

Neutral Citation Number: [2012] EWHC 735 (Ch)

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2012

Before :

MR JUSTICE ROTH

Between :

(1) DENNIS MICHAEL SEATON
(2) MICHAEL GRANT
(3) KELVIN GRANT
(4) FREDERICK WAITE JUNIOR (aka JUNIOR WAITE)
(by his litigation friend MS BRENDA DICKENS)
(5) BRENDA DICKENS
(as Personal Representative of the Estate of Patrick Wait
(deceased))

Claimants

- and -

(1) ANTHONY SEDDON
(2) PAUL WOOLF
(3) ANTHONY PAUL CUNNINGHAM
(4) DAVID PATRICK IRVING
(5) MOHAMMED YUSEF
(6) LLOYD FERGUSON
(formerly of the musical group called “The Mighty Diamonds”)
(7) FITZROY SIMPSON
(formerly of the musical group called “The Mighty Diamonds”)
(8) SPARTA FLORIDA MUSIC GROUP LIMITED
(9) MUSIC SALES LIMITED
(10) UNIVERSAL/ISLAND MUSIC LIMITED
(formerly Island Music Limited)
(11) RYDIM MUSIC LIMITED
(12) EMI MELODIES LIMITED
(formerly Leosong Copyright Service Limited)
(13) G MINOR MUSIC
(14) STRICTLY ROCKERS MUSIC
(15) EATON MUSIC LIMITED

Defendants

John BRISBY QC, Tim LUDBROOK and Michael SMITH (instructed by **Edwin Coe LLP**) for the **Claimants**
Joanna SMITH QC (instructed by **Clyde & Co LLP**) for the **1st to 5th Defendants**

Hearing dates: 14th, 15th and 21st November 2011

Judgment

Mr Justice Roth :

Introduction

1. The band “Musical Youth” (“MY”), with five boy members playing music in the Reggae style, enjoyed a short but spectacular success in the early 1980s. Its recording of a song called “Pass the Dutchie”, released in September 1982, became the fastest selling British single of that year and sold over 100,000 copies in one day. By 1985, there was dissension between the members of the band; several of the members left and not long afterwards MY broke up.
2. “Pass the Dutchie” was an adaptation of another song, “Pass the Kouchie”¹, which had been recorded by a Reggae group, “The Mighty Diamonds”. The relationship between those two songs, which I shall call “Dutchie” and “Kouchie” for short, forms the background to these proceedings. Kouchie itself was probably not novel and appears to have incorporated music with the title “Full Up” composed by a musician and arranger called Jackie Mittoo many years earlier. This case concerns the entry into an agreement concerning Dutchie, Kouchie and “Full Up” in September 1984, referred to as “the Sparta Florida Agreement”.

The parties

3. The first four claimants were members of MY, and the second and third claimants are brothers. The fourth claimant, Fredrick Waite Jnr, is mentally ill and brings this action by his litigation friend, the corporate receiver of Birmingham City Council who was appointed as his “receiver” by order of the Court of Protection. The fifth member of MY was Patrick Waite, the brother of the fourth claimant, but he died on 18 February 1993 and his personal representative sues as fifth claimant on behalf of his estate. The claim is therefore brought by or on behalf of the former members of MY and I shall refer to them for convenience as “the band”. Their respective dates of birth are as follows:

Dennis Seaton	-	2 March 1967
Michael Grant	-	7 January 1969
Kelvin Grant	-	9 July 1971
Fredrick Waite Jnr	-	23 May 1967
Patrick Waite	-	17 May 1968

Accordingly, all five were children (i.e. under 18) at the time of the events with which the claim is concerned.

4. The claim form was issued on 4 February 2010. It was amended in July 2010 only to remove one of the defendants and the Particulars of Claim were not then amended to change consequentially the enumeration of the defendants. That change is made in the draft Amended Particulars of Claim now before the court, which means that the numbering of the eighth and subsequent defendants differs as between the original and draft amended pleading. In the following paragraphs, I shall use the new numbering.

¹ ‘Kouchie’ is Jamaican slang for a pot in which marijuana is kept; ‘Dutchie’ is a Dutch stewing pot in the same patois.

5. The first defendant, Mr Tony Seddon, was a partner in Woolf Seddon, a firm of solicitors which has since been dissolved but which specialised in media and entertainment work, particularly in the music industry. Mr Seddon was the individual solicitor who dealt with MY and its members. The second to fifth defendants are alleged to have been the other partners in Woolf Seddon who are jointly and severally liable with Mr Seddon. I shall refer to the first to fifth defendants collectively as “Woolf Seddon”.
6. The sixth and seventh defendants were members of the group “The Mighty Diamonds”. Together with a company called Mighty Diamonds Music Ltd (“MDML”) (which has since been dissolved) and the thirteenth and fourteenth defendants, they apparently purported to grant certain exclusive rights to Kouchie to The Company of the Two Pieters BV (“Pieters BV”), a Dutch company which has also since been dissolved. The twelfth defendant claimed to be the administrator of MDML. The sixth, seventh, twelfth, thirteenth and fourteenth defendants were all parties to the Sparta Florida Agreement. However, of these, only the twelfth defendant has been served with the claim form.
7. The eighth and ninth defendants are related companies: the eighth defendant (“Sparta Florida”) is or was a music publisher and apparently the assignee of the copyright in “Full Up”. Sparta Florida was a party to the Sparta Florida Agreement and the ninth defendant is alleged to have become entitled to the benefit of Sparta Florida’s rights thereunder.
8. The tenth and eleventh defendants were also parties to the Sparta Florida Agreement, representing the interests of another artist who claimed the copyright in “Full Up”.
9. Pieters BV granted a copyright licence for Kouchie for the United Kingdom to The Company of the Two Pieters Ltd. (“Pieters UK”), which has also since been dissolved. The fifteenth defendant acted in the UK as administrator of the catalogue of Pieters UK and in that capacity was a party to the Sparta Florida Agreement.
10. The claim against Woolf Seddon essentially rests on the fact that, while also the solicitors to the MY members, Woolf Seddon acted for Pieters BV and Pieters UK (together, “the Two Pieters”) in relation to the negotiation and conclusion of the Sparta Florida Agreement and the distribution of monies thereunder. This is alleged to give rise to various breaches of duty and trust which it will be necessary to consider in detail. From the proposed Amended Particulars of Claim, it seems that the sixth to eighth and tenth to fifteenth defendants are joined in the action on the basis that they were parties to the Sparta Florida Agreement and the ninth defendant is joined because of its link to the eighth defendant (Sparta Florida). A discrete claim for copyright infringement, which does not concern Woolf Seddon, is made against the sixth to fifteenth defendants.

The present applications

11. On 8 October 2010, Woolf Seddon issued an application for summary judgment on the claim against them, alternatively that the claim be struck out as against them under CPR rule 3.4(2)(b) as an abuse of process.

12. On 20 April 2011, the claimants applied for permission to amend their Particulars of Claim. That application was not served on the sixth, seventh, thirteenth and fourteenth defendants, who had never been served with the original claim form. The remaining defendants have been served and have not consented to the amendments but they chose not to participate in the hearing of the claimants' application.

The factual chronology

13. In March 1982, MY signed a recording agreement with MCA Records Ltd ("MCA") - the parents of the members of MY signing in addition to the members of the band - granting copyright to MCA in any recordings it would make in return for specified royalties. In the course of the following months, MY had several recording sessions of its own version of Kouchie, which it had adapted from The Mighty Diamonds' recording and had performed successfully at a London club. By September 1982, this version had changed to Dutchie, which was considered more suitable because of the young age of the band and, indeed, the age of MY's target audience. Dutchie was released by MCA on 26 September 1982, in 12" and 7" versions, with another song recorded by MY, "Please Give Love a Chance", on the other side of the record. It achieved instant and phenomenal success, going to number one in the charts in the UK and selling very well also overseas. The record label for Dutchie, produced by MCA, credits with the composition: "Jackie Mittoo – F. Simpson – L. Ferguson" and refers also to The Sparta Florida Music Group Ltd. However, Dutchie differed from The Mighty Diamonds' Kouchie in certain respects, which the claimants allege were significant.
14. By the end of 1981, a Mr Toney Owens had become the manager of MY. It was Mr Owens together with Mr Freddie Waite Snr, who had been instrumental in setting up MY and was the father of the two Waite brothers in the band, who approached Mr Seddon around the time of the release of Dutchie to become MY's solicitor. There is a letter in Mr Seddon's file dated 7 October 1982 signed by the parents of the MY members which states:

"Musical Youth

This letter is to confirm our instructions to you on behalf of our sons to represent them in all dealings of a legal nature.

We confirm that you may take instructions on a day to day basis from the band's manager Mr. Tony Owens with regard to the boys' affairs. You are to keep us informed by correspondence to us on all matters of a major nature affecting the boys' careers."

In his evidence, Mr Seddon states that "it is quite common for a music industry solicitor representing a band or solo artist to deal on a day to day basis with the manager." And he adds: "It was almost inevitable in this case, where the Band's members were themselves so young."

15. Mr Seddon's first task was to negotiate the boys' publishing agreements with Virgin Music (Publishers) Ltd ("Virgin"), which were entered into on 20 October 1982. It appears that identical form agreements were entered into by each member of MY and

one of these was before the court (“the Virgin Agreement”). By the Virgin Agreement, the MY members granted a world-wide transfer and assignment of copyright in all their musical compositions in return for royalties and substantial advances. It was common ground that the original Virgin Agreements were replaced in the course of 1984 after the members of MY, apparently following tax advice which Mr Seddon had arranged to obtain from a firm of accountants, each set up a personal service company and Virgin itself assigned its music publishing interests to 10 Music Ltd (“10 Music”). As a result, each member’s personal service company entered into a substitute agreement with 10 Music, but those agreements (“the 10 Music Agreements”) were made with effect from 20 October 1982 and in all other respects were identical to the Virgin Agreements.

16. The grant of rights under these agreements is of some importance. Under the definitions in the agreement, “the Writer” is the member of MY, “the Company” is his personal service company, “the Publisher” is 10 Music, “the Territory” is the world, and “the Term” is a period of one year renewable twice for a further year by the Publisher. Clause 1 of the agreement provides as follows:

“The Company hereby as beneficial owner sells transfers and assigns by way of sale transfer and assignment of copyright both present and future to the Publisher (subject to the terms hereof) all rights of whatsoever nature now known or which may hereafter come into existence (including without limiting the generality of the foregoing the so-called public lending right therein whether now existing or hereafter created) in and to each and every musical composition (including title words and music thereof [sic]) to the extent of the Writer’s authorship thereof (which are hereafter together called “the “Works”) that Writer shall have written conceived arranged composed or originated heretofore (save only in respect of such existing works as the Company shall have notified the Publisher in writing prior to signature hereof) and that the Writer shall write conceive arrange compose or originate during the Term ... whether alone or in collaboration with others and without prejudice to the generality of the foregoing the entire copyright throughout the Territory and the right to secure and renew and extend the copyright in the Works throughout the Territory in the name of the Publisher to hold the same unto the Publisher absolutely for a period of six years from the date of the expiration of the Term hereof in all parts of the Territory such period being referred to as the Exploitation Period.”

17. Clause 9.4 of the agreement states:

“At the expiration of the Exploitation Period the copyright in the Works is hereby automatically reassigned to the Company.”

18. Mr Seddon says in his evidence, and this appears to be uncontroversial, that during 1983 and 1984 he was also engaged in negotiating a new management agreement for MY with Toney Owens and renegotiated the band’s recording contract with MCA.

19. During 1984, there developed disputes regarding song-writing credits as between the members of MY (and also Mr Frederick Waite Snr), and more particularly, as regards the way royalties should be shared. Those disputes are not material for present purposes but they contributed to increasing tension that developed between the members of MY. Moreover, the two Waite brothers were in a poor mental state and a planned tour of Ireland by the band could not proceed. The two Grant brothers left MY and during 1986 or 1987 the band dissolved altogether.

The Sparta Florida Agreement

20. The background to this agreement is described by Mr Seddon in his witness statement as follows:

“As I recall, I was informed by Toney Owens soon after the single was released that a dispute had arisen as to who was entitled to be credited for “Pass the Dutchie”. As I soon discovered, the issue revolved around who had the rights to Jackie Mittoo’s compositions (was it Sparta Florida or a different company?); whether “Full Up” had in fact been written by Jackie Mittoo or by somebody else; and whether “Full Up” had in fact been used in the writing of “Pass the Kouchie” (which was disputed by The Mighty Diamonds). The position was complicated, but there appeared to be at least two possible scenarios in which it might turn out that “Pass the Dutchie” was an infringement of copyright (that is, if the statutory clearance process had not been gone through with the correct rights owners).

My recollection is that Toney Owens was concerned that the existence of this dispute could be detrimental to the success of the record and could therefore prove a setback to the Band’s nascent career. I believe we were both of the view that the situation needed to be sorted out, so as to remove any possible impediment to the future exploitation of the song.

The rights holders for “Pass the Kouchie” in Europe were two companies, called The Company of the Two P(i)eters B.V. and The Company of the Two P(i)eters Limited (for convenience I will refer to them together as “the Two P(i)eters”). I do not now recall precisely how I was put in contact with them, but it came about through Toney Owens and the upshot was that I agreed to represent the Two P(i)eters in proceedings against Sparta Florida and others, with a view to establishing that “Pass the Dutchie” should be credited solely to them. The proceedings were issued in November 1982, and eventually resulted in a settlement agreement dated 27 September 1984, ...”

21. The Sparta Florida Agreement is entitled a “Settlement Agreement re ‘Pass the Dutchie’.” It states on its cover sheet that it was produced by Woolf Seddon. The first and third recitals of the agreement state as follows:

“(1) The parties hereto have been involved in a dispute arising from the success of a song entitled “Pass the Dutchie” (hereinafter called “Dutchie”)

...

(3) The parties hereto agree that Dutchie is an adaptation of Kouchie”

22. Subsequent recitals refer to the proceedings commenced in the Chancery Division by the Two Pieters and that the parties have agreed to settle that action on the basis set out in the agreement. Clause 1 of the agreement provides:

“The copyright of Kouchie and Dutchie shall be treated as having derived from two equal contributions so that one half of each such copyright shall be deemed to have derived from [those claiming to be responsible for Dutchie] and the other half of each such copyright shall be deemed to have derived from those responsible for writing ‘Full Up’.”

23. The details of the agreement are complex and for present purposes it is sufficient to note that in broad terms it provides that:

- i) Sparta Florida shall own the copyright in Dutchie and Kouchie for the world (save that for the Benelux countries the copyright shall until 31 December 1987 be owned jointly by Sparta Florida and Pieters BV), and to the extent necessary the other parties will assign such copyright in those works as they may own to Sparta Florida;
- ii) the sums relating to Kouchie or Dutchie frozen or held in escrow were to be shared equally as between Sparta Florida and the Two Pieters;
- iii) for the future, royalties were to be shared equally as between Sparta Florida and Pieters BV.

24. As regards the distribution of the monies that had been frozen, clause 4(a) provides:

“In respect of all royalties having arisen in the United Kingdom and Eire one half shall be paid to Sparta Florida and one half shall be paid in the U.K. to Messrs Woolf Seddon the solicitors acting on behalf of Peters B.V. and Peters U.K. whose receipt shall be a full valid and binding discharge of Sparta Florida’s obligations in respect of such sum.”

25. There is no specific reference to MY in the Sparta Florida Agreement save for the statement in one clause dealing with the permitted percentage deduction from royalties for ‘cover versions’ that “for the avoidance of doubt the recording of Dutchie by [MY] is not to be treated as a ‘cover version’”.
26. It is not suggested by Mr Seddon that he specifically informed the members of MY, or their parents, at the time about the Sparta Florida Agreement.

27. Following the break-up of MY, Mr Dennis Seaton became a solo artist and his manager was a Mr David Morgan, who describes himself in his evidence as having been a manager and advisor to numerous bands since 1977. Mr Seaton gave up performing in about 1998.
28. Mr Morgan has since 1997 run a business called Music Royalty Investigations, acting as a specialist advisor to the music industry in tracking down unpaid royalties. In about 2000, he got in touch with Mr Seaton after seeing on television the film “The Wedding Singer” in which Dutchie was used. Since the members of MY had received no royalties on account of this, Mr Morgan started to investigate the matter with Universal Records, which by then had taken over MCA, on behalf of Mr Seaton and the other former members of MY. He formed the view that there must be significant unpaid recording royalties, and in the course of those investigations came to see Mr Seddon in his offices in early March 2002. Mr Seddon allowed Mr Morgan to go through his old files concerning MY and make copies of any documents he wanted. In the course of looking through those papers, Mr Morgan came across the Sparta Florida Agreement.
29. In this regard, Mr Morgan in his witness statement says as follows:
- “I spoke with Dennis Seaton shortly after the inspection of documents at Seddon’s offices and told him that I had seen a copy of what is now referred to as the Sparta Florida Agreement. I told him that I felt that there might be the possibility of a claim for recovery of unpaid publishing income but that it would need to be investigated and proper advice taken in due course. We decided at the time to leave the consideration of whether the band had a possible publishing claim until we had dealt with the record company issue because we all felt it would be too much to take on at one time.”
30. Mr Seaton’s evidence is in the same terms. He says in his witness statement that Mr Morgan told him about the Sparta Florida Agreement soon after finding it and that:
- “we agreed that we would have to park the issue in relation to any possible claim for publishing royalties until we had dealt with the record sales issue. I told Michael and Kelvin [Grant] about this shortly after I spoke to David, and they agreed with the plan.”
31. The claim for recording royalties against MCA/Universal Records was duly pursued with Mr Morgan’s help and was settled in December 2002. Mr Nigel Angel of Angel & Co, solicitors, was also involved in assisting with that claim. Mr Morgan says that he thought he sent a copy of the Sparta Florida Agreement to Mr Angel in 2002, but Mr Angel believes that he did not receive a copy until February 2004. Mr Seaton states that Mr Morgan has been “the driving force” behind the attempt to get an action going regarding publishing royalties.

The Claim against Woolf Seddon

32. The first intimation of a potential claim against Mr Seddon was not made until 10 March 2004 when Angel & Co wrote to Mr Seddon, who by then was practising in the firm Seddons. This followed instructions received in February 2004 from a Mr David Sloane, an accountant who had assisted Mr Morgan in the negotiations with MCA/Universal Records. Mr Angel also sought to have all relevant files made available but Mr Seddon explained that he could not make the files relating to the Two Pieters available without their consent. He eventually located them in Holland but by August 2004 they had still not responded to his request for consent and it seems that it was never obtained.
33. However, as I have already mentioned, it was only on 4 February 2010 that the claim form in the present proceedings was issued. This followed the instruction of the claimants' present solicitors on 27 March 2009. The claim form includes as "Brief details of the claim":

"At various material times, among other things:

- (i) The First to Fifth Defendants (inclusive) permitted/countenanced/facilitated/suffered the exploitation of the Works in circumstances where they did not, or alternatively could not have honestly consider(ed) such exploitation to be for the benefit of their clients.
- (ii) In consequence of the terms of the [Sparta Florida] Agreement and/or the Defendants' conduct associated with the [Sparta Florida] Agreement the Defendants:-
 - a. failed to account to the Claimants/Mr Waite/Mr Waite's Estate in respect of certain assets/property belonging to them; and/or
 - b. converted to their own use such assets/property; and/or
 - c. deliberately concealed from the Claimants and Mr Waite/Mr Waite's Estate facts relevant to their right of action; and/or
 - d. infringed copyright in the Works."

The claim form goes on to refer to:

"the Defendants' unlawful conduct, variously grounding [sic] allegations of fraud / breach of fiduciary duty / breach of trust / breach of contract / inducing a breach of contract / unlawful interference / conversion..."

The original Particulars of Claim

34. On an application of this nature, the normal course is to consider the statement of case as it is proposed to be amended, since if it would not be susceptible to summary judgment or striking out in its amended form, permission to amend should be granted.

Here, however, there are significant limitation issues that affect the question of amendment and it is therefore necessary to consider first the original Particulars of Claim.

35. The essential factual basis for the claim is that although Dutchie was an arrangement of Kouchie, it was a sufficiently original work to attract distinct copyright in the arrangement as regards both music and lyrics. That allegation is supported by a report analysing the two works from the musicologist Mr Guy Protheroe, who has frequently acted as an expert in such cases. For the purpose of the present applications, I accept that the claimants can show a well arguable case on that issue.
36. On that basis, the complaint underlying the claim against Woolf Seddon is that Mr Seddon had a fundamental conflict of interest in acting for the Two Pieters when he was also the solicitor to MY, and that he was in breach of his obligations to MY in failing to advise the band of their entitlement to copyright in Dutchie. More particularly, Woolf Seddon are said to have been in serious breach of their duties by reason of the making and execution of the Sparta Florida Agreement which failed to protect a distinct copyright held by MY in Dutchie but, on the contrary, agreed the attribution and division of publishing royalties in Dutchie as between other parties on the basis that Dutchie and Kouchie were subject to the same copyright.
37. That may be thought to be a foundation for a claim for professional negligence and breach of the solicitors' contract of retainer. However, although the claim form refers, as set out above, to a claim for breach of contract, no such claim is in fact pleaded in the Particulars of Claim, presumably because it would be long out of time. No doubt for the same reason, there is no claim in negligence. Instead, it is alleged that Woolf Seddon stood in a fiduciary position as regards the members of MY. The consequent causes of action that are pleaded in the original Particulars of Claim are, I have to say, not very easy to follow but, as explained in argument before me, the claims can be summarised as follows:
 - i) breach of fiduciary duty or trust in that Woolf Seddon acted for the Two Pieters and assisted in the making of the Sparta Florida Agreement while acting for the members of MY, and received and distributed in accordance with the terms of that agreement publishing royalties derived from Dutchie that belonged to the band, and also earned fees, which profits they hold on trust for the band: paras 15-16; further, in para 17 it is alleged that these breaches were committed fraudulently;
 - ii) knowingly or recklessly making a false representation, whether expressly or by silence, that the band enjoyed no, or alternatively had no legitimate claim to any, rights in Dutchie with the intention that the band should act or rely on it or suffer in consequence: para 18;
 - iii) inflicting harm by unlawful means or unlawful interference with trade. Three allegations are pleaded under this head as follows at para 23:
 - “(i) In consequence of the herein aforesaid acts of the First to Fifth Defendants and/or of the Ninth and/or Tenth Defendants, under the terms of the Sparta Florida Agreement one or more of the Sixth to Eighth Defendants and the

Eleventh to Sixteenth Defendants paid to the other monies that should have been paid by them to the Claimants/Patrick Waite (as the case may be).

(ii) The said acts were, or would be if they caused loss, actionable as against the First to Fifth Defendants and/or of the Ninth and/or the Tenth Defendants at the suit of one or more of the Sixth to Eighth Defendants and the Eleventh to Sixteenth Defendants.

(iii) The First to Fifth Defendants and/or [of] the Ninth and/or the Tenth Defendants thereby deliberately caused loss and damage to the Claimants/Patrick Waite (as the case may be) by interfering with the freedom of one or more of the Sixth to Eighth Defendants and the Eleventh to Sixteenth Defendants in a way that was unlawful as against the said parties with the intention of injuring the Claimants/Patrick Waite (as the case may be).”

The governing principles

38. As well as issues of limitation, two areas of general principle are engaged by the present applications: first, what is required in pleading an allegation of fraud; and secondly, the approach to summary judgment or striking out.

(a) Pleading fraud

39. In order to be sustainable, an allegation of fraud in a pleading must be clearly expressed. If the facts pleaded are consistent with innocence, it is not open to the court to find fraud unless an allegation of fraud or dishonesty is expressly made. Thus an allegation that a defendant “knew or ought to have known” is not a clear and unequivocal allegation of actual knowledge and will not, without more, support a finding of fraud: *Armitage v Nurse* [1998] Ch 241, per Millett LJ at 256-57, citing Buckley LJ in *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, 268.
40. This much was common ground. However, there was dispute between the parties as to whether such an allegation has to be particularised by setting out its factual foundation. For Woolf Seddon, Ms Joanna Smith QC referred to paras 2.8-2.9 of the Chancery Guide, which provide:

“2.8 In addition to the matters which PD 16 requires to be set out specifically in the particulars of claim, a party must set out in any statement of case:

- (1) full particulars of any allegation of fraud, dishonesty, malice or illegality;
- (2) where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.”

41. The reference to PD 16 is to para 8.2 of the Practice Direction to CPR Part 16 which states:

“The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim:

any allegation of fraud,
the fact of any illegality,
details of any misrepresentation,
details of all breaches of trust,
notice or knowledge of a fact...”

42. For the claimants, Mr Brisby QC, appearing with Mr Ludbrook and Mr Michael Smith, submitted that a change in this regard has been introduced by the CPR. RSC Ord 18, rule 12 provided that:

“(1) ... every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing,

- (a) particulars of any fraud, ... on which the party pleading relies;
- (b) where a party pleading alleges any condition of mind of any person, whether ... any malice, fraudulent intention or other condition of mind except knowledge, particulars of facts on which the party relies; ...”

43. That has been replaced as regards the particulars of claim by CPR rule 16.4(1), which states insofar as material:

“(1) Particulars of claim must include –

- (a) a concise statement of the facts on which the claimant relies;
- ...
- (e) such other matters as may be set out in a practice direction.”

Sub-paragraph (e) accordingly imports the requirements of PD 16 set out above.

44. On that basis, it was submitted for the claimants that although the RSC had required the pleading to include particulars of the facts relied on to support an allegation of dishonesty which was the foundation of fraud, that was no longer an obligation under the CPR which required only an express allegation of fraud. It was accepted that para 2.8 of the Chancery Guide went further, but Mr Brisby submitted that this was inconsistent with the CPR, and that it would be wrong to strike out a statement of case

on the basis of a requirement only of a guide and not an obligation under the governing rules. The modified approach of the CPR to a pleading of fraud was said to be consistent with its underlying approach to civil procedure of reducing the need for such full pleadings, with greater emphasis on the role of witness statements and the opportunity to seek further information by way of a request under CPR Part 18.

45. I fully accept that the Chancery Guide is not to be regarded as a substitute for the CPR and that in the case of any inconsistency, the CPR must prevail. Indeed, the Chancery Guide says as much: see at paras 1.5-1.6. But I reject the claimants' underlying submission that the CPR has introduced such a significant change in fraud cases by removing or reducing the obligation found in the RSC as to what has to be pleaded where fraud is alleged. The CPR and the associated practice directions are to be interpreted in accordance with the overriding objective: CPR rule 1.2(b). That objective is to deal with a case justly, which includes ensuring so far as practicable ensuring that a case is dealt with fairly: CPR rule 1.1(1), (2)(e). Although I think that the drafting of PD 16 could be improved, I consider that the obligation which it imposes to "specifically set out ... any allegation of fraud", read together with CPR rule 16.4(1)(a), is to be interpreted as meaning more than a simple statement that fraud is alleged but also the specific basis of the allegation, i.e. the facts relied upon.
46. That no substantial change as regards a pleading of fraud has been introduced is established by the judgment of the House of Lords on the strike-out application in the *BCCI* case: *Three Rivers District Council v. Bank of England (No. 3)* [2001] UKHL 16, [2003] 2 AC 1. The application was determined under the CPR: see Lord Hope at [13]. After referring to the reduced need for extensive pleadings under the CPR, Lord Hope (with whose opinion Lords Steyn and Hutton agreed) stated (at [51]):

"On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud."
47. After referring to authorities, including the observations of Millett LJ in *Armitage v Nurse* mentioned above, Lord Hope continued (at [55]):

"Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."
48. In his concurring speech, Lord Hutton emphasised the need for it to be clear whether fraud is alleged, and continued (at [124]-[125]):

"... in the present case, ... , the pleader does expressly allege bad faith because paragraph 37 pleads that "the motives of the Bank in acting as pleaded above were improper and unlawful

and in the premises the Bank acted in bad faith” and the paragraph sets out particulars in support of that allegation. In my opinion those particulars are not consistent with mere negligence.

I further consider that if a plaintiff clearly alleges dishonesty or bad faith *and gives particulars*, the statement of claim cannot be struck out under rule 3.4(2)(a) because the facts he pleads as giving rise to an inference of dishonesty or bad faith may at the trial, after a full investigation of the circumstances, be held not to constitute proof of that state of mind. If a defendant applies to strike out an action on the ground that the plaintiff has no prospect of adducing evidence at the trial to establish the case which he pleads the application should be brought under rule 3.4(2)(b) or rule 24.2(a)(1).” [emphasis added].

49. Although Lords Hobhouse and Millett dissented, neither of them suggested that any substantive change in pleading had been introduced by the CPR.

(b) *Summary judgment*

50. The principles that apply to an application by a defendant for summary judgment or to strike out a claim were not in dispute. They were conveniently set out by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], in a formulation approved by Court of Appeal in *A.C. Ward Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd’s (I & R) Rep 301 at [24]:

“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 63;

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. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. 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.”

51. To those principles I would only add as pertinent what was said by Lord Woolf MR (with whose judgment Judge LJ agreed) in *Swain v Hillman* at 94a:

“It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.”

Woolf Seddon's application: the existing Particulars of Claim

(a) The fraud allegation

52. Here, the term “fraudulently” is expressly used as regards the allegation of a breach of trust. However, the facts pleaded in support, although set out in a somewhat convoluted manner, amount in effect to no more than that Woolf Seddon acted for the Two Pieters and in the formation of the Sparta Florida Agreement while also acting for the band, that they did so without telling the band (or the parents of the members of MY), and that they failed to tell the band about its right to publishing royalties in Dutchie. On the basis that Woolf Seddon was specialised in the music industry and that the case of *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109, a decision of Robert Goff J (as he then was) of 1980 dealing with the degree of originality required to establish a separate copyright in arrangements, had been widely reported, it is said that Woolf Seddon must have known that the band had a distinct copyright in the arrangement and therefore were acting dishonestly.
53. Ms Smith submitted that the factual allegations were all consistent only with negligence and cannot therefore support a plea of fraud or dishonesty. She relied also on the use of “knew or ought to have known” by reference to the firm’s state of mind in para 18 of the Particulars of Claim. I do not accept that argument. Here the allegation of fraud is expressly made, and if Mr Seddon actually knew that the band had a distinct copyright in Dutchie but then acted as he did, that could constitute dishonesty. The fact that on fuller investigation it might be found that there was no dishonesty does not make this a defective allegation of fraud which should on that ground be struck out: see the *BCCI* case.
54. However, that question of pleading is distinct, as Lord Hutton emphasised in *BCCI*, from the question of whether the claim in para 17 of fraudulent breach of fiduciary duty or trust stands any realistic chance of success. In that regard, the pleading obligation is important since the allegation is to be considered on the basis that the essential facts relied on are set out in the Particulars of Claim. Even if it were the case that Mr Seddon should have appreciated that the band had a claim to copyright in Dutchie, that alone cannot establish that he did in fact know this. The court is entitled to analyse the allegation somewhat further to ascertain whether it is more than fanciful or speculative.
55. In that regard, I was referred to some of the standard works in this field, in the editions that were current at the time. *Copinger and Skone James on Copyright* (12th edn, 1980) stated that for a new arrangement of music, “not only an original composition but any substantially new arrangement or adaptation of an old piece of music” is a proper subject of copyright: para 129. The other standard work, Laddie Prescott and Vitoria, *The Modern Law of Copyright* (1980), stated as regards literary, dramatic and musical works at para 2.33, that:

“the precise amount of skill, labour, etc required to sustain a claim to originality cannot be defined, but must be a question of degree, to be determined on the facts of each case.”

56. Mr Seddon in his witness statement responds to the accusation that there was a conflict of interest in his acting for the Two Pieters and that he was dishonest, as follows:

“Had I been conscious of any conflict, I would not have accepted instructions to act for the Two P(i)eters . I accepted those instructions because I believed that it was in the interests of the Band for the dispute² to be resolved and I did not perceive any conflict between them.

The fact is that there was no such conflict. “Pass the Dutchie” was an adaptation of a pre-existing song and as such the publishers royalties were properly payable to the rights holders of the pre-existing song. That was my understanding at that time, and I believe it was correct.”

57. The only ground on which it is alleged that this is untruthful is that Mr Seddon is and was a solicitor specialised in the music industry and that he therefore could not have honestly believed that there was no distinct copyright in Dutchie. However, where the test for distinct copyright in an arrangement is a matter of fact and degree, that is not in my judgment a realistic basis for a finding of dishonestly.
58. Moreover, it is striking that Virgin and Music 10, to whom the band had assigned the publishing copyright in their works, did not at any time seek to assert a distinct copyright in Dutchie and claim publishing royalties in what was far and away the most successful work of the band. If the existence of a distinct copyright in Dutchie was so clear, they would surely have been alert to do so. Mr Brisby sought to argue that the Virgin and Music 10 Agreements on their true construction did not cover Dutchie, but I find that interpretation unarguable. He had to accept that on its literal wording clause 1 of the agreements would cover any work by the band, and there was no basis for his suggestion that the agreements should be interpreted as not covering Dutchie because of an estoppel by convention. There is no ground for supposing that Virgin/Music 10 conducted themselves on the basis that Dutchie had a distinct copyright but fell outside the scope of the agreement, as opposed to the basis that it did not enjoy a separate copyright at all.
59. Further, I consider that there is force in Mr Seddon’s assertion that he would hardly have chosen to act for the Two Pieters in High Court proceedings concerning copyright in Kouchie and Dutchie in the expectation that this would be kept secret from the band. Had the case not settled but proceeded to trial, it would have become public knowledge and the band would have learnt of his involvement.
60. Accordingly, I conclude that this allegation of fraud as particularised has no realistic prospect of success. Were it otherwise, almost every solicitor who is alleged to have been seriously negligent as regards an interpretation of the law would be susceptible on that basis alone to an arguable claim for fraud. Nor is it permissible for the claimants to seek to pursue the claim to trial in the hope that some further evidence may turn up on disclosure or on cross-examination of Mr Seddon which might establish that he is lying. That is entirely speculative: this is not a case where there

² i.e. as to who was entitled to be credited for Dutchie: see para 20 above

are reasonable grounds to suppose that fuller investigation would yield evidence that would significantly alter the position.

61. The two other causes of action in the original Particulars of Claim do not involve a claim of fraud. The misrepresentation claim is pleaded on the basis of what Woolf Seddon “knew or ought to have known” and that they “thereby knowingly or recklessly represented...”. That is not an unequivocal allegation of fraud. The unlawful means claim in para 23 of the Particulars of Claim does not include any express allegation of fraud or dishonesty: see para 37(iii) above. The allegation in sub-para 23(ii) is, frankly, incomprehensible, as Mr Brisby was constrained to accept, and the other two sub-paragraphs allege an intentional tort.

(b) Limitation

62. The causes of action alleged against Woolf Seddon accrued in about 1984 when the Sparta Florida Agreement was executed. Section 28(1) of the Limitation Act 1980 (“the 1980 Act”) provides, insofar as material:

“... if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.”

The period of six years from the time the members of MY attained their majority expired long before the issue of the claim form in 2010. Accordingly, the fact that they were under a disability by reason of their infancy when the causes of action accrued does not overcome any limitation defence. A distinct issue arises under section 28(1) as regards the fourth claimant, because of his mental illness. I shall address that separately below.

(i) *Breach of trust/fiduciary duty*

63. For the breach of trust claim, the claimants seek to rely on sections 21 and 32(1) of the 1980 Act. In my view, it is also necessary to refer to the much-criticised section 36, in the light of the claim for breach of fiduciary duty.
64. Section 21(1) and (3) of the 1980 Act, insofar as material, provides as follows:

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

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

....

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. ...”

65. The proper interpretation of these provisions received extensive consideration by the Court of Appeal in *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400. Since that case involves a number of issues that arise in the present case, it is appropriate to describe it in some detail. The plaintiff finance company acted as mortgage lenders and claimed against the defendant solicitors for losses suffered on loans made to mortgage borrowers. The defendants acted for both the plaintiffs and the borrowers in relation to those loans but failed, in breach of the terms of their retainer, to advise the plaintiffs that the borrowers were sub-purchasers who were purporting to buy the properties from sub-vendors at prices that were significantly higher than the prices being paid by those sub-vendors to the vendors. The borrowers defaulted on their mortgage payments and on recovering possession the plaintiffs suffered substantial loss, partly due to the collapse in property prices. The plaintiffs commenced proceedings against the solicitors alleging breach of contract, negligence and breach of fiduciary duty. They subsequently applied to amend their claim to allege conspiracy to defraud, fraudulent breach of trust and intentional breach of fiduciary duty, but that amendment was sought more than six years after the last transaction. The basis of the fraud allegation was that the borrowers never went into occupation of the properties and it appeared that they never intended to make any mortgage payments but were engaged in a scheme to defraud the plaintiffs, and it was alleged that the defendants were aware of, but concealed, this information from the plaintiffs.
66. The issue before the court was whether the amendments should be allowed. That raised the questions (a) whether the proposed amendments introduced new causes of action, (b) whether any applicable period of limitation had expired at the date of the hearing, and (c) whether any new causes of action arose out of the same or substantially the same facts as those already pleaded. In the leading judgment, Millett LJ, with whom Pill and May LJ agreed, summarised the allegation of fraudulent breach of trust (at 408b-d):
- “The plaintiffs’ case is that the defendants obtained the mortgage advance dishonestly by statements (in the report on title) which they knew to be untrue and consequently held the money on a constructive trust to return it to the plaintiffs immediately on receipt. Payment of the money to or by the direction of the borrower on completion of the sub-purchase instead of to the plaintiffs was a breach of this constructive trust. As counsel for the plaintiffs acknowledged, it was not a breach of the trust which would have arisen in the ordinary way from the receipt of the advance money for payment of the amount due on completion. That trust was discharged according to its terms, but its existence assumes that the

defendants acted honestly; on the plaintiffs' case it never came into being but was displaced ab initio by the constructive trust in their favour."

67. Millett LJ proceeded to draw a distinction between two different uses of the term "constructive trust", which he held was important when applying the statute of limitations:

"Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff."

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and *Rochefoucauld v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all,

even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungood-Thomas J.

The constructive trust on which the plaintiffs seek to rely is of the second kind. The defendants were fiduciaries, and held the plaintiffs' money on a resulting trust for them pending completion of the sub-purchase. But the plaintiffs cannot establish and do not rely upon a breach of this trust. They allege that the money which was obtained from them and which would otherwise have been subject to it was obtained by fraud and they seek to raise a constructive trust in their own favour in its place.

68. Millett LJ considered that the use of the term "trust" in the second class of case ("a class 2 trust") should not lead the plaintiff's claim to fall within section 21(1) and escape any period of limitation. However, since the question there arose only on an application for permission to amend a claim, he held (at 414e):

"We do not have to decide this question, because it is sufficient that the plaintiffs cannot show that the defendants have no reasonably arguable limitation defence. In my judgment we should treat the defendants as having an arguable limitation defence of which they should not be deprived by amendment."

69. Although Millett LJ's conclusion was therefore expressed in qualified terms, the distinction that he makes between class 1 and class 2 trusts for the purpose of section 21 of the 1980 Act has subsequently been applied as authoritative: *Gwembe Valley Development v Koshy* [2003] EWCA Civ 1048, [2004] 1 BCLC 131. The court there also referred to the guidance given by Millett LJ as to the proper use of the term fiduciary duty in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16:

"The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty"

70. After distinguishing duties, such as the duty of care, which, although owed by fiduciaries, are no different in principle than equivalent duties in common law, Millett LJ continued at 18:

“This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations”

71. Section 36(1) of the 1980 Act provides, insofar as material:

“1) The following time limits under this Act, that is to say—

(a) the time limit under section 2 for actions founded on tort;

....

(b) the time limit under section 5 for actions founded on simple contract;

....

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.”

72. The application of section 36(1) to a claim for breach of fiduciary duty was addressed by the Court of Appeal in *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112. On a claim against an underwriter, it was held that since claims against him in contract and tort were statute-barred under sections 2 and 5 of the 1980 Act, the claim for dishonest breach of fiduciary duty arising out of the same facts was subject to the same six year limitation period by analogy under section 36(1). Giving the leading judgment, Waller LJ (with whom Clarke LJ and Sir Christopher Staughton agreed) held that it made no difference that the claim included the extra allegation of “intention” and that the relief sought “equitable compensation” as well as damages. The reality of the claim was the same. And commenting on *Paragon Finance*, Waller LJ stated (at 122):

“In my view, it is fundamentally to misunderstand the judgment of Millett LJ to suggest that he would have approved the view

that a claim for damages brought against a fiduciary, even alleging a dishonest breach of that duty, would be free from limitation altogether. In my view, Millett LJ's treatment of *Nelson v Rye* [1996] 1 WLR 1378 demonstrates that point and demonstrates beyond peradventure that the question whether equity was exercising its exclusive as opposed to its concurrent jurisdiction does *not* supply the definitive answer as to whether equity applied the statute by analogy."

73. Drawing on these judgments, the court in *Gwembe* sought to summarise the position as regards fiduciary duties and limitation, at [111]:

"In the light of those cases, in our view, it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries. The starting assumption should be that a six-year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act, ss 2, 5; see the *Seguros* case [2001] 1 WLR 112). By contrast, claims for breach of fiduciary duty, in the special sense explained in *Mothew's* case, will normally be covered by s 21. The six-year time limit under s 21(3) will apply, directly or by analogy, unless excluded by s 21(1)(a) (fraud) or (b) (class 1 trust)."

74. The reference in the final sentence to the exclusion of section 21(3) in the case of fraud *or* a class 1 trust is puzzling since Millett LJ's judgment in *Paragon Finance*, which the court was applying, appears to be clear that both provisions of section 21(1) would apply only in the case of a class 1 trust. I note that Carnwath LJ, who was a party to the decision in *Gwembe*, appeared to recognise this in a footnote to a passage in his judgment in *Halton International v Guernroy* [2006] EWCA Civ 801I, where he emphasised the rationale of section 21(1):

"Section 21(1) provides an exception to the ordinary limitation rule that civil actions are barred after six years. Such an exception needs to be clearly justified by reference to the statutory language and the policy behind it. It is important therefore to keep in mind the reasoning behind the exception. It is not about culpability as such; fraud may not be sufficient to avoid the ordinary rule.⁽¹⁾ It is about deemed possession: the fiction that the possession of a property by a trustee is treated from the outset as that of the beneficiary. In the words of Millett LJ, the possession of the trustee is "taken from the first for and on behalf of the beneficiaries" and is "consequently treated as the possession of the beneficiaries". An action by the beneficiary to recover that property is not time-barred, because in legal theory it has been in his possession throughout.

1. See *Paragon* at p 411b, *Clarkson v Davies* [1923] AC 100. I should note that, although the judgment in *Gwembe* (to which I was a party) proceeded on the premise that fraud was sufficient to bring the case within section 21(1)(a)) (para [120]), the ultimate decision may be better explained by reference to the alternative ground of fraudulent concealment: s 32.

The Chancellor and Tuckey LJ agreed with this judgment. See also per Newey J in *Kleanthous v Paphitis* [2011] EWHC 2287 (Ch) at [60].

75. In the present case, it is not necessary to resolve this particular issue since I have held that the pleaded claim of fraud has no chance of success. The allegation therefore falls to be considered on the basis of a negligent or innocent breach of trust or fiduciary duty. In my judgment, it is clear that this is not a case of a class 1 trust. The fact that Woolf Seddon were the solicitors to the band cannot in itself make them trustees over the assets of the members of MY, including any copyright in Dutchie. The trust alleged on the facts is in respect of monies received by Woolf Seddon by reason of the Sparta Florida Agreement, which is the agreement which the claimants seek to impugn. Accordingly, it is a class 2 trust and the trust claim falls within section 21(3) and the limitation period of six years applies.
76. The claim for breach of fiduciary duty, although mixed up with the breach of trust claim in the pleadings, is conceptually distinct in that Woolf Seddon can be said to have owed a fiduciary duty to the members of MY by reason of being their solicitors, with the attendant obligation of loyalty, to which Millett LJ referred in *Mothew*. But all the allegations against Woolf Seddon brought under this head amount to a breach of their duties as solicitors and therefore mirror the allegations that would lie for breach of contract or negligence. The claim is a personal one, although by reason of Woolf Seddon's position as fiduciaries the claimants have available the equitable remedy of an account. Accordingly, following *Cia de Seguros* and *Gwembe*, the six year limitation period applies by analogy pursuant to section 36 of the 1980 Act.

(ii) *Misrepresentation/unlawful means*

77. The claims for misrepresentation and the use of unlawful means are both tort claims. The applicable limitation period is therefore six years: section 2 of the 1980 Act. Accordingly, subject to any postponement of the limitation period by reason of section 32 and the special position of the fourth claimant, those claims are out of time.

(iii) *Postponement of the limitation period*

78. Section 32(1)-(2) of the 1980 Act, insofar as material, provides as follows:

“(1)... , 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."

79. Guidance on the application of section 32(1) is given by Millett LJ in *Paragon Finance* at 418:

"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...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."

80. In *Law Society v Sephton* [2004] EWCA Civ 1627, [2005] QB 1013, Neuberger LJ (with whom on this issue Maurice Kay and Carnwath LJ agreed) observed at [116] that the concept of "reasonable diligence" carries with it "the notion of a desire to know, and, indeed, to investigate."
81. Since the claim form was issued in February 2010, the claimants must show that they could not with reasonable diligence have discovered the matters on which they rely prior to February 2004. However, not only did Mr David Morgan obtain a copy of the Sparta Florida Agreement in March 2002, but he then realised that it was potentially of significance and might found a claim for publishing royalties. The involvement of Woolf Seddon in the Sparta Florida Agreement was self-evident: their name appears on the cover sheet. The only reason, on Mr Morgan and Mr Seaton's evidence, why a claim arising from the Sparta Florida Agreement was not immediately investigated was that they wished to concentrate first on the claim against MCA/Universal Records in respect of the recording rights: see paras 29-30 above. But even if that reason were sufficient to delay the date of 'reasonable discovery' for the purpose of section 32(1), which I doubt, the claim against MCA/Universal Records was settled in December 2002. Accordingly, I consider that, at the very latest, the period of limitation would have started to run at that point or, if a few months are allowed for further investigation, in early 2003.
82. It follows that the claims against Woolf Seddon in the existing Particulars of Claim are out of time, save possibly for the fraudulent breach of trust claim and the special position of the fourth claimant to which I now turn.

The fourth claimant

83. The fourth claimant claims by his litigation friend on the basis that he is mentally ill. In that regard, the statutory definition of disability has changed over the relevant period. In 1984, section 38(2)-(4) of the 1980 Act provided as follows:

“(2) For the purposes of this Act a person shall be treated as under a disability while he is an infant, or of unsound mind.

(3) For the purposes of subsection (2) above a person is of unsound mind if he is a person who by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing or administering his property and affairs.

(4) Without prejudice to the generality of subsection (3) above, a person shall be conclusively presumed for the purposes of subsection (2) above to be of unsound mind -

(a) while he is liable to be detained or subject to guardianship under the Mental Health Act 1983 (otherwise than by virtue of section 35 or 89); and

(b) while he is receiving treatment as an in-patient in any hospital within the meaning of the Mental Health Act 1983 or mental nursing home within the meaning of the Nursing Homes Act 1975 without being liable to be detained under the said Act of 1983 (otherwise than by virtue of section 35 or 89), being treatment which follows without any interval a period during which he was liable to be detained or subject to guardianship under the Mental Health Act 1959, or the said Act of 1983 (otherwise than by virtue of section 35 or 89) or by virtue of any enactment repealed or excluded by the Mental Health Act 1959.”

84. There were some amendments to sub-sections 38(3)-(4) that applied between 1 April 2002 and 30 September 2007 that are immaterial for present purposes, but with effect from 1 October 2007 sub-sections 38(3)-(4) were deleted and sub-section 38(2) was amended to read:

“For the purposes of this Act a person shall be treated as under a disability while he is an infant, or lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings.”

85. The Mental Capacity Act 2005 (“the 2005 Act”) introduced comprehensive new provisions regarding the question of mental capacity. Sections 1-3 provide, insofar as material:

“1. The principles

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

2. People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

3. Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.”

86. Further, section 42 of the 2005 Act provides for the issue by the Lord Chancellor of codes of practice for, inter alia, the purpose of persons assessing whether a person has capacity in relation to any matter. Section 42(5) states:

“If it appears to a court or tribunal conducting any ... civil proceedings that—

(a) a provision of a code,

.....

is relevant to a question arising in the proceedings, the provision ... must be taken into account in deciding the question.”

87. The fourth claimant was born on 23 May 1967. Accordingly, as at the date of accrual of the causes of action he was under a disability by reason of his age (“the first disability”). He ceased to be under that disability on becoming 18 on 23 May 1985. In the ordinary course, subject to application of sections 21 or 32 of the 1980 Act, time would therefore begin to run on that date and would have expired six years later on 22 May 1991.

88. Mr Brisby accepted that once time begins to run, nothing can interrupt it. Despite the potential harshness of this rule, it is of long standing and firmly established: *Purnell v Roche* [1927] 2 Ch 142. In *Sheldon v Outhwaite* [1996] AC 102, Lord Keith (with whose opinion Lord Mustill agreed) stated that section 1(2) of the 1980 Act effectively ensured that once time has started to run it will continue to do so, unless there is an express statutory provision to the contrary: see at 140. The Court of Appeal and the dissenting judgment of Lord Lloyd of Berwick considered the issue of disability specifically (per Sir Thomas Bingham MR at 110-111 and Lord Lloyd at 146 and 149). The latter noted that:

“If the Plaintiff is of unsound mind when the cause of action accrues, the limitation period is extended. But there is no

extension if he becomes of unsound mind during the running of the limitation period”.

89. Accordingly, if time began to run on the fourth claimant’s 18th birthday, it would not thereafter be interrupted, albeit that such time period could be postponed pursuant to section 32 of the 1980 Act. Therefore, if the fourth claimant became of unsound mind a month after reaching his majority, that will not stop time from running.
90. However, the first disability from which the fourth claimant was suffering when “*any right of action accrued*” for the purposes of section 28(1) of the 1980 Act, was not disability by reason of mental incapacity. The alleged disability by reason of mental incapacity is a subsequent disability (“the second disability”). Moreover, the claim in this case was issued on 4 February 2010, after the coming into force of the 2005 Act and the consequent amendments to section 38(2)-(4). That gives rise to two questions:
- i) If the second disability commenced before the termination of the first disability, does that extend the limitation period? More specifically, if the fourth claimant came to lack mental capacity *before* his 18th birthday, would that stop time from running?
 - ii) Is the determination of whether or not the fourth claimant was of unsound mind or lacking in mental capacity to be made pursuant to the 1980 Act as it was at the time of the facts being considered or in its amended form? More specifically, is the relevant test whether the fourth claimant was incapable of managing and administering his property and affairs by reason of a mental disorder under the terms of the Mental Health Act 1983 (“the 1983 Act”), or whether he lacks capacity within the meaning of the 2005 Act to conduct legal proceedings?

(i) *Subsequent overlapping disability*

91. For the fourth claimant, it was submitted that so long as a claimant is continually under “a disability”, time does not begin to run, even if the second, overlapping disability is of a different nature to the first disability. For Woolf Seddon, it was argued that time began to run on the fourth claimant attaining his majority regardless of whether he can establish that he was under the second disability as at that date.
92. This question turns on the correct interpretation of section 28(1) of the 1980 Act. For convenience, I set this out again, together with sub-section (3):

“(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

....

(3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.”

93. In support of his interpretation, Mr Brisby pointed to the wording “under a disability” in the final part of section 28(1). He submitted that if it had been intended to preclude extension in the case of a second, overlapping disability, the words “such a disability” or “that disability” would have been used. For her part, Ms Smith referred to section 28(3), which precludes extension of the limitation period where the cause of action passes from one person under a disability to another person under a disability. She submitted that this showed the legislative intention to adopt a strict approach as regards any further extension.
94. On this question, on which there appears to be no authority, I prefer the submission of Mr Brisby. The thrust of section 28(1) is that so long as a person is under a disability, the limitation period should not start to run so that he is not potentially compelled to commence proceedings. Since that applies to a child until he reaches the age of 18, if on his eighteenth birthday he is still under a disability, albeit a different disability from that which applied when the cause of action accrued, it would be inconsistent with the statutory purpose for the running of the limitation period to commence nonetheless. As I have already mentioned, the rule that a second disability which starts only after the cessation of the first disability will not cause an extension or suspension of the limitation period is capable of harshness. For a cause of action which accrues to a child, the limitation period will run from his eighteenth birthday even if he is involved in an accident the next day that causes brain damage such that he thereafter lacks mental capacity. But I see no reason to interpret section 28(1) so as to increase its potential harshness by imposing the same result if he developed a mental illness before – and possibly long before – his eighteenth birthday. The fact that mental incapacity can be long-lasting and that therefore time may not run for a long time is inherent in the existing statutory scheme and not the result of this construction. I note that the Law Commission’s recommendation that there should be a long-stop limitation period, but also that if a claimant develops lack of capacity after a limitation period has commenced then the running of time should be suspended, has so far not been adopted: *Limitation of Actions* (Law Com no. 270, 2001), paras 3.126-3.133. As for subsection 28(3), that is addressing a different and specific situation and it does not in my view assist on this point.

(ii) *The relevant statutory test*

95. Where section 28(2) is engaged on the grounds of mental incapacity, there may well be a long period over which the claimant suffers from that incapacity. In *Maga v Archbishop of Birmingham* [2009] EWHC 780 (QB), where the cause of action accrued over 30 years before trial, Jack J held that the question of disability for the purpose of limitation should be determined under the law as it stood when the proceedings were commenced: see at [10]. This approach received endorsement in the Court of Appeal, where Lord Neuberger MR referred to this as “the relevant time”: [2010] EWCA Civ 256, [2010] 1 WLR 1441 at [16]. In consequence, the amendments resulting from the 2005 Act were there disregarded. However, it appears

that this point was conceded and was not the subject of argument. Therefore, I do not think that this approach is binding upon me.

96. Although *Maga* is of persuasive authority, I have respectfully come to the view that the applicable test is that determined by the law when the cause of action accrued. If it were otherwise, some claimants might find previously actionable items had become time-barred before the commencement of the statutory amendment. The point may be illustrated hypothetically by supposing that someone suffered brain injuries in 1997 in an accident caused by another's negligence. Although the limitation period would normally expire in 2000, because the consequences of his injury fell within the condition of "unsound mind" under section 38(3) of the 1980 Act as it then stood, time did not begin to run and he did not start proceedings. However, his condition would not have met the stricter test for lack of capacity under the 2005 Act. Accordingly, once the 1980 Act was amended with effect from 2007 to introduce the new section 38(2), if the new test were to be applied it would no longer be possible for him to bring a claim since it would be time barred as from 2000. When the age of majority was lowered from 21 to 18, this particular problem was avoided by inclusion of a transitional provision for the purpose of the statute of limitations disapplying the lower age where a cause of action had already accrued: Family Law Reform Act 1969, schedule 3, para 8. Although no analogous transitional provision was introduced in conjunction with the 2007 amendment changing the test for mental disability in the 1980 Act, I do not regard that in itself as determinative. I consider that unless compelled by the statutory wording, the court should resist such a potentially retrospective imposition of a time bar, and I do not see anything in the 1980 Act which requires such a result.
97. Accordingly, I consider that the relevant test here for the purpose of section 28(1) of the 1980 Act is the version of section 38 prior to the amendment that introduced reference to mental incapacity under the 2005 Act. However, in case I am wrong about that, I shall consider the position under both tests.

Application to the facts

98. Section 38 as it applied in 1984 when the cause of action accrued is set out at para 83 above. The primary test is whether the fourth claimant was by reason of mental disorder within the meaning of the Mental Health Act 1983 "incapable of managing or administering his property and affairs": sect 38(3). This is the same test as applied under RSC Ord 80 rule 1 governing the right of an individual to commence or compromise litigation without the interposition of a next friend or, in the former nomenclature, a guardian ad litem.
99. That test was considered by the Court of Appeal in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511 (a case that was not cited to me). In that case, the issue arose both under RSC Ord 80 r 1 and under section 38(3) of the 1980 Act (in its then form) as regards the capacity to litigate and compromise an action. In his judgment (with which Potter and Chadwick LJ agreed), Kennedy LJ stated (at [27]):

"What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to

the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all “lay client” decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the plaintiff is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in *White’s* case (12 November 1987), capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere. ”

100. In a separate and detailed judgment, Chadwick LJ provided an extensive discussion of the authorities which established two broad propositions (see at [58]):

“First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained.”

101. Referring to RSC Ord 80 and CPR 21, Chadwick LJ stated, at [75]:

“... the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedural should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the CPR, a litigation friend).”

102. Chadwick LJ further approved the approach adopted by Boreham J in the unreported case of *White v Fell*, which he summarised (at [77]) as follows:

“In that case, also, it was necessary to decide whether the plaintiff had been incapable of managing her property and affairs in the context of a Limitation Act defence. The judge identified three features to which he thought it appropriate to have regard. First, the need for the plaintiff to have “insight and understanding of the fact that she has a problem in respect of which she needs advice”. Second, the need to be able to instruct an appropriate adviser “with sufficient clarity to enable him to understand the problem and advise her appropriately”. Third, the need “to understand and make decisions based upon, or

otherwise give effect to, such advice as she may receive". Boreham J accepted that the plaintiff was "now quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries". Further, he accepted that, if she succeeded in her claim for compensation "as almost inevitably she will", she would need to "take, consider and act upon appropriate advice"; but that she might choose not to take advice. He accepted that "she may not understand all the intricacies of litigation, or of a settlement, or of a wise investment policy". But he was satisfied that, nevertheless, the plaintiff had not been shown to be incapable of managing her affairs. She had had the necessary understanding to take the decisions which she needed to take in relation to a claim for compensation."

103. In the present case, there is evidence from Mr John Winfield, the Group Manager – Specialist Services at Birmingham City Council, and now the litigation friend of the fourth claimant, that he first met the fourth claimant in 1987 when senior social worker to the academic unit at All Saints Hospital in Birmingham. He states that the fourth claimant was then seriously ill with schizophrenia. Mr Winfield was involved in the process that led to the fourth claimant being detained under section 2 of the 1983 Act, which occurred on 18 April 1987. Mr Winfield says that the fourth claimant was constantly ill during the period of three years over which he knew him.
104. However, it is common knowledge that schizophrenia is a progressive illness and this evidence cannot establish the fourth claimant's mental state some two years earlier, on 23 May 1985 when he became 18. On behalf of the fourth claimant, there was produced from his medical records a letter dated 7 June 1985 from a consultant psychiatrist to whom the fourth claimant had been referred by his GP. That letter states that the GP had discovered the day before that the fourth claimant was suffering from a schizophrenic illness and confirmed the diagnosis. The letter refers to incidents that had occurred three weeks previously.
105. I accept that this letter is evidence from which it can be inferred that the fourth claimant was suffering from a relevant mental disorder as at his 18th birthday. But that is only part of the test. Following *Masterman-Lister*, the other part of the test is issue-specific: it is also necessary for the fourth claimant to establish, and the burden is on him, that he would not have been able to understand, with an appropriate explanation, that he may have a claim against MY's solicitors related to a failure to get the band publishing royalties for Kouchie, and to decide whether to make such a claim. Moreover, I think that the test has to be applied in the particular circumstances of the case. It is therefore relevant that the fourth claimant would have been able to consider this along with the other members of the band, including his elder brother. Obviously, the fourth claimant would not be expected to have understood the various intricacies of his claim, an aspect that I suspect eludes many claimants of entirely sound mind. But the evidence here, in my judgment, falls far short of showing that the fourth claimant would at that time have lacked sufficient understanding to take such decisions.
106. Accordingly, I find that the fourth claimant has not shown a sufficiently arguable case that he met the statutory criteria for disability by reason of unsound mind on his 18th

birthday. However, even if I were wrong about that, in order to maintain the extension of the limitation period until at least six years before the start of this action, the fourth claimant would need to show that he remained under such a disability continuously until February 2004. The evidence is wholly inadequate to support that conclusion.

107. It is convenient to consider the position as at 2002, when Mr Morgan, acting on behalf of the members of MY, obtained a copy of the Sparta Florida Agreement and mentioned it to at least some of them. Mr Winfield does not appear to have been in contact with the fourth claimant at that time, and the claimants' response to Woolf Seddon's request for further information served on 7 October 2011 states only that: "Mr Waite was treated as an outpatient during 2002 and 2003", until on 22 August 2003 he was admitted to hospital under section 2 of the 1983 Act. Moreover, I think it is significant that Mr Morgan felt able to act in 2002 for the fourth claimant as one of the former members of MY, and conclude a settlement on his behalf with MCA/Universal Records in December 2002 as regards payment for recording rights. Evidently, Mr Morgan must have considered that the fourth claimant was mentally able to give him those instructions and decide to accept the settlement, and no application was made to the court for approval of that settlement under CPR Part 21.
108. I turn to consider the position in the alternative under section 38 in its current form, which applied as at the date of the issue of these proceedings. That requires a determination of whether the fourth claimant has shown that he lacked capacity within the meaning of the 2005 Act to conduct legal proceedings: see para 84 above. As I have mentioned, the matters to be considered before finding that a person lacks what is now called mental capacity have been broadened, such that a more detailed and sensitive evaluation is required before the statutory presumption of capacity is displaced. Moreover, the 2005 Act expressly provides that mental incapacity cannot be determined simply because the individual has a particular diagnosis or by reference to an aspect of their behaviour: section 2(3). Because of the implications of a finding of mental incapacity for an individual's freedom of action, the thrust of the 2005 Act is to safeguard against a ready finding of lack of capacity. As under the 1983 Act, as explained in *Masterman-Lister*, the determination is issue-specific.
109. Further, the statutory code issued by the Lord Chancellor pursuant to section 42, which the court must take into account, provides as regards an assessment of people with fluctuating or temporary capacity, that "[a] person with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but disappear at others": para 4.26. The issue of the fourth claimant's mental capacity to decide to bring a claim has to be examined only at the time when this decision had to be made. Pursuant to section 28 of the 1980 Act, the limitation period will start to run once he was not under a statutory disability and will not thereafter be interrupted. Accordingly, he would have to establish that there was no period between 23 May 1985 and 4 February 2004 when he had the requisite capacity.
110. In short, it is clear that if, as I have found, the fourth claimant has not shown that he was "of unsound mind" under the test in section 38(2) of the 1980 Act in its previous form, he is unable to show that he lacked capacity under the new test which refers to the 2005 Act so as to avoid the application of a limitation period.

111. In my judgment, it is not adequate for the fourth claimant to say that his mental capacity is a matter for expert evidence which he would wish to call at trial. Where he seeks to rely on his incapacity to rebut an obvious limitation defence and the case comes before the court on a summary judgment application, particularly where that application was issued on 8 October 2010 and, for various reasons, came on for full argument over a year later, it is incumbent upon the fourth claimant to place before the court sufficient evidence to support his claim of mental incapacity. This is obviously not an issue that will be affected by disclosure from the defendants. I consider that it would be wholly wrong to permit the fourth claimant's claim to go to trial on all the substantive issues that are otherwise statute barred, on the speculative basis that he might by then be in a better position to establish his own mental incapacity that would overcome the limitation defence.

The claimants' application: the proposed Amended Particulars of Claim

112. Apart from various factual or drafting amendments, to which no objection is taken, the changes proposed in the draft Amended Particulars of Claim can be summarised as follows:

- i) As regards fraudulent breach of trust or fiduciary duty, the particulars are considerably expanded, including with quotations from Mr Seddon's witness statement: paras 14-16.
- ii) As regards misrepresentation, the allegations under para 17 of the various matters that Woolf Seddon "knew or ought to have known" are now pleaded as matters that Woolf Seddon "knew", including that they:
 - a) "knew that the members of the band had a legitimate claim to be the owners of, or alternatively the owners of a share of, copyright subsisting in the Works and did not communicate such facts and matters to them"; and
 - b) "knew that the nature and effect of the terms of the Sparta Florida Agreement were entirely contrary to the interests of the members of the band;"

I think the various amendments under this head clearly amount to a claim of fraudulent misrepresentation.

- iii) To the unlawful means and interference with trade claim there is added a new claim of conspiracy. I set out the amended paras 20-21 in an Appendix to this judgment.

- iv) A new claim is introduced as against all defendants of knowing receipt or dishonest assistance to the knowing receipt by others of property of the members of MY, with a claim to an account of consequent profits: para 22. That includes the allegation under the "Particulars of Knowledge/Dishonesty" at sub-para (iii) that:

"The fact that the Sparta Florida Agreement on its face betrays a calculated and profound concealment of material

facts and matters from the members of the band by [Woolf Seddon] contrary to the band's interests."

113. The relevant principles to be applied when deciding whether to allow an amendment are not in dispute. First, an amendment should not be allowed if it has no real prospect of success, and therefore would be subject to an adverse summary judgment or a successful application to strike out under CPR rule 3.4. Secondly, if the effect of an amendment is to add a new claim after a period of limitation has expired, the court may not allow the amendment unless it arises out of the same or substantially the same facts as a claim already pleaded: section 35 of the 1980 Act and CPR rule 17.4(1)-(2). That is because, pursuant to section 35(1), a new claim introduced in an existing action is deemed to have been commenced on the same date as the original action, and the defendant would therefore otherwise be deprived of a limitation defence

114. In *Hemmingway v Smith Roddam* [2003] EWCA Civ 1342, Waller LJ encapsulated the test arising from the second principle as follows at [11]:

"The test to be applied is thus, whether, even if a new claim is being made, the new claim arises out of "the same facts already in issue". The question is whether the factual issues under the old pleading were going to be litigated between the parties; if they were, then the court should take the view that section 35 had it in mind that the parties should be able to rely on a cause of action which substantially arises from those facts."

115. It is well established that the introduction of an allegation of dishonesty or fraud, where that was not previously alleged, amounts to a new cause of action. This also was an issue addressed in the *Paragon Finance* case, where Millett LJ stated at 406:

"In my judgment it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action".

In a later passage in his judgment, he said (at 418):

"In the *Thakerar* case, Chadwick J observed that it would be "contrary to common sense" to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree. In all our jurisprudence there is no sharper dividing line than that which separates cases of fraud and dishonesty from cases of negligence and incompetence."

116. In *Fattal v Walbrook Trustees* [2010] EWHC 2767 (Ch), Lewison J, having referred to the judgment of Millett LJ in *Paragon Finance* said at [35]

“It follows from this that the introduction of a claim based on dishonesty, where none existed before, is a new claim which does not arise out of the same facts as the previous claim or claims”.

117. As regards fraudulent breach of trust or fiduciary duty, I have found that this claim is made in the existing Particulars of Claim and accordingly no new claim is involved. However, I also found that the allegation in the Particulars of Claim stood no realistic chance of success. In my judgment, there is nothing in the expanded particulars set out in the proposed Amended Particulars of Claim which further advances this claim or affects that conclusion. Accordingly, permission to make that amendment is refused.
118. Aside from the question of the applicable limitation period in a case of fraudulent breach of a class 2 trust, I have found that the other claims against Woolf Seddon in the original pleading were time barred. It follows that the original action would not have proceeded to trial.
119. The claim for fraudulent misrepresentation is, on my interpretation of the original pleading, a new claim since previously the misrepresentation claim did not clearly allege fraud. I think that on balance it may be said to arise out of the same facts as the fraudulent breach of trust claim. However, for the reasons set out above I find that it has no prospect of success because both (a) there is no arguable basis for the allegation of fraud, and (b) as at the date of issue of the original claim it would have been out of time.
120. It is admitted by the claimants that the claim for conspiracy is new. The relevant paragraphs are appended to this judgment and I find them, at least in part, hard to follow. It is wholly unclear on what basis it is alleged that the Sparta Florida Agreement is “unlawful”: para 20.2. The allegation in para 20.3 is at least clear, but it founders on the same twin obstacles that there is no factual basis to support an intention to infringe copyright and the limitation bar, applied as at February 2010. Moreover, on balance, I think that it does not arise out of substantially the same facts as the original pleading, since it alleges a deliberate combination between Woolf Seddon and the other defendants to use unlawful means. That is accordingly a further and distinct ground for refusing permission to amend.
121. The claim for knowing receipt/dishonest assistance (which is also admitted to be a new claim) appears designed to constitute a trust claim within section 21(1) of the 1980 Act. However, the analysis set out above as regards the original trust claim applies equally to this claim. I consider that if there was a trust at all, it was a class 2 trust, in the sense of a constructive trust imposed by way of an equitable remedy. As regards Woolf Seddon, I have already dealt with the allegation that they were in knowing or intentional breach of fiduciary duty. And aside from fraud or dishonesty, any such trust claim against Woolf Seddon was out of time when these proceedings were commenced.
122. Moreover, there is a further answer to this allegation of knowing receipt as against Woolf Seddon. Under the Sparta Florida Agreement, Woolf Seddon only received money in respect of copyright royalties pursuant to clause 4(a). Under that provision, one half of the sums then frozen relating to Kouchie and/or Dutchie in respect of

royalties that had arisen in the UK and Ireland were to be paid to Woolf Seddon as solicitors for the Two Pieters. Aside from the fact that Woolf Seddon were obviously obliged to pass this money on to the Two Pieters, the money was in respect of royalties accrued up to the date of the Sparta Florida Agreement. There is no provision for Woolf Seddon to receive any further money thereafter.

123. However, under the Virgin Agreements, replaced retroactively by the Music 10 Agreements, the members of MY had assigned all their publishing royalties to Virgin / Music 10. The period of the assignment under those agreements had not expired by November 1984. Accordingly, if and insofar as the monies which passed to Woolf Seddon under the Sparta Florida Agreement included royalties referable to a distinct copyright in Dutchie, the members of MY had no beneficial interest in or entitlement to those monies. This claim as against Woolf Seddon therefore has no chance of success.

Conclusion

124. Accordingly, I find that:

- i) Woolf Seddon are entitled to summary judgment on the claim against them as it stands. I consider that these proceedings are an attempt to turn a claim for professional negligence into a claim for fraud or dishonest breach of trust in order to overcome the obvious problems of limitation, and I regard the claim as wholly without merit.
- ii) The claimants' application for permission to amend the Particulars of Claim as regards Woolf Seddon is refused.

125. There is obviously no question of summary judgment as regards any of the other defendants since there is no application before the court on their behalf.

126. As regards the claimants' application for permission to amend the Particulars of Claim as regard the other defendants, the position is a little more complicated:

- i) The sixth, seventh, thirteenth and fourteenth defendants were not served with the application. The claimants accordingly accept that no order can be made as regards them. Reference to "the tenth to fifteenth defendants" below should be read as excluding the thirteenth and fourteenth defendants.
- ii) The remaining defendants were served and did not consent to the amendments but chose to take no part in the hearing of the application. However, the restriction under CPR rule 17.4 on permitting an amendment is mandatory. It therefore applies in their case as much as it does as regards Woolf Seddon, even though the claimants did not present any argument to the court as regards those other defendants. Accordingly:
 - a) The original claim for unlawful means/ unlawful interference with trade was pleaded against Woolf Seddon, Sparta Florida and the then tenth defendant (now the ninth defendant). The amendment in para 21 of the draft extends this allegation to what are now the tenth to fifteenth defendants. It is therefore a new claim as against the latter and as these

allegations were not previously made against them, I consider that it does not arise out of substantially the same facts as the existing pleading. Since it would deprive them of a limitation defence, permission to make this amendment is refused.

- b) I have held that on balance the new claim of conspiracy as against Woolf Seddon does not arise out of substantially the same facts as in the original pleading. I reach the same view as regards that claim against Spa Florida. That conclusion is all the stronger as regards what are now the tenth to fifteenth defendants who were not the subject of any allegation of an intention to injure in the original Particulars of Claim and against whom the facts alleged are clearly new. Permission to introduce this claim by amendment is accordingly refused.
- c) The new trust claim and remedies for knowing receipt/ dishonest assistance are alleged against all the defendants and all (except the ninth defendant) ("Music Sales") are alleged to have acted dishonestly. No allegations of dishonesty were previously alleged against anyone other than Woolf Seddon. As regards all defendants other than Woolf Seddon and Music Sales, this is accordingly a claim that does not arise out of substantially the same facts and permission to introduce it is therefore refused. The difficulty in determining whether this claim as against Music Sales arises out of substantially the same facts arises because of the lack of particularisation in para 23 of the original pleading. However, the allegation of knowledge on the part of Music Sales in para (v) of the particulars under the proposed para 22 of the Amended Particulars of Claim is new, and on balance I find that this claim against Music Sales also does not arise out of substantially the same facts. Since the allegation is of a class 2 trust, the claim was statute barred in April 2011 and permission to amend is accordingly refused.
- d) In all other respects, the application for permission to amend concerning the defendants, other than the sixth, seventh, thirteenth and fourteenth defendants, is granted. That of course does not preclude any of those defendants from issuing an application for summary judgment.

APPENDIX

PROPOSED AMENDED PARTICULARS OF CLAIM: PARAS 20-21

“Inflicting harm by unlawful means/unlawful interference with trade/conspiracy

20. Further or alternatively, notwithstanding the generality, but in consequence of the totality, of the herein aforesaid facts and matters:
 - 20.1 Under the terms of the Sparta Florida Agreement the Sixth to Eighth Defendants and the Tenth to Fifteenth Defendants and each of them purported to determine ownership of and/or authorise the exploitation of and/or be authorised the exploitation of and/or entitled to exploit copyright in Pass the Dutchie and distributed, or authorised the distribution of, monies that should have been paid by one or more of them and/or by a third party or third parties to the Claimants/Patrick Waite (as the case may be).
 - 20.2 The First to Fifth Defendants (through the First Defendant) assisted and/or procured the Sixth to Eighth and the Tenth to Fifteenth Defendants to enter into the Sparta Florida Agreement with, and in the knowledge that, its terms and effect were unlawful.
 - 20.3 The First to Eighth and Tenth to Fifteenth Defendants and each of them thereby deliberately combined together and/or intended to cause and/or knew that one or more of the other parties to the Sparta Florida Agreement intended to cause loss and damage to the Claimants/Patrick Waite (as the case may be) and furthermore intended to use unlawful means (namely infringement of copyright) in doing so.
 - 20.4 The aforesaid conduct of each of the First to Eighth and Tenth to Fifteenth Defendants was, or would be if it caused loss, (notionally) actionable as against each of the said Defendant at the suit of any one or more of the Sixth to Eighth and Tenth to Fifteenth Defendants (and also on behalf of the Claimants).
21. In the premises, the First to Eighth and the Tenth to Fifteenth Defendants and each of them:
 - 21.1 conspired with the other in the herein aforesaid combination or common design to injure and/or to use unlawful means; and
 - 21.2 inflicted the said harm by the said unlawful means; and
 - 21.3 intended to injure or injure the Claimants/Patrick Waite (as the case may be).”