Neutral Citation Number: [2024] EWHC 581 (KB)

Claim No: KB-2022-003539

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 March 2024

Before :

Master Brown

- -

Between :

CCP GRADUATE SCHOOL LIMITED	**Claimant**
- and –	
NATIONAL WESTMINSTER BANK PLC	**First Defendant**
-and-	
SANTANDER UK PLC	**Second Defendant**

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Mr Barry Coulter (instructed by **Saracens Solicitors)** for the Claimant
Mr. Andrew McLeod (instructed by **Pinsent Masons LLP**) for the First Defendant
Ms. Alexia Knight (instructed by **Addleshaw Goddard LLP**) for the Second Defendant

Hearing dates: 19 July 2023 and 16 January 2024
Draft circulated: 6 March 2024

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Judgment Approved by the court for handing down

Master Brown:

1. The First and Second Defendants seek the summary dismissal of the claims made against them by way of (reverse) summary judgment under CPR 24.2 of the claim and/or the summary dismissal by way of striking out of the Claim Form and the Particulars of Claim under CPR 3.4(2)(a).

2. The Defendants' applications were first listed on 19 July 2023. Shortly before the hearing, on 12 July 2023, the Supreme Court handed down their decision in *Philipp v Barclays Bank plc* [2023] UKSC 25. This decision dealt with matters which were relevant to the applications. On 17 July 2023, and just before the initial hearing, an application was made by the Claimant to amend the claim, prompted -it might appear - by the Supreme Court decision. In any event it was not possible to hear all the argument on 19 July.

3. A further hearing was listed for 8 September 2023 but personal reasons relating to one of the advocates meant that it could not proceed and, indeed, could not be relisted until 16 January 2024. Following that hearing some further submissions were requested by me on matters on which I needed some further assistance[1].

4. This judgment sets out my decisions on these three applications. I am grateful to counsel for their assistance in dealing with what have been quite a number of discrete issues over an unusually protracted period.

Background

5. The Claimant's case is that it has been the victim of an "*authorised push payment*" ('APP') fraud. Between 13 September and 12 October 2016, Mr Pathirana, who is the Claimant's sole director, gave instructions to the First Defendant to make fifteen payments, in aggregate amounting to £415,909.67 from a bank account with the First Defendant (the '*Natwest Account*') to a bank account held with the Second Defendant (the '*Santander Account*') ('the Payments'). It is said that at the time the Payments were made the *Santander Account* was (unbeknown to Claimant) under the control of what the Claimant understands to be a criminal gang; and that gang ('the criminal gang') fraudulently induced it to part with its funds. Once the funds were received in the *Santander Account*, most of the money was dissipated and it appears ultimately lost. I understand that only about £14,000 has been retrieved.

6. The first 14 Payments were effected using the First Defendant's online banking facility. Mr Pathirana instructed the final Payment in person at the First Defendant's Wembley Park branch using the Clearing House Automated Payment System ('CHAPS'). (I should perhaps say that there were some further payments from Mr. Pathirana himself but it is agreed that the claim in connection with these payments is not sustainable as part of the Claimant's claim, and that the claim should, as I understand it, be struck out to this extent.)

[1] I also received a Note directly from Mr. Pathirana, the director of the Claimant. This was sent to me directly and raised one of the points that had concerned me and on which I was about to circulate an email. It is not was not sent with the knowledge of the Claimant's counsel or with the authority of its solicitors. But I am not satisfied that it raises anything new save the point I myself was concerned about, so it is not I think necessary to rule on its admissibility.

7. In respect of each Payment, the Claimant (via Mr Pathirana) provided the sort code and the account number for the *Santander Account* and the First Defendant says it was authorised to make the payment to that account. The Claimant says that it was deceived by the criminal gang into instructing the First Defendant to transfer funds to the *Santander Account* on the false basis that those funds would be applied from this account as investments by PGW Limited. The Claimant pleads that it believed (through its director) that the Payments were to be made to PGW Limited and states as part of this case that the payee reference used in respect of each of the payments was PGW limited. In fact the name of the holder of the *Santander Account* was PGW Consultants Limited.

8. There is some controversy as to when exactly Mr Pathirana first contacted the First Defendant; but in any event it is agreed that by 22 October 2016 he had raised what is described by the First Defendant as a "*fraud alert*" in relation to the Payments: as I understand he had by then told the First Defendant that the Claimant had been induced by fraud perpetrated by a third party to make the payments. The First Defendant is said to have notified the Second Defendant the very same day that the Claimant believed it was the victim of a fraud.

9. As against the First Defendant, the Claimant contends in its Particular of Claim that the bank owed it a contractual and/or tortious duty not to carry out its payment instructions without taking steps "*to ensure that the same was not an attempt to defraud the Claimant*". The claim, the First Defendant says, is based on a so-called *Quincecare* duty, as recognised in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 and by the Court of Appeal in *Philipp v Barclays Bank plc* [2022] QB 578. By allowing the sum of £425,814.95 to be paid out of the Claimant's account into PGW Consultants Limited's account with the Second Defendant the First Defendant was in breach of contract and/or breach of duty.

10. There is some controversy as to what precisely is alleged against the Second Defendant (I deal with this below). At the very least there is a further claim set out in the Particulars of Claim that the Second Defendant allowed the sums which were transferred into the *Santander Account* to be removed from the account and in doing so it failed in its duty of care to the Claimant.

Considerations that apply on the Defendants' applications

11. The proper approach to determining whether, under what is now CPR 24.3, the claim has any real prospects of success is not in issue. The considerations derive from *Easyair v Opal Telecom Ltd* [2009] EWHC 339 Ch. Although very well known, in view of the detailed argument I have had on a number of points, I set out the guidance from *Easyair* as follows:

> *"i) The court must consider whether the Claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;*
>
> *ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a Claimant says in his statements before the court. In some cases it may*

be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3;

vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

12. In accordance with this guidance I should not conduct a 'mini -trial'. Indeed, I must remind myself of the importance of considering that any new material may become available before the trial, and the likelihood that any such material will give the claimant a real prospect of success[2].

13. It is not, I think, suggested that there might be some compelling reasons for these claims being determined at trial if I were to find that the claims had no real prospects of success.

14. By CPR 3.4(2)(a), the court has a discretion to strike out a statement of case if it appears to the Court "*that the statement of case discloses no reasonable grounds for bringing or defending the claim*". The legal principles governing applications brought under CPR 3.4(2)(a) are also well-established and also, as I understand it, uncontroversial. As is clear from the formulation of the test for an application to strike out, unlike applications for summary judgment under CPR 24, the claim must be determined on the assumption that the facts pleaded can be proved: *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All ER (Comm) 346. Normally the evidence is to be taken as set out in the pleading. Further,

"i) The court should strike out parts of a pleading only in clear and obvious cases;

[2] See, *inter alia* , the judgment of Lord Hamblen in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

ii) Whether some or all of the pleading is to be struck out should generally be decided by reference to what is pleaded in the pleading under challenge, not by reference to evidence; and
iii) As with summary judgment applications the court should not conduct a mini-trial even if evidence has been served in support of, or in answer to, the application." See *Oysterware Ltd v Intentor Ltd & Others* [2018] EWHC 611.

15. In *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] EWHC 85 (QB) at [60], Roger Ter Haar QC (sitting as a Deputy High Court Judge) drew together guidance from a number of authorities which are relevant to the approach in the following summary:

"(1) In Biguzzi v Rank Leisure plc [1999] 4 All ER 934–940, [1999] 1 WLR 1926–1933 per Lord Woolf MR, the Court of Appeal referred to strike out as a 'draconian' step: the striking out of a valid claim should only be taken as a last resort.

(2) In a strike-out application the proportionality of the sanction is very much in issue; see Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607, [2015] 1 Costs LO 157.

(3) If the Court is able to say that a case is 'unwinnable' such that continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides it may be struck out: see Harris v Bolt Burdon [2000] CP Rep 70, [2000] CPLR 9 at [27].

(4) An application to strike out the claim should not be granted where there are significant disputes of fact between the parties going to the existence and scope of an alleged duty of care unless the court is 'certain' (emphasis in original) that the claim is bound to fail: see Hughes v Richards (t/a Colin Richards & Co) [2004] EWCA Civ 266, [2004] PNLR 35 at [22].

(5) Where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or is in any way sensitive to the facts, an order to strike out should not be made': per Sir Thomas Bingham in E (a minor) v Dorset County Council [1994] 4 All ER 640f, [1995] 2 AC 633B.

(6) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: see Farah v British Airways [1999] All ER (D) 1381, (2000) Times, 26 January, CA at [42] referring to Barrett v Enfield London Borough Council [1999] 3 All ER 193, [2001] 2 AC 550(see [1999] 3 All ER 193, [2001] 2 AC 550) and X (minors) v Bedfordshire County Council [1995] 3 All ER 353, [1995] 2 AC 633.

(7) A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: see Bridgeman v McAlpine-Brown (19 January 2000, unreported) (CA) at [24]."

The claim against the First Defendant

(a) Statute barred?

16. The First Defendant contends that the claim against it, having been issued on 18 October 2022, has been commenced outside the relevant limitation periods that apply under sections 2 and/or 5 of the Limitation Act 1980.

17. It is accepted by the Claimant that loss was suffered when the money left the Natwest Account, at least in so far as it related the failure to prevent any payment out. The Claimant's pleaded causes of action against the First Defendant (whether framed in contract or tort) thus accrued on the dates on which each payment was made to the *Santander Account*. Each payment out gives rise to separate cause of action and is subject to its own separate limitation period. The last of the series of payment payments left the *Natwest Account* on 12 October 2016. On any view therefore the claim or claims are made more than six years after the last Payment was made and outside the relevant limitation periods under sections 2 and/or 5 of the Limitation Act 1980. The Claimant does not dispute this but argues that the limitation period is extended under subsection 32 (1) (c) of the 1980 Act which provides that where

> *(c)the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the* [claimant]m *has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*

The Claimant says that it was not until 22 October 2016 that it, through its director, discovered that it had been the victim of the APP fraud and the claim is an action for the relief from the consequences of mistake.

18. It is clear however that this extension only is available only where mistake is an essential part of the cause of action: see *FII Group Test Claimants v Revenue and Customs Commissioners* [2012] 2 AC 337 (*inter alia* at [62][63]). A cause of action for these purposes is the factual situation which gives rise to the entitlement to the remedy sought: see *Letang v Cooper* [1965] 1 QB 232 at [242].

19. Whilst it could be said that there was some mistake in that on the assumed facts- the Claimant' director thought he was authorising payment from the NatWest Account to the account held by PGW limited in my judgment, it is clear that this is not an essential ingredient to the claim. The claim is founded on there being a duty or care in tort or duty under contract, a breach of duty and loss (see *Roberts v RBS* [202] EWHC 3141 if support is needed for this). The essential ingredients of this claim do not require a mistake as between the parties to the claim. If it were otherwise and the mistake alleged here were sufficient, where a claimant had been misled in some way by a third party this might of itself give them the benefit of the extension now sought.

20. No other basis is now alleged for overcoming the primary limitation periods in respect of the claim as currently pleaded. Accordingly, in my view the claim based as it is on allowing the Payments to be made must be struck out.

(b) No duty to decline client's instructions to make the Payments

21. If I were wrong about limitation, it would be necessary to the consider the alternative basis on which it is said that the claim should be struck out, namely that it is founded on a *Quincecare* duty and that following the decision of the Supreme Court in *Philipp* such a duty is not recognisable in law. Although this was not a ground initially relied upon in the application, no objection was made as I understand it to the application proceeding on this basis (see in particular in the Note prepared in advance of the resumed hearing on 16 January[3]) and there was full argument on the point.

[3] Which Note I had requested from the Claimant in order to clarify its case in the light of developments.

22. The First Defendant asserts that it is common ground, or at least apparent from the Statements of Case, that each of the Payments was authorised by Claimant and that it is beyond argument that the First Defendant made the Payments in accordance with the payment instructions it received. In *Philipp*, it was held that a bank does not owe its customer a duty to decline to carry out payment instructions that are unequivocally authorised and instructed by that customer; in doing so, it reversed the Court of Appeal's decision upholding a *Quincecare* duty. At [63]) Lord Leggatt explained,

> "*Where the bank receives a valid payment order which is clear and leaves no room for interpretation or choice about what is required in order to carry out the order, the bank's duty is simply to execute the order by making the requisite payment. The duty of care does not apply*."

23. He continued (at [65]):

> *"It is not only a mistake to suppose that the bank's duty of care is capable of conflicting with and potentially displacing its duty to execute a valid payment order from its customer. It is also wrong to suppose that, in the absence of some expressly or impliedly agreed exception to that primary duty, there can be any contractual justification for not executing such a payment order which would afford a defence to a claim by the customer for breach of mandate."*

24. Where a bank's customer is the victim of an APP fraud, the bank's duty to exercise reasonable care and skill is not engaged unless there are doubts as to the validity of the customer's instruction. (at [100]). As to the *Quincecare* principles, Lord Leggatt held,

> *"…these principles have no application to a situation where, as in the present case, the customer is a victim of APP fraud. In this situation the validity of the instruction is not in doubt. Provided the instruction is clear and is given by the customer personally or by an agent acting with apparent authority, no inquiries are needed to clarify or verify what the bank must do. The bank's duty is to execute the instruction and any refusal or failure to do so will prima facie be a breach of duty by the bank."*

25. I accept that the Claimant's pleaded claim against the First Defendant depends on demonstrating that its duty to exercise reasonable care and skill was engaged in carrying out the Claimant's payment instructions to make the Payments and required the First Defendant to refuse to carry out those instructions. It is uncontroversial that a bank owes a general duty of care to interpret, ascertain and act in accordance with its customer's instructions that applies only insofar as the contract between the bank and the customer gives the bank latitude in executing the instructions. The duty "*only arises where the validity or content of the customer's instruction is unclear or leaves the bank with a choice about how to carry out the instruction*": *Philipp* at [63]]. It has no application where the customer provides clear and valid payment instructions which is what the First Defendant says happened here.

26. In response it was argued on behalf of the Claimant that the instructions were equivocal (referring to PGW Limited and not PGW Consultants Limited), and that the First Defendant was wrong to effect the payment as there were no proper instructions and there was therefore a breach of mandate. The Claimant intended to authorise payment to PGW Limited and not PGW Consultants Limited.

27. It is however clear to me that the claim is not currently pleaded as a breach of a mandate: the Claimant alleges that the First Defendant failed to exercise a reasonable standard of care (the standards of which are said to derive from the EU Wire Transfer Regulations of 2006 and 2015-which I will return to in due course). The First Defendant had or should have had reasonable grounds for believing that the Payments were generated by a fraudulent scheme and should, exercising reasonable care, not have allowed all the Payments to be made. It is seems to me clear that what is asserted is a *Quincecare* duty, not a breach of mandate.

28. No application was made to amend the Particulars of Claim to plead a breach of mandate on the grounds that the Payments were not authorised in terms that would be required following the decision in *Philipp*.

29. In any event, it seems to me to be sufficiently clear on the evidence that I have received as to the terms and conditions that applied as between the First Defendant and the Claimant that the Payments by the First Defendant were authorised. The terms and conditions of 2015 which appear to have been in place until 30 September 2016 provided that the bank account and sort code of an account identified the recipient, not the name of the account holder (they also provided at [6.9] that "*if the customer does not provide correct payment details, the bank will not be liable for failing to make a payment or making an incorrect payment*"). From 1 October 2016 the relevant terms and conditions appear to provide at [8.2] albeit under the heading " *what we'll do if you tell us about an incorrect payment",* again provides that the sort code and account number of an account identifies it, not the name of the account. It states that,*"*[if] *you give us incorrect payment details (for example, the wrong sort code or account number) then, once you've told us, we'll make reasonable efforts to recover your payment for you but we may not be able to recover the payment and we may charge you a fee for trying to recover it…."*. As to the CHAPS payment, the sufficiency (as a matter of standard practice) of a matching account number and sort code appears to have been confirmed in *Tidal Energy* [2014] EWCA Civ 1107- at least in respect the position in 2012- 2013.

30. It is correct that what was explicit in the 2015 terms was more oblique in those applicable from 1 October 2016, but to my mind read overall the terms were sufficiently clear to make clear that the First Defendant was to execute payment instructions on the basis of the sort code and account number provided. Accordingly, had the First Defendant not carried out the Claimant's payment instructions, it would have been in breach of its mandate.

31. In these circumstances it seems to me to be clear, that on this alternative ground, the matters pleaded in the Particulars of Claim are defective as a matter of law or otherwise, and should be summarily dismissed.

(c) Should I allow the Claimant's application to amend?

- **the application**

32. The Claimant seeks to plead an alternative case that even if there is no *Quincecare* duty to prevent payments out there is a duty in law at a certain point to take reasonable steps to retrieve or recover the sums paid out as result of the APP fraud (this case being based on what is referred to as a 'retrieval duty').

33. Support for this case is found in *Philipp* at [115]-[119]. The claimant in that case argued that the defendant Bank should have contacted the banks in the UAE to which the funds had

been sent and request them to freeze the funds. In that case the relevant date on which the duty arose was the date on which the Bank received the "tip-off" from the police and, in response, immediately froze Mrs Philipp's current account (16 March). If the Bank had taken steps at that time to recall the payments made pursuant to the instructions given at an early date (on 10 and 13 March 2018 on the facts of that case) there was, it was said, at least a substantial chance that the funds transferred would have been successfully reclaimed from the UAE banks. As it was, the Bank took no steps to attempt to recall the payments until on or about 31 May 2018, by which time it was too late. Lord Leggatt explained that such a duty could not arise until Mrs Philipp first notified the Bank that she believed she was the victim of a fraud ([117]). That was because Mrs Philipp had not countermanded her instructions to make the relevant payments; the Bank had no authority, let alone obligation, to attempt to reverse earlier transactions when to do so would have been directly contrary to its customer's payment orders.

34. Lord Leggatt held that the likelihood that, even if prompt action had been taken by the Bank on or immediately after 27 March 2018, any of the money transferred to the UAE would have been successfully reclaimed seems slim. He went on to say:

> *that, when* [Mrs. Philipp] *reported that she had been induced to make the payments by fraud, the Bank's staff should have sought her instructions on this point - which would surely have been given - as it was clear that Mrs Philipp would now wish any available steps to be taken to recover the money. The fact that the Bank made attempts on and after 31 May 2018 to recall the funds which had been transferred to the UAE (see para 15 above) indicates that there were steps that could be taken to try to do so and prompts the question of why the Bank did not take those steps sooner. These are not matters that can be resolved at this stage of the proceedings on an application for summary judgment.*

35. He later said,

> *"… there are too many imponderables in this counterfactual scenario for the matter to be decided against Mrs Philipp on paper": para 182. That was a matter of judgment on which I do not think it would be right for this court to override the view taken by the judge. Although the judge did not himself draw this inference, it seems to me logically to follow from that conclusion that the claim for the loss of a chance of recovering money from the UAE should not have been summarily dismissed.*

36. The Claimant in this case now wishes to allege as against the First Defendant that a Fraud Investigator from Lloyds Banking Group, Ms Ellen Suffolk, contacted them setting out her concerns regarding payments into the *Santander Account* held in the name of PGW Consultants Limited by the Claimant. It is said that on or about 25 October 2016, Ms Suffolk told the First Defendant that she had identified that a Lloyds Bank account had received large sums of money from the *Santander Account* originating from the *Natwest* Account. The Lloyds Bank account holder had then themselves distributed the funds out of the Lloyds Bank account shortly after receipt, which action Ms Suffolk considered to be suspicious.

37. Relying on these matters, the Claimant seeks to allege that the First Defendant was on notice of matters that called for investigation and immediate action, and that having been put on notice in this way, among the steps the First Defendant- acting as a reasonably prudent banker – would or should have taken would have been to immediately contact the banks into which the Claimant's money had been transferred and either sought a recall of those payments or warned the receiving bank that there were strong grounds for suspecting that criminality was

involved and not to allow any further movements of money from the *Santander Account* until such time as an investigation had been carried out giving appropriate indemnities as required. Reliance is also placed on various terms of the contract between the Claimant and the First Defendant. The Claimant seeks to allege that Lloyds Bank having taken effective and prompt action to retrieve the money when notified of the fraud and recovering some of the Claimant's money was evidence that more could have been done by the First Defendant. Had prompt and effective action been taken by the First Defendant in all likelihood some or all of the Claimant's money would have been recovered.

-considerations that apply on this application

38. It is common ground that CPR r17.4 is engaged on this application to amend. It provides as follows:

> "*(1) This rule applies where –*
>
> *(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and*
>
> *(b) a period of limitation has expired under –*
>
> *(i) the Limitation Act 1980*
>
> *…*
>
> *(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.*"

39. In *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 at [38] the Court of Appeal recently confirmed that whether the Court has power to allow an amendment under CPR 17.4 and whether it should exercise that power, involves four questions:

> "*i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?*
>
> *ii) Did the proposed amendments seek to add or substitute a new cause of action?*
>
> *iii) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?*
>
> *iv) Should the Court exercise its discretion to allow the amendment?*"

-decision on application

Limitation period – question (i)

40. In my judgment, as set out above, the primary limitation period in relation to any claim in contract or tort in respect of the claim to allow Payments has now expired. I understood the Claimant to have accepted that if there were no extension of time under section 32 (1) (c) the relevant limitation period in respect of any acts or omissions which arise in respect of

the alleged breaches under a retrieval duty has now also expired. It seems to me that must be right (given that any action which stands a chance of retrieving the sums must be done within a relatively short period of the Payments being made). The answer to this question is therefore, yes.

A new cause of action? question (ii)

41. The argument at the hearing on 16 January proceeded on the basis that this was a new claim which had not previously been alleged. No mention was, I think, made of the claim as set out in the Claim Form.

42. It was a re-reading of the papers which led me back to Claim Form; this alleges that the First Defendant was in breach of duties of care owed to the Claimant in contract and in tort in failing to recover payments that had already been made from the Claimant's bank account, when it had reasonable grounds for believing that the payments were part of a scheme to defraud the Claimant.

43. However, it is clear, and accepted by Mr. Coulter, following *Chandra v Brooke North (a firm)* [2013] EWCA Civ 1559, at [9], that the wording of a proposed amendment must be considered against the earlier statement of case that is sought to be amended rather than by reference to any wider wording that may be contained in the claim form. In that case Jackson LJ said,

> *On the other hand once the Claimant serves particulars of claim on a defendant, he pins his colours to the mast as against that defendant. Particulars of claim are normally narrower in their scope than the original claim form. Those particulars then constitute the ongoing claim against that defendant. If the Claimant applies to amend as against that defendant, what the court has to do it to compare the original particulars of claim with the proposed amendments. If the Claimant is seeking to add a new claim after expiry of the limitation period, he cannot escape from the tentacles of section 35 (3) to (5) of the 1980 Act by relying upon the broad wording contained in his original claim form.*

44. Whether an amendment introduces a new claim depends on a comparison between the "*bare minimum of essential facts*" for the cause(s) of action asserted in the original pleading compared with those in the proposed new or different claims: *Co-operative Group Ltd v Birse Developments Ltd* [2013] EWCA Civ 474 at [20]-[21]. Where the proposed new claim involves separate and distinct allegations of breach of duty, that is indicative of a new cause of action: *ibid* at [26]. I am, I think, bound by the decision in *Chandra* but in any event there being no controversy as to it, it seems to me to be clear, and having regard the principles that are to be derived from the distinction made by the Supreme Court in *Philipp*, that comparing the original Particulars with the proposed amended Particulars, the latter must be seen as seeking to allege a new claim.

Same or substantially the same facts? question (iii)

45. Whether a new claim arises from the same or substantially the same facts is a question of fact and degree: *Mulalley* at [50], [89]. It is clear that the overlap need not be total, but there must be sufficient overlap in order to support a conclusion that the factual basis is more than merely "*similar*" and is "*the same or substantially the same*": *Mulalley* at [88].

46. Mr. Coulter alleges that to the extent that there are distinct claims nevertheless the same duties and same breaches were engaged or are alleged in respect of both. Both derive from obligations to act as a prudent banker and to take steps to protect against fraudulent activity.

47. I am however persuaded by Mr. Mcleod that when looking at the bare essential facts that found the claims there is little overlap between the two claims. Indeed there is, to my mind, a clear distinction between alleged acts and omissions prior to the payment out from the *NatWest Account*, and the alleged absence of steps taken to retrieve the sums after the point when the duty to retrieve arise (in the analysis above at [37], when the Claimant first notified the First Defendant that he believed they were the victim of a fraud). The alleged breaches are temporally different and involve largely different acts and omissions: one to take steps to retrieve and one to stop the being money paid out; indeed the alleged duties to act are prompted by different matters. The new allegations are likely in my judgment to involve a different enquiry. Mr. McLeod rather sought to give evidence on this point by saying a different department of the bank would be involved in considering the new claim. He was not entitled to do so, but it would not be surprising if this were the case- and his point seems to me to illustrate the different nature of the allegations.

48. Accordingly, in these circumstances I am unable to conclude that the new cause of action arises out of the same or substantially the same facts as are already in issue in the existing claim. It follows from this conclusion that I have no power to allow the amendment.

Discretion -no real prospect? question (iv)

49. In the event that I were wrong about the above, it would be necessary for me to consider whether I should exercise its discretion to grant permission to amend under CPR 17.3. Since this point only arises on my analysis if I were to have answered the above question differently, it is not perhaps necessary for me to go into this in great detail.

50. The general principles governing the exercise of that discretion are well known. An amendment application must show that the amendments put forward a case with a real (as opposed to fanciful) prospect of success. This requires the amending party to demonstrate that (a) the claim carries some degree of conviction and is not merely arguable; (b) the pleading is coherent and properly particularised; and (c) there is evidence that establishes a sufficiently arguable case that the pleaded allegations are correct and not pure speculation or invention.

51. The Claimant says, in substance, that the First Defendant could have done more. Lloyds Bank appear to have taken a number of steps – and informed the First Defendant of possible fraud. Why was more not done by the First Defendant (and for that matter the Second Defendant)? There is at least a reasonable inference that more could have been done by other banks in this process.

52. The First Defendant says that it did provide an indemnity to the Second Defendant on 25 October 2016, after it received notification from the fraud investigator, Ms Suffolk, of her concerns. It says by reference to matters pleaded in the Defence of the Second Defendant that a stop had been put on the *Santander Account* on 21 October 2016. Indeed the First Defendant relies upon an assertion apparently made by Ms. Suffolk in an email of 25 October 2016 that what needs to be done was "*definitely getting done*".

53. On this issue it seemed to me clear that I was being asked to engage in what was essentially a mini trial – which I should not do. However it is perhaps appropriate for me to

comment in at least some detail on the issues arising (not least because they have some bearing on issues that arise in respect of the claim against the Second Defendant).

54. On the evidence available, it appears that perhaps the most obvious step, if not the principal step, that could be taken by a bank which is on notice of a fraudulent scheme such as the one alleged here, is to offer an indemnity to the bank receiving payment. Such an indemnity, I am told by counsel, is against liability which the receiving bank might incur to its customer (and, possibly, others) when preventing any further payment out and as I understand it, allows the account to be effectively frozen.

55. It is however perhaps unclear when precisely the First Defendant was aware that there was a real prospect that the Payments were likely to be the product of a fraud: Mr. Pathirana says he called the First Defendant on 21 October 2016; the First Defendant assert there was no 'fraud alert' until 22 October 2016. It appears that by the time a stop had been placed on *Santander Account* (on 21 October, it is suggested) as a result, it might appear, of efforts on the part of Lloyds there was minimal money left in it (£5.39). It also appears however from the third statement of Mr. Hay of the First Defendant at [16] that an indemnity was not provided to the Second Defendant until sometime later on 24 October: at what point such an indemnity could have been offered and whether any such indemnity could have been provided at an earlier point, is not within the Claimant's knowledge and there has as yet been no disclosure on the point. If the first time the First Defendant were alerted to the need to act and/or can be taken to have instructions to retrieve the Payments was on 21 and 22 October a question might, I suppose, arise as to whether an indemnity could have been offered to the Second Defendant then (albeit, of course, a further question might arise as if it had it would have made a difference). In any event I am not satisfied that the apparent assertion of Ms. Suffolk in the email to which I referred should be understood as conveying a view that all that had been done could not have been done at an earlier stage. Indeed I cannot, I think, take any assurance given to the Claimant in an email on 25 October 2016 as determinative as to what could have been done.

56. There are further issues arising which again I do not need to deal with in any detail. It appears to be suggested in the witness statement of Mr. Hay that it would be highly irregular, and give rise GDRP obstacles, if the customer's bank were to attempt to do more than merely providing an indemnity to the receiving bank, by (for instance) providing an indemnity to other banks further down the chain of payments. I take on board all these points. But in circumstances where matters are likely to be revealed by further disclosure, so that it can be seen what in fact happened, and there is likely to be further material as to the banking practices referred to in the evidence, it seems to me difficult to say that there would be no real prospects of success.

57. In short, if I had a discretion to allow an amendment I would have exercised it in the Claimant's favour.

The claim against the Second Defendants

a) What is the Claimant's current pleaded case against the Second Defendant?

58. As I have indicated above, at [18] of the Particulars of Claim it is alleged that by allowing the sums which had been transferred from the NatWest account to be removed from the Santander account (held by PGW Consultants Limited) the Second Defendant failed in its duty of care to the Claimant. By way of further Particulars the Claimant also alleges in

their original Particulars Claim essentially those matters which the Claimant now seeks to allege against the First Defendant (which I have summarised above at [36] and [37] above) in substantially the same form: namely, that the Second Defendant could and should have taken certain steps to retrieve the sums which had been paid out to others and, in particular, that having been put on notice that the Payments were the product of a fraud, the Second Defendant could, amongst other things, have contacted the banks into which the Claimant's money had been transferred and either sought a recall of those payments or warned the receiving bank that there were grounds for suspecting that criminality was involved and not to allow any further movements of money (until such time as an investigation had been carried out).

59. Ms. Knight was critical of the pleadings and the sufficiency of the Particulars of Claim. She says that although there were some (albeit inadequate, in her submissions) particulars in respect of the failings there was no pleading of the relevant duty that supports the allegation that these acts or omissions could amount to a breach.

60. The Claimant now wishes to amend the claim clarifying, it is said in effect, that it is their case that the Second Defendant should have taken steps not just to prevent payment of the sums but to retrieve them at the stems of paragraph [18].

61. Whilst in my view the Particulars of Claim should have included an express allegation that the Second Defendant was under a duty to take reasonable steps to retrieve the sums it paid out of the *Santander Account*, that this was the case put is clear from the particulars of breach provided. I would not read the Particulars of Claim as narrowing or excluding the allegation in the Claim Form (which did plead that the Second Defendant had reasonable grounds to believe that one of its customers was operating a bank account with the intention of carrying out a fraud and failed to take action to prevent the fraud being perpetrated and/or to recover money that had been obtained from the Claimant by fraud). Further and in any event, it seems to me that there was an obvious error in the stem of [18] of the Particulars of Claim.

62. In short, and following the comparison that is required by *Chandra*, I do not regard that this error as a sufficient basis to conclude that the claim advanced in respect of duty to retrieve by the amendment is a new one. The facts which ground the claim and constitute the cause of action are, to my mind, sufficiently pleaded in the existing Particulars of Claim. It seems to me that those Particulars of Claim did put the Second Defendant on notice that it was being alleged that the Second Defendant could and should have done more to retrieve the sums paid out. This is so not least because the Second Defendant has expressly responded in their Defence (at [31]) to such a case (on the basis of the unamended Particulars of Claim) alleging that it owed no obligation to the Claimant to seek to recover its funds.

b) Statute barred?

63. Against the Second Defendant, it is accepted that the same analysis applies in respect of limitation as I have set out above. The Claimant also seeks an extension under section 32 (1) (c) of the 1980 Act in this claim. But, for reasons which I have set out above, I do not think the mere fact that the Claimant can in some respects be said to have made a mistake is a sufficient basis to extend the limitation period so I reject that contention in this claim as well.

64. However, as appears from the witness statement of Mr Unger for the Second Defendant [15] that as of 18 October 2016, there remained £120,294.39 in the *Santander Account.*

65. There is a dispute between the Claimant and the Second Defendant which was not addressed at the hearing on 16 January but which was dealt with in later written submissions as to precisely the effect of the primary limitation period and whether it bars any reliance on conduct (be it omission or act) on 18 October 2016.

66. Mr. Coulter says that there is no such bar. When a cause of action accrued part-way through a day, it was well established that the day on which the cause of action accrued was excluded: *Matthew v Sedman* [2021] UKSC 19.

67. Ms. Knight appeared to accept that where a cause of action accrues on a particular day, that day is excluded from the calculation of the six-year period. Thus, for a cause of action arising on 18 October 2016, the 18 October 2016 itself would be excluded. However she goes on to argue that the claim in this case having been issued was commenced on 18 October 2022; as such, she says, a cause of action accruing on 19 October 2016 is within time but that a cause of action accruing on 18 October 2016, however, is out of time.

68. I did not quite follow the Second Defendant's argument. As is clear from *Matthew* when calculating the limitation period for a "midnight deadline" case where a cause of action accrued at, or on the expiry of, the midnight hour on a given day, the day which commenced at or immediately after the midnight hour had to be included in the calculation of the six-year period under the Limitation Act 1980 s.2. But in other cases as the Supreme Court made clear, where the cause of action accrued part-way through the day on which a cause of action accrues that day is not included in computing the period of limitation*:* see also *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336 (the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day: see *Matthew* [40]).

69. The effect of this would appear to be that if 18 October 2016 is excluded for the purpose of calculating the limitation period and any claim relating to acts or omissions on this date is not statute barred. Unless I have misunderstood the argument of Ms. Knight (in respect of which she can address me further on this point, given the way it has arisen) it is only in respect of any claim in respect of acts and omissions prior to this date which is barred.

70. The application of the limitation period does bar any claim for allowing the money into the account because by 17 October 2016, all moneys had by then been received into the *Santander Account* from the *Natwest Account*. The Second Defendant's case that the claim was wholly statute barred was based on the contention that the date on which money came in to the account was the material date for determining the limitation period, but it is at least arguable that the cause of action alleged here against this defendant accrues in respect of payments out, when money leaves the account (since it is at any point up to this date that steps could have been taken to prevent any payment out). Hence, if the above is correct, steps could have been taken to prevent the sums remaining in the account on 18 October 2016 being paid out and to this extent (and in respect of the sums still left in the account on this date are concerned), the claim that the Second Defendant should not have permitted payment out cannot be struck out on the ground of limitation.

(c) No duty owed by the Second Defendant to the Claimant

71. The Second Defendant denies that it can have any legal liability to the Claimant. The Claimant was not its customer; it was, on any view, a third party with whom the Second

Defendant had no contractual relationship (indeed the Claimant, it was said by the Second Defendant, was unknown to the Second Defendant). There was, it was argued, in any event no assumption of responsibility by the Second Defendant, who at all material times was the agent of the payee, the holders of the *Santander Account*, not of the Claimant. Further, the loss alleged is economic loss and, at least in large part, the claim is founded on an omission (of for instance, to take reasonable steps to retrieve or indeed freeze the account). All these factors are sufficient to deny any assertion of a duty even if it could be said that the losses suffered were reasonably foreseeable.

72. Ms. Knight argued that not only does the *Quincecare* duty not arise directly, but there is no basis for extending the tortious duty of care to third parties. In *Royal Bank of Scotland International Ltd (Respondent) v JP SPC 4* [2022] UKPC 18 [2023] A.C. 461 ("RBSI"), the Privy Council held that the duty of care owed by a bank to refrain from executing a customer's order did not extend beyond the duty owed by the bank to its customer, which arose as an aspect of the bank's implied contractual duty of care and co-extensive tortious duty of care (at [39]ff *per* Lords Hamblin and Burrows). In so finding, it relied upon the Supreme Court decision in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189 where there was *"no hint in [Baroness Hale's] judgment that the duty might be owed to anyone other than the bank's customer"*. The Privy Council concluded, at [44], that:

> *"..on the present state of the authorities, there is nothing in* Quincecare *itself or in the cases subsequently applying it (including the decision in* Philipp v Barclays Bank UK plc [2022] QB 578 *which was handed down after the hearing in this case) to support the argument that the* Quincecare *tortious duty of care extends beyond being a duty owed to the bank's customer which arises as an aspect of the bank's implied contractual duty of care and co-extensive tortious duty of care. The mention by Steyn J of protecting innocent third parties in* Quincecare *has to be read in context. It is best understood as recognising that the* Quincecare *duty of care, even though owed only to the customer, protects not only the customer against fraud but also innocent third parties."*

73. Ms. Knight relies on the reasoning in *Philipp,* the recognition by the Supreme Court in *Philipp* that to the extent set out above RBSI represented the law (see [52]), and the ruling of the Privy Council that there could be no incremental development of the law of negligence such that a *Quincecare* duty could be owed by a bank to third parties. In short, if such a duty is not owed to a customer in a contractual relationship with its bank, it cannot conceivably be owed to a third party with whom it has no relationship.

74. Further, at [6] in *Philipp* Lord Leggatt referring to APP fraud said this,

> *"The type of fraud which occurred here is a growing social problem and can undoubtedly cause great hardship to its victims, as the sad facts of this case make all too clear. Whether victims of such frauds should be left to bear the loss themselves or whether losses should be redistributed by requiring banks which have made or received the payments on behalf of customers to reimburse victims of such crimes is a question of social policy for regulators, government and ultimately for Parliament to consider. It is in fact, as I will mention in more detail shortly, the subject of new legislation. But it is not a question for the courts. It is not the role of the courts to formulate such policy, still less to impose on the parties to a contract an obligation to which they have not consented and cannot reasonably be presumed to have consented since it is inconsistent with the normal and established allocation of risk and responsibility under contracts of the*

relevant type." [my underlining]

75. And at [65] he went on to say:

> *"A duty to combat fraud or to protect customers (let alone innocent third parties) against fraud is not an ordinary incident of the contractual relationship between a bank and its customer. Nor is any wider public interest in promoting those goals a proper basis on which to identify an implied term of the contract."* [again, my underlining]

76. Against this background Ms. Knight says that the Claimant cannot satisfy the Court that the alleged duty already exists, or that it is fair, just and reasonable to impose the duty contended for upon the First Defendant in accordance with principles set out in *Caparo v Dickman* [1990] UKHL 2. It would be absurd to find that there was a duty on a bank to a third party when a bank does not owe such a duty to its own customers. These matters are for Parliamentary regulation and not the court.

77. I accept that there can be no *Quincecare* type falling on the Second Defendant and that such a duty would be inconsistent with the contractual duty to effect any mandate by their customer. As the Supreme Court made a clear in *Philipp* the *Quincecare* duty does not apply *"to cases of the present kind where the customer has unequivocally authorised and instructed the bank to make a payment"* (at [5]). I think it can be assumed the Second Defendant received authorisation for payments out of the *Santander Account* and there is no basis for considering otherwise– indeed Mr. Coulter did not press me otherwise. Accordingly, and to the extent that the claim is based only upon the alleged *Quincecare* duty, it must be struck out.

78. Mr. Coulter relied upon the Wire Transfer Regulations including in particular those of 2006 and Articles 5 (2) and 7(2) of 2015, the latter requiring that the payment service provider (bank for current purposes) to implement effective measures to ensure that when transfers are effected not only must the account number and sort code of the bank account match, the name of account holder into which the payment transfer is to be made must match with the name of the payee. I am not however persuaded that these Regulations by themselves assist. The immediate difficulty is that they are an example of regulatory duty only. But also, whilst I accept the development of regulatory provisions, can be relevant on occasions in considering whether there might also be a corresponding duty of care at law, the 2015 Regulations were not in force at the material time (article 6 of the Wire Transfer Regulations 2006 only required a match of the account number and sort code). They might, I suppose, demonstrate the standard of care of a reasonable banker but it is not clear how this would necessarily assist in demonstrating that a duty of care existed between the Second Defendant and the Claimant.

79. I did not however understand Mr. Coulter to press the case for a *Quincecare* type duty in the light of the decision in *Philipp*. Rather his case as I understood it, was, at least substantially, founded on the recognition by the Supreme Court in *Philipp* that there could be a duty of retrieval (at [115] to [119], see above). That duty, it might be argued, was not expressed or to be seen in terms of a contractual obligation (not perhaps on its face being necessary for the business efficacy of the contract) but a duty in tort. If such a duty applies to the customer bank, Mr Coulter effectively says that it is at least arguable that it would be anomalous if the bank that operates the account of the criminal gang (who can be assumed to have perpetrated the fraud) was not under a similar duty.

80. Despite the force of the points made by Ms. Knight- and not without some hesitation, I have, on balance, come to the conclusion that I should not strike out the case based on a retrieval duty. Whether or not it could be described as a developing area of law, there is to mind is some uncertainty as to whether any such duty lies on the bank of those who can be assumed to have perpetrated the fraud.

81. I can at least see how it might be said that it is not necessarily fatal to the claim that there may have been no assumption of responsibility by the Second Defendant to Claimant. Although arising in quite different circumstances (liability of a public authority for abuse by a parent), in *HXA v Surrey CC* [2024] 1 WLR 335 Lord Burrows set out the following principles at [88]:

> "*In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger*." [4]

82. It is perhaps (iii) and (iv) which are of some particular relevance here. On the assumption that the Second Defendant had at least some measure of control over the Payments and the movement of money from the account held by the fraudulent gang (it must be assumed) Mr. Coulter argues that the Second Defendant is in a special position to take steps to recover the sums due.

83. Ms. Knight seeks to rebut such a case saying in effect that the Second Defendant did not have special control over the holders of the account. It was required to effect all instructions in accordance with the authorisation provided by its customer. *Philipp* makes clear that the bank cannot countermand instructions of their client; indeed, it had an overriding duty to their client. In *RBSI,* the Privy Council accepted that the bank "*had no special level of control over the source of danger (i.e. it was not in control of the fraudsters)"*. However in that case the court was concerned with a *Quinceare* duty to a third party not a duty of retrieval, indeed the factual situation was, it might said, quite different[5]. Further, as I understand it from the evidence of the system of retrieval which I have referred to above (when considering causation: see [54] to [56] above) it operates in practice by a chain of indemnities. It strikes me (although the matter was not explored in any detail), that it might be said that the indemnity at least to some extent is intended to <u>permit</u> a bank to take steps which might countermand its own client's instructions. So it is not entirely clear that their own client's instructions can be a complete answer by the Second Defendant to the argument that a <u>retrieval duty</u> applies to a bank which receives payments made under an APP scheme (particularly, it might be supposed, where the client can be assumed to be the criminal gang behind it).

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[4] See too perhaps *Clerk & Lindsell* (2023) 7-15 to 7-66.

[5] It involved a claim by two investment funds against a bank where it was alleged that as a result of the fraud perpetrated by an Isle of Man company money in the company's accounts with the defendant which were beneficially owned by the Claimant were paid out of that account for the benefit of the company's owners or others

84. Moreover, and on a practical level, as appears from the arguments about causation there seems to be at least some basis for arguing that if the retrieval duty recognised in *Philipp* is effective it is perhaps because the bank of the customer and presumed victim (the'customer bank') could provide an indemnity to the first receiving bank (referred to in the evidence as 'first generation' bank) and that that indemnity in turn is passed on to the bank to which the funds are then transferred ('second generation' banks) and so on until the funds are located and frozen. If this is correct then the effectiveness of any steps taken by the customer bank to retrieve sums paid out would appear to be dependent on co-operation of the first and later generation banks. For this system to work, presumably it requires the indemnity to be passed on promptly (it can perhaps be assumed that criminal gangs would not leave money in a first generation account for long). But I think there might at least be some basis for arguing that the duty recognised in *Philipp* requires, or at least is consistent with, a duty on the first generation and later generation banks to take what at least appeared in argument to be the relatively straightforward step of passing on an indemnity to the next generation bank.

85. Various issues were discussed, albeit briefly, in argument about the potential exposure of a bank to liability if parties were to trigger a requirement on banks to retrieve or recover payments made as a result of fraudulent scheme. These considerations might, of course, go to the issue as to whether it was fair and reasonable for any retrieval duty to be recognised. However the short point, it seems to me, is that the evidence produced in this application at the very least hints at there already being in place a system for retrieval and that any such system might be presumed to be capable of operating without difficulty. Indeed the possible existence of any such system strikes me as at least relevant to considering whether a duty should be recognised and on this point more material could be anticipated if I were not to strike the claim out. It is, as Mr. Coulter stresses, apparent that Lloyds Bank did undertake some significant steps for the benefit of the Claimant.

86. Ultimately then, I am not persuaded that the matter is sufficiently clear for me to strike out the claim, on what is necessarily a summary basis, in respect of a retrieval duty. Accordingly, and to this extent, the application is rejected.

(d) Causation – failure to particularise or plead causation of the alleged loss

87. Although this was intimated in the application as a further basis for summary dismissal, Ms Knight's skeleton argument of 17 July 2023 (see [5]) limited her grounds to those I have dealt with above.

88. In any event I would not, on the arguments before me, have considered it appropriate to strike out the claim on this basis. It appears that an indemnity was given by the Second Defendant to Lloyds at some stage. I am not satisfied however that all sums in the *Santander Account* were in fact transferred to the Lloyds account and there were not other transfers that might have triggered the need to pass on an indemnity to another bank.

89. It was not clear to me what else could have been done by the Second Defendant and whether any further step could or should have been taken, perhaps at an early stage. However even it can be said that the case of the Claimant is currently somewhat inchoate this is perhaps understandable given that it cannot be expected to know what happened and indeed to know, a this stage, what could be expected of Second Defendant as a matter of standard practice. I

would have thought that there are reasonable grounds for believing that disclosure may materially add to the evidence relevant to the claim.

90. I appreciate that there is a further question as when, and whether any further steps would have led to the retrieval of any further sums, but I am not satisfied that I have been sufficient evidence for making any determination on a summary basis on this matter either. In the bundle at Tab 15 there is a list giving details of when sums were received into the accounts of the defendants in criminal proceedings, but how long they remained in the relevant is unclear and that may be important.

(e) Claimant's application to amend its case against the Second Defendant

91. Inevitably the issues arising on this application played a lesser role in the argument given the importance of addressing the primary points above, and it may be that further consideration is required of the precise amendments to be allowed.

92. I have reminded myself of the four stage test. Even accepting that any amendment to set out new facts would be out of time, as I have said, I do not think an amendment to make clear the alleged duty of retrieval seeks to introduce a new claim against this defendant. In any event to the extent that the proposed amendment merely corrects an error or anomaly which was obvious and the new pleading arises out same or substantially facts as already pleaded, I cannot - as things stand- see any difficulty with permitting it.