if it were some kind of statutory test applicable in all circumstances where section 32 has to be considered in a business context. As Lewison LJ said in *Butters v Hayes* [2021] EWCA Civ 252 at [42], “it is a mistake to read a judgment as if it were a statutory text, especially on a point that was not in issue”.

56. The question which we face in the present case, where a claimant was carrying on business at the time when a wrong was committed, but had ceased to do so by the time when facts began to emerge which might have enabled the wrongdoing to be discovered, did not arise in *Paragon Finance* or in any of the later cases in which it has been applied. To treat the terms of a judgment as laying down a rule of law applicable to circumstances which were never in contemplation runs counter to the whole approach of the common law, which develops flexibly as new factual situations arise. What was said in *Paragon Finance* has rightly been described as “authoritative guidance”, and no doubt will provide the answer in many cases, but it can be no more than guidance. To treat it as providing an answer to the present case would be to force a square peg into a round hole. What matters are the language and purpose of section 32.
57. Accordingly it is necessary to consider whether treating OTC as if it continued in business when in fact it did not gives effect to or defeats the purpose of section 32. As I have explained, the purpose of the section is to ensure that the claimant is not disadvantaged by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake. As the majority of the Supreme Court explained in the *FII* case, the rationale for the section is the same as that for sections 11 and 14, under which the running of the limitation period in personal injury cases may be postponed until the date on which the claimant acquires or might reasonably be expected to acquire knowledge of facts forming the cause of action. Accordingly these sections also require an objective approach, but nevertheless an approach which is concerned with what the claimant might reasonably be expected to ascertain. It is therefore helpful, by way of analogy, to consider how the court has approached the application of these sections.
58. In *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76 the adult claimant brought an action for damages suffered as a result of the defendant’s failure to diagnose his dyslexia when at school. The House of Lords held that his claim was barred by limitation because a person experiencing serious problems as a result of difficulties with reading and writing could reasonably be expected to have sought professional advice more than three years before the date when the action was commenced. For present purposes, the interest of the case lies in Lord Hoffmann’s approach to the question of what assumptions needed to be made about the claimant. He said:

“33. Section 14(3) uses the word ‘reasonable’ three times. The word is generally used in the law to import an objective standard, as in ‘the reasonable man’. But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part [of] someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when a person is



assumed to be a normal young child or a person with a more specific set of personal characteristics. The breadth of the appropriate assumptions and the degree to which they reflect the actual situation and characteristics of the person in question will depend upon why the law imports an objective standard.”

59. In my judgment a similar approach applies to section 32. The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant – the actual claimant and not a hypothetical claimant – is not disadvantaged by the concealment. In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests. Rather, claimants in a similar position should be treated consistently. However, a claimant in administration or liquidation which is no longer carrying on business is not in a similar position to claimants which do continue actively in business and it is unrealistic to suggest otherwise.
60. Mr Jowell protested that it is necessary to treat a claimant in administration or liquidation as if it were still carrying on business in order to achieve certainty, and thereby avoid injustice, for defendants who might otherwise be exposed to claims by companies in administration or liquidation many years after the event. However, as I have explained, an element of uncertainty is inherent in section 32. It is, moreover, unnecessary to be too sympathetic to defendants who have committed fraud (section 32(1)(a)) or who have deliberately concealed wrongdoing (section 32(1)(b)) and who, if they wish to ensure that the limitation period begins to run, can always make a clean breast of their wrongdoing by contacting their victims. This latter consideration does not apply in the case of section 32(1)(c) (relief from the consequences of a mistake) where the running of limitation may be postponed without wrongdoing by the defendant. However, as the facts of *FII* demonstrate, it may be many years before a mistake comes to light and, even then, there may be considerable uncertainty as to precisely when time begins to run.
61. For these reasons I conclude that there is nothing in the language of section 32 which requires the claimant to be treated as if it were still carrying on business at the time when facts concerning the wrongdoing begin to emerge and that achieving the purpose of the section does not require any such assumption to be made. As Lord Hoffmann put it in *Peconic*, it does not follow that because an objective standard is applied, the claimant must be assumed to have been someone else.

### **The Respondent’s Notice**

62. This conclusion means that it is unnecessary to consider the Respondent’s Notice and in the event we did not call upon Ms Ford for Infineon who would have dealt with this issue on behalf of both appellants.

63. The judge said that if (contrary to his view) the issue of reasonable diligence had to be approached on the assumption that OTC was still a trading entity buying DRAM, he would not have been persuaded that it should not be treated as reasonably on notice of the concealed facts. On that assumption, it was in the same position as the Granville Companies.
64. OTC challenges that conclusion but does so, as explained by Mr McGrath, on a very narrow basis. This was that there was no evidence and no finding that OTC had any knowledge of or involvement in the Centerprise class action.
65. I would reject that challenge. At a very simple level, if it has to be assumed that OTC was still trading, the burden was on it to obtain a finding that it could not with reasonable diligence have discovered the concealed facts. It failed to do so. That is enough to defeat the Respondent's Notice argument.
66. Moreover, as Mr McGrath frankly acknowledged, it was not OTC's case before the judge that it was knowledge of or involvement in the Centerprise class action which made all the difference in distinguishing the position of OTC from that of the Granville Companies. No doubt, if it had been, the judge would have addressed that point specifically. As it was, the judge's reasoning as to the Granville Companies was not dependent on the Centerprise class action, which was merely one factor in his conclusion.
67. I would only add that if OTC had continued in business, as distinct from going into administration and then liquidation, it may well have learned about or been invited to participate in the class action itself, in which case the suggested point of distinction with the Granville Companies would not have arisen. This possibility, however, illustrates a complication which would arise if the appellants' argument on the appeal were correct. Thus, if it has to be assumed, contrary to the fact, that OTC had continued in business instead of going into administration, the question would then arise what further assumptions need to be made in order to address the issue of reasonable diligence. As further questions arise about the hypothetical world which OTC has to be treated as inhabiting, the exercise of deciding what it could have discovered with the exercise of reasonable diligence becomes increasingly artificial.

### **Disposal**

68. I would dismiss the appeal.

### **Lord Justice Coulson**

69. I agree.

### **Lord Justice Peter Jackson**

70. I also agree.

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**ORDER**

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**UPON** the appeals of the Appellants against paragraphs 2 and 4 of the Order of Mr Justice Foxton dated 28 February 2020 and against paragraph 3 of the Costs Order of Mr Justice Foxton dated 22 April 2020

**AND UPON** hearing counsel for the Appellants and counsel for the Respondent

**IT IS ORDERED THAT:**

1. The appeals are dismissed.
2. The Appellants shall pay the Respondent's costs of these appeals, save for the costs of and occasioned by the Respondent's Notice, such costs to be determined by detailed assessment unless agreed.
3. The Appellants shall be jointly and severally liable to pay the Respondent within 28 days of the date of this Order the sum of £239,403.25 as an interim payment on account of the costs ordered pursuant to paragraph 2 above.
4. Detailed assessment proceedings may be commenced no earlier than 28 days after the final determination of any appeals arising in respect of this Order.
5. The Appellants are refused permission to appeal to the Supreme Court of the United Kingdom.

**[BY THE COURT]**