Neutral Citation Number: [2023] EWHC 710 (Comm)

Case No: CL-2022-000075

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 30/03/2023

Before :

Simon Rainey K.C. (sitting as a Judge of the High Court)

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Between :

(1) PRASHANT HASMUKH MANEK
(2) SANJAY CHANDI
(3) EAGM VENTURES (INDIA) PRIVATE LIMITED **Claimants**

- and -

(1) 360 ONE WAM LIMITED
(formerly known as IIFL WEALTH MANAGEMENT LIMITED)
(2) 360 ONE ASSET MANAGEMENT (MAURITIUS) LIMITED
(formerly known as IIFL ASSET MANAGEMENT (MAURITIUS) LIMITED)
(3) 360 ONE CAPITAL PTE LTD **Defendants**

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Rajesh Pillai K.C., William Day and Rishab Gupta (instructed by **Howard Kennedy**) for the **Applicants / Defendants**
Anna Dilnot K.C. and Joshua Crow (instructed by **Cleary Gottlieb**) for the **Respondents / Claimants**

Hearing dates: 17th March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIMON RAINEY K.C. SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 30 March 2023 at 10:30am.

Simon Rainey KC :

1. This is an application by the Defendants, 360 One Wam Limited (formerly IIFL Wealth Management Limited), 360 One Asset Management Limited (formerly IIFL Asset Management (Mauritius) Limited) and 360 One Capital Pte Limited (formerly IIFL Capital Pte Limited) to set aside the order of Foxton J dated 7 June 2022 granting *ex parte* permission to the Claimants to serve these proceedings ("the New Proceedings") on the Defendants out of the jurisdiction. I shall refer to the Defendants individually, as they were referred to in argument before me, as IIFL Wealth, IIFL Mauritius and IIFL Singapore respectively. Collectively they are referred to in this Judgment as the Defendants or the IIFL Defendants.

The background to the application: the 2017 and 2022 proceedings

2. The New Proceedings are concerned with an alleged fraudulent scheme that resulted in the Claimants selling their shares (amounting to a 6% shareholding) in an Indian company, Hermes i-Tickets Pte Ltd ("Hermes") at a significant undervalue.

3. The underlying factual allegations made in the New Proceedings effectively mirror those made by the Claimants in another set of proceedings issued on 6 October 2017 ("the Existing Proceedings") against Mr Ramu and Mr Palani Ramasamy ("the Ramasamys"), IIFL Wealth (UK) Ltd ("IIFL UK") and Mr Amit Shah ("the Original Defendants") which are currently pending before the Commercial Court. Essentially the facts alleged and which are relied upon as giving causes of action against the Original Defendants and now the IIFL Defendants are these.

4. The Ramasamys were the majority shareholders in Hermes. The Claimants sold their shares by sale and purchase agreements ("the SPAs") executed in September 2015 to a company controlled and owned by the Ramasamys, Great Indian Retail Pte Ltd ("GIR"). The Claimants had been told, by the Original Defendants, that a Mauritius entity, Emerging Markets Investment Fund 1A ("EMIF") was the third party ultimate purchaser of Hermes. They were also told that the price EMIF was paying (c.USD 42 million for 100% of Hermes) was a good price, that Hermes' performance had been deteriorating, and that the Ramasamys would not retain any economic interest in Hermes after the sale to EMIF. Six weeks after the SPAs, on 27 October 2015, Wirecard announced that it had acquired Hermes from GIR for a consideration in excess of EUR 200 million (and in excess of EUR 300 million when earn-out payments are included). It is alleged that the true ultimate buyer, the true value of Hermes and the true profits made on the transactions were all fraudulently concealed from the Claimants.

5. The Claimants' case in the Existing Proceedings is that the representations which had been made to them by the Original Defendants were all false (and dishonestly so) in that they had been involved with the negotiations and due diligence for Wirecard's purchase of Hermes, which had been in prospect since at least 2014. Therefore, they knew that EMIF was not the ultimate purchaser, that the price paid to the Claimants was not a good one, that Hermes' performance had in fact been improving, and that those involved stood to make substantial sums because Hermes was being sold to Wirecard for a hugely increased consideration. It is also alleged that Mr Amit Shah made threats to use unlawful means to strip Hermes of its assets in the event the Claimants refused to sell their shares to GIR. The Claimants additionally allege that the Original Defendants formed a conspiracy to use unlawful means to cause damage to

the Claimants. The Claimants claim damages representing the difference between the true value of the shares and the value they received.

6. By the New Proceedings, the Claimants expand the circle of Defendants in respect of these allegations to include the IIFL Defendants, alleging that the actions of Mr Shah are to be attributed to the IIFL Defendants, or that they are vicariously liable for them. Therefore, the IIFL Defendants are liable in deceit, intimidation and conspiracy. Additionally, the Claimants allege that the IIFL Defendants also became party to the conspiracy, and also furthered the common design to commit torts against the Claimants, through at least two other IIFL Group employees: Mr Maharoof Parokot and Mr Sarju Vakil.

7. The Claimants therefore advance four causes of action against each of the Defendants: deceit, intimidation, conspiracy and joint tortfeasance.

The IIFL Defendants' application to set aside service

8. The Defendants' application is made upon two grounds.

9. First, the Defendants contend that the claims made against each of them by the Claimants have no realistic prospect of success because each claim is time barred.

10. Secondly, it is contended by them that the Claimants were in breach of their duty of full and frank disclosure in various respects which warrant the setting aside of the permission granted.

Ground (1): No realistic prospect of success

Relevant principles

11. There was no issue between the parties as to the approach to be taken by the Court. In order to justify the grant of permission to serve out of the jurisdiction, the Claimants must establish, with the burden of proof upon them, that they have a realistic prospect of success in respect of each claim against each of the Defendants.

12. Once that is challenged by the Defendants, the position reverts effectively to a summary judgment application. As it was put by the Supreme Court in *Lungowe v Vedanta Resources plc* [2019] UKSC 20 at [42] (and cited by the Defendants):

> "The single task of the judge under this heading was to decide whether the claim against Vedanta could be disposed of, and rejected, summarily, without the need for a trial. This is because, although Vedanta made no reverse summary judgment application of its own, the assertion by a foreign defendant seeking to set aside permission to serve outside the jurisdiction […] that the claim […] discloses no real issue to be tried involves, as is now agreed, a summary judgment test: see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804, per Lord Collins of Mapesbury at para 82."

The Defendants' case on time bar

13. The Defendants' case is that, (i), the Claimants' claims are governed by Indian law and are time-barred as a matter of Indian law; alternatively, (ii), if the claims are governed

by English law (as the Claimants contend that they are), then they are similarly time-barred.

14. For present purposes, the only relevant difference between Indian and English law in relation to limitation is that, rather than the six year limitation period which would apply for torts under section 2 of the English Limitation Act 1980, under the relevant Indian statute, the Limitation Act 1963, the applicable time bar is three years from the date of the accrual of the cause of action (Article 113).

15. It is common ground that the causes of action in respect of each of the four claims arose on or about 9 September 2015 when the Claimants signed the SPAs with GIR under which they sold their minority shareholding in Hermes as a result of the alleged deceit, intimidation, conspiracy and joint tortfeasance of the Defendants. The New Proceedings were commenced by a claim form issued on 16 February 2022, therefore *prima facie* out of time.

16. The Claimants however contend that they did not and could not have discovered the relevant facts to enable them to make their claims against the IIFL Defendants until much later, that the relevant starting date for the limitation period is accordingly postponed and that in consequence the New Proceedings were commenced in time.

17. Both the English and Indian limitation statutes provide for the postponement of the running of the limitation period in the cases of fraud, concealment or mistake in very similar terms.

18. Section 32 of the English Limitation Act 1980 provides:

> "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."

19. Section 17(1) of the Indian Limitation Act 1963 provides:

> "Where, in the case of any suit or application for which a period of limitation is prescribed by this Act —
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

> (c) the suit or application is for relief from the consequences of a mistake; or
>
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him,
>
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production […]"

20. It follows that to have the benefit of the postponement of running of time, if English law applies the Claimants must establish that they did not discover and could not with reasonable diligence have discovered the fraud and the involvement of the Defendants in it before 16 February 2016.

21. However, if Indian law applies, the relevant date is either 16 February 2019 or 15 March 2017, depending upon the effect in Indian law of the temporary suspension of limitation periods by various orders of the Indian Supreme Court between March 2020 and January 2022 in consequence of the Covid-19 pandemic, on which there was an issue between the parties before me, with expert evidence on both sides.

Indian law or English law?

22. The question of applicable law to the torts alleged by the Claimants is governed by Article 4 of Regulation No 864/2007 (Rome II), retained in English law in amended form by virtue of section 3 of the European Union (Withdrawal) Act 2018 and the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (reg 11).

23. Article 4 provides:

> Article 4
>
> General rule
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that closely connected with the tort/delict in question."

24. The Defendants contended that the Claimants have no realistic prospect of success of establishing that English law applies pursuant to the provisions of Article 4 and that the Court should determine upon a summary basis that the applicable law is Indian law, this being a short point on which there was no real likelihood of there being more material available to the Court at trial that would make a difference to the resolution of the issue. In Mr Pillai KC's submission for the Defendants, this was therefore a proper case for the Court 'grasping the nettle': see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

25. This was argued to be because (a) applying the default rule set out in Article 4(1), it was unarguable that the place where the damage occurred as a result of each of the torts was India, that being "the place of direct damage because the Claimants were only finally divested of their shares when they were re-registered in GIR's name by Hermes, which occurred in India" (Skeleton, para. 71) and (b) that this was not a case where the Claimants could arguably displace Article 4(1) by reliance upon Article 4(3).

26. The Defendants submitted also that in respect of the particular claim made by the Third Claimant against IIFL Wealth, given that both were Indian companies, Indian law would apply to that claim in any event under the habitual residence criterion in Article 4(2).

27. The Claimants contended in answer that the application of Article 4(1) was complex (citing *Griffin Underwriting Ltd v Varouxakis* [2019] 1 W.L.R. 2529 (Males J) at [76]) and that in the present case its application provided for a number of possible answers of which India was the least likely. This was because England or the UAE were stronger contenders because these were the places where the Claimants irreversibly committed themselves by either signing the SPAs by which the Claimants bound themselves to transfer their shares (SPAs version 1; SPAs version 2 were signed by the Claimants variously in England and Kenya) or alternatively by the physical handing over of the share certificates by the Claimants to the purchasers which took place in the UAE.

28. For this reason and in any event the Claimants submitted that this was a case where Article 4(3) was amply engaged because, as it is put in Dicey, Morris & Collins, Conflicts of Laws (16th Edn, 2022) at para. 35.032 there is a "clear preponderance of factors" and the "centre of gravity" of the claim points to England rather than to any other country which might be identified under Articles 4(1) and (2).

29. In my view, the Claimants plainly have the better of the argument and if I were to go further and to 'grasp the nettle' I would hold that the law applicable to the Claimants' claims against each of the Defendants is English law. However, on this application it is not necessary for me to do so and I consider it inappropriate to do so, given that the factual circumstances as determined at trial may have a subsequent bearing on the assessment under Article 4(3). It is enough that the Claimants are able to establish, at this stage and when put to the test by the Defendants, that their case that Article 4 leads to the result that English law applies has a more than realistic prospect of success.

30. I reach this conclusion for the following reasons.

31. In relation to Article 4(1), the parties were essentially agreed that, as it is put in Dicey, Morris and Collins at para. 35-026 (cited by both parties), the relevant exercise is "to identify and locate the outward consequences of the defendant's conduct—or of an

event for which the defendant is claimed to be legally responsible—and then to treat as the relevant ‘‘damage’’ those consequences which are closely and foreseeably linked to that conduct etc., which are in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country".

32. While the final step of the transfer of the shares in pursuance of the fraud or intimidation or otherwise upon which the Defendants rely took place in India where the shares were registered in GIR's name, this is merely the technical consequence of what the Claimants, by reason of the torts, had already irreversibly committed themselves to, either by entering into the SPAs, binding themselves to the transfer, or by then handing over the shares physically in performance of the SPAs.

33. I consider that the Claimants' analogy with cases on deceit under the Brussels I Regulation, holding that damage occurs where a party commits itself to accepting the transaction, is persuasive: see *Maple Leaf Macro v Rouvroy* [2009] EWHC 257 (Comm) at [241] and, more recently, *The Kingdom of Sweden v Serwin* [2022] EWHC 2706 (Comm) at [77]-[78]. I note also the view in Dicey at para. 35-026 that "if the defendant by a representation specifically addressed to the claimant induces the claimant to enter into an unfavourable transaction (such as a contract) with a third party, it is strongly arguable that the claimant should be taken to have suffered damage at the point, and in the place, where the claimant or his or her representative concludes the transaction, with that place being determined according to factual rather than legal criteria" (my emphasis).

34. That is enough for summary judgment purposes to entitle the Claimant to displace the Defendants' sole reliance on the re-registering of the shares in India as the only arguable conclusion under Article 4(1).

35. The application of Article 4(1) points variously to England, the UAE and Kenya. That would suggest that the correct approach is to consider whether there is some jurisdiction to which there is a much stronger connection, given that no party contends that UAE or Kenyan law is sensibly applicable and where these countries have no real connection with the torts alleged.

36. In relation to Article 4(3), looking, as the Article requires, at "all the circumstances of the case", there is more than a realistic prospect of success that the Claimants will establish that these point to England rather than to India in respect of each of the four torts alleged.

37. First, I bear in mind that the concept of "all the circumstances" in Article 4(3) will also "encompass the country in which any proceedings have been commenced": see e.g. *Lakatamia Shipping Co Ltd v Nobu Su* [2021] EWHC 1907 (Comm), per Bryan J. at [859(iii)]. While not decisive, it is in my view a highly relevant consideration in assessing the centre of gravity that there are other longstanding proceedings which concern the same fraudulent scheme and other actors in it which are on foot in England.

38. Secondly, the key or principal stages in the commission of the alleged fraudulent scheme took place in England.

39. While as with very many complex frauds of international scope events took place in a number of countries and with actors based in different jurisdictions, standing back, the

centre of gravity of what was done was (or realistically arguably was), more than any other country, England. I bear in mind the helpful guidance given by Picken J. in *Avonwick Holdings v Azitio* [2020] EWHC 1844 (Comm), [156]; "relevant matters include: where the alleged wrongdoing "was planned, orchestrated and implemented" which … may involve focusing on the country in which "the 'puppet masters' pulling the strings" carried out the relevant alleged acts, even if other entities carried out other alleged acts in one or more other countries".

40. I agree with the Claimants' submission that "The most critical events in the commission of the deceits took place in England. First, at the First London Meeting on 8/9 August 2015, where Ramu [Ramasamy] made a series of important misrepresentations; second, at the Second London Meeting on 24 August 2015, where some of those misrepresentations were repeated by Sarju [Vakil] and third, the telephone call on 22 August 2015 during which Amit [Shah] made threats to asset-strip Hermes." (Skeleton, para. 28(1)).

41. In the Existing Proceedings (in the different context of the tort gateway under the CPR: 6BPD; para. 3.1(9)) the Court of Appeal, in considering for the purposes of the *Metall und Rohstoff v Donaldson* [1990] 1 QB 391 test of "whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere)" concluded that these three events satisfied *that* test and in terms which, in my view, correctly reflected the paramount significance of the three events in the alleged fraudulent scheme overall: see [2021] EWCA Civ 264.

42. Thus, in relation to the First London Meeting and the misrepresentations there made, the Court of Appeal stated at [55]:

> "They were, on any view, substantial; they embraced all the major elements of the alleged fraud. And they were efficacious: they were ultimately the reason why the appellants sold their shares to GIR."

43. Similarly, in relation to the Second London Meeting, the Court stated at [60]:

> "The meeting was arranged by AS so as to present to Hasu and Jayesh the updated version of the SPA between GIR, Hermes, EMIF, Ramu and Palani. Unlike the others, AS's partner Sarju was in London, so he provided the updated SPA. This time Hasu and Jayesh were allowed to keep a copy. On the face of it, therefore, these events were an important part of the pressure being placed on the appellants to sell their shares so as to avoid the risk of asset-stripping, and therefore an important part of the evolving fraud."

As the Claimants point out, this was the only face to face meeting between the Claimants and one of the representatives of the Defendants, who are now in the New Proceedings said to have been also involved, viz. Mr Sarjui Vakil of IIFL Mauritius.

44. Lastly, the telephone call between the Claimants (in London) and Mr Shah (in Singapore) was an important aspect of the fraud (as well as forming the basis of the separate tort of intimidation which is alleged). The Court of Appeal's view is, for the purposes of the present application, difficult to fault (based on my independent assessment of the evidence):

> "Jayesh placed the call from London to obtain information from AS as part of an evolving story, and where the key building blocks of the fraud had been put in place in London on 8/9 August. On his case, what AS said was an important part of that continuing fraud. Nobody suggests that, simply because AS was in Singapore at that time, that country would have the relevant jurisdiction to deal with this claim. I consider that, whilst not critical to my assessment, it is not irrelevant that, on Jayesh's case, the particular misrepresentations of 22 August were made to him in a call he made from London." [59]

45. I carefully bear in mind that the Article 4(3) exercise is, of course, a different one and that a conclusion for the purposes of the *Metall und Rohstoff* test is not necessarily a pointer or a short cut for the satisfaction of the Rome II test of the "manifestly more closely connected" test.

46. However, the importance of these three events, all tied to London, in bringing about the successful fruition of the fraud, by deceit, by intimidation and by a conspiracy (as alleged) as analysed by the Court of Appeal and as borne out by the evidence before this Court makes it difficult to contend that the Claimants have no realistic prospect of success in showing, by reference to those same events as against the IIFL Defendants, that the torts are all and each manifestly most closely connected to England.

47. The Defendants themselves describe the second and third events, together with another call and emails "in this short window (21 to 26 August 2015)" as forming "the bedrock of the claims against both IIFL UK in the Existing Proceedings and the Defendants in the New Proceedings" (Skeleton. Para. 16, original emphasis). I agree. That "bedrock" (which must include the First London meeting as well in my view) is essentially situated in England and nowhere else.

48. Thirdly, it cannot be said on the present evidence that it is unarguable that India is manifestly more closely connected with the torts than England. The matters relied upon by the Defendant do not support such a conclusion.

49. The Defendants' submissions are essentially silent as to the connection between the commission of the torts and England: the only reference made is to meetings in Chennai on between the Ramasamys and the Claimants on 4 July 2015 and between the Ramasamys and Wirecard (allegedly attended by Mr Shah) on 7 to 9 July 2015. Those do not outweigh the key events in the fraud to which I have referred above.

50. Nor do I regard the facts (relied on by the Defendants) that the fraud (whose bedrock in terms of its commission was in London) related to shares in an Indian company (Hermes), or that IIFL is an Indian group, or that the SPAs (induced by the fraud) contain Indian governing law clauses or that the Third Claimant received its proceeds of sale in India as displacing the very close connection between the torts themselves and England.

51. Given my conclusion that the Claimants have a realistic case that limitation falls to be assessed applying English law and that I reject the Defendants' case that Indian law must unarguably apply, it is not necessary for me to consider Indian law further nor the dispute between the parties as to the effect of the Covid-19 suspension on the running of time under the Limitation Act 1963 and on the appropriate 'start' date for the application of section 17 of that Act.

The application of section 32 of the Limitation Act 1980

52. The terms of section 32 are set out earlier in this judgment. The Claimants must therefore establish that they have a realistic prospect of establishing at trial that they did not discover and could not with reasonable diligence have discovered "the fraud" (see below) and the involvement of the Defendants in it before 16 February 2016.

53. In summarising what the Claimants must show, I have used the words "the fraud" as a convenient portmanteau term for the factual foundation giving rise to the four different tortious causes of action alleged by the Claimants in the New Proceedings (viz. deceit; intimidation, conspiracy; joint tortfeasance) and also in the Existing Proceedings against the Original Defendants. Mr Pillai KC for the Defendants stresses (correctly) that the burden on the Claimants must be discharged taking each cause of action against each new IIFL Defendant separately and assessing when it could and should have been discovered. I return to this later in this Judgment.

54. The applicable principles to be applied under section 32 were, again, essentially common ground between the parties. For present purposes, given that they can be derived from a long line of cases (see e.g. *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at 418; *Granville Technology Group Limited v Infineon Technologies AG* [2020] EWHC 415 (Comm) at [22]-[48]; *OT Computers Ltd (in liquidation) v Infineon Technologies AG* [2021] QB 1183 at [26]; *Bilta v SVS Securities Plc* [2022] EWHC 723 (Ch) at [31]), they can be summarised briefly as follows:

    i. A fraud or concealment is "discovered" when the claimant knows or is capable with reasonable diligence of discovering (only) "each of the facts without which the cause of action is incomplete": *OT Computers* [26].

    ii. The 'acid test' is therefore when could and should the claimant have found out those facts necessary for it to plead out the cause of action: e.g. for fraud "the essential facts constituting the alleged fraud": *Bilta* [31(7)(f)]. All other facts are irrelevant.

    iii. Given that the focus is on the pleading out of the cause of action, while strong or weak, the pleaded case must be one "which would not be struck out on the basis that it has no sufficient evidential basis or was not sufficiently arguable" and "must be one capable of being supported by a Statement of Truth": *Granville* [29].

    iv. In order to plead a claim alleging fraud or dishonesty, counsel must have reasonably credible material to support the allegations: *Medcalf v Mardell* [2003] 1 AC 120 at [22].

    v. Section 32 looks solely at what a reasonable claimant in the actual claimant's shoes could and would have done: the enquiry is an objective one.

    vi. While section 32 assumes on an objective basis a claimant who is reasonably attentive at all times, there will normally be a 'trigger' which puts a reasonably attentive claimant on notice as to the need to investigate a potential claim: *OT Computers* [46]-[47]).

vii. Once the claimant has (or objectively should have been, if being reasonably attentive) been put on such notice, the burden lies on the claimant to show that the fraud or concealment could (not would) only have been discovered by exceptional measures going beyond those which the claimant could reasonably have been expected to take: *Paragon* at 418.

55. While, as the Court of Appeal explained in *OT Computers* (supra), section 32 posits a single enquiry into the objective conduct of someone in the claimant's position and what it would have shown and when, in practical terms it is useful to ask in the present case: (a) When should the Claimants have been put on notice of the need to investigate the Hermes transaction? (b) What steps thereafter could they and should they have taken to investigate matters further? (c) In terms of a pleadable case in respect of each tort and each defendant (as defined above), what would those steps have shown and when?

56. I consider each of these questions in turn.

57. As to (a), the Claimants accepted that "They were first alerted to the possibility of foul play on 27 November 2015" (Skeleton, para. 35(1)). This is explained by Mr Gadhia (of the Claimants' solicitors) as follows: "On that date, the Claimants' Representatives noticed an Indian press article headed "Wirecard Acquires Great Indian Retail Group for E 230 million" [SG1/931-932]. That article described some of Hermes' assets, but did not mention Hermes by name. GIR and GIT were both mentioned." (Gadhia 1; para. 128)

58. In oral argument, Ms. Dilnot KC appeared to seek to row back from that by submitting that the 'trigger' came about only at the conclusion of a series of investigations online into published sources, culminating in February 2016. It was unclear if that was pursued but, if it was, I am unable to accept it. The clear evidence of Mr Gadhia makes it clear that the article seen on 27 November was the trigger for investigations by the Claimants to begin: "The Claimants therefore began to investigate the possibility that they had been misled in relation to the true nature of the transactions in respect of Hermes": Gadhia 1, para. 129. This was also reflected in the Claimants' Skeleton at para. 35(2): "Nonetheless, Cs immediately began to investigate."

59. Further, and importantly, even if the Wirecard announcement did not mention Hermes by name, Mr Gadhia confirms that, on 30 November 2015, the Claimants additionally saw an article in the Financial Times dated 12 November 2015 which described the sale in terms that suggested that Wirecard had bought the shareholding in GIR and which also made it clear that GIR's value, reflected in the price payable by Wirecard, was largely attributable to the value of the Hermes business.

60. It was argued (at least in the Defendants' witness evidence: see Mr Bagshaw's first statement, para. 52) that, if the Claimants had been reasonably attentive to their interests and to information circulating earlier, they could and should have been alerted a month earlier on 27 October 2015 by a Wirecard press release of that date which described the purchase by Wirecard of GIR for US$230M.

61. The Claimants' evidence was that, *following* being alerted on 27 November as set out above and *then* beginning to investigate, "On 29 November 2015, the Claimants found a press release on Wirecard's own website which indicated that Wirecard had bought

the "payments business" of GIR [SG1/378]. Again, Hermes was not mentioned in the press release, but GIT was mentioned." (Gadhia 1, para. 130)

62. I consider it tenuous on an application of the present kind to contend that the Claimants could and should unarguably have been aware of the Wirecard announcement other than when they discovered it on Wirecard's website, following the mention (for the first time as far as they were aware) of Wirecard in an Indian publication which they saw on 27 November 2015. Mr Pillai KC realistically and correctly in his oral submissions treated the 'trigger' as having been pulled on 27 November 2015 and did not pursue Mr Bagshaw's prior witness statement argument.

63. I therefore hold that the Claimants could and should have been put on notice of the need to investigate the transaction no earlier than they in fact were, i.e. on 27 November 2015.

64. As to question (b), and those steps thereafter which the Claimants could and should have taken to investigate matters further, the Defendants contended that "The fundamental elements of each claim against each [IIFL] Defendant could reasonably have been identified and pleaded on – or in a matter of weeks after – 27 November 2015" and "The claim thus could, with reasonable diligence, have been issued before 16 February 2016 and thus should have been issued before 16 February 2022": Skeleton, paras. 5 and 2 respectively.

65. Just standing back from that submission to assess it by way of overview, it requires the Court to conclude that any reasonable person in the position of the Claimants could and should have investigated and would as a result of such investigation have learned all that was necessary for solicitors and counsel to plead, firstly, a case of "fraud" (used again as a portmanteau term: I return to the separate torts below) in the two and a half months between 27 November 2015 and 16 February 2016 in relation to the transaction against some or all of the Original Defendants in the Existing Proceedings and, secondly and in addition, against each of the IIFL Defendants on the tortious basis which has been alleged in the Existing Proceedings and which is now alleged by the Claimants against the IIFL Defendants in the New Proceedings.

66. Instinctively, where, if what is now alleged is true, a sophisticated and carefully planned and concealed fraud upon the minority shareholders was planned and executed, while of course possible, it seems unlikely that all of the necessary factual averments for the serious allegations which are now made could, should and would all have been unearthed so as to plead a case of fraud (at all) and one against the IIFL Defendants in addition to or in place of the Original Defendants in the Existing Proceedings in this very short period.

67. Against that practical consideration, I turn to the Claimants' account of what they did and what they learnt once they started investigating in the period prior to 16 February 2016 is set out in Mr Gadhia's first statement at paras. 131 to 135.

68. As summarised by Ms Dilnot KC in oral argument, three steps were taken by the Claimants: (a) investigations into press articles surrounding the Wirecard purchase; (b) asking GIR (pursuant to the terms of the SPAs) for a copy of the GIR – EMIF SPA and (c) investigations into corporate filings made by Hermes, showing that the officers of GIR remained officers of Hermes .

69. I remind myself that the enquiry is not what the Claimants did, but what they could and should have done, and that the burden lies on them to show that the fraud or concealment could only have been discovered by exceptional measures going beyond those which they could reasonably have been expected to take. Mr Pillai KC submitted, with some force, that the Claimants' evidence merely narrated what they did, and did not address what they could and should have done and what that would or would not have revealed.

70. However, in a case such as this, while the burden remains squarely on the Claimants, the absence of credible allegations (or, indeed, even suggestions) by the Defendants of what investigations could and should have been undertaken and what would have been their result between 27 November 2015 and 16 February 2016 is relevant.

71. Mr Pillai KC was highly critical of the Claimants' response to matters, following having been alerted by at the very least the FT article to what he described as "the 'flip' of the Hermes shares by GIR to Wirecard". In oral argument, in response to my question, he identified the things which he submitted the Claimants could and should have done after 27 November 2015 as being (a) to instruct lawyers and forensic accountants to investigate matters further; (b) to take steps to enforce their contractual right to production by GIR of the SPA with EMIF by, if necessary, commencing proceedings against GIR and (c) to write directly to Wirecard for information.

72. I consider that it is realistically arguable that reasonable persons in the position of the Claimants, when faced with what Mr Gadhia (Gadhia 1, para. 131) describes as the confusing picture being shown in press articles (which, in particular, the most detailed FT account, did not as such describe GIR as having sold the Hermes shares to Wirecard but rather of GIR having been the subject of an acquisition by Wirecard) would take immediate steps to investigate further as best they could, and to chase up their counterparty (GIR), as they did, seeking to check the contractual position between GIR and EMIF. I do not consider that it is unarguable that learning of the Wirecard purchase that the Claimants should immediately have mobilised an immediate and highly lawyered approach.

73. I turn to aspect (c): in terms of a pleadable case in respect of each tort and each defendant (as defined above), what would those steps have shown and when? Even if the Claimants could and should have done more after 27^{h} November 2015, e.g. by taking all of the steps urged as being indispensable on a 'could and should' basis by Mr Pillai KC, would they have revealed the essential facts making up the causes of action now relied upon by the Claimants against each of the IIFL Defendants so as to allow all of those causes of action to have been properly pleaded before 16 February 2016?

74. I consider that the Claimants have a strongly arguable case, which has a more than realistic prospect of success at trial, that nothing they could have done in that short period would have revealed the information upon which they now rely to allege that, apart from the GIR interests acting fraudulently towards them and Mr Shah (whom they believed was acting for IIFL UK), *additionally* the IIFL Defendants (or one or more of them) were directly involved in "the fraud" from the beginning and were acting in conspiracy with the GIR interests and as joint tortfeasors with them and that officers of the IIFL Defendants, namely Mr Shah, Mr Vakil and Mr Parokot were acting for the IIFL Defendants and with their assent in relation to the sale and re-sale of the shares so as to make the IIFL Defendants vicariously liable for their actions.

75. I reach this conclusion for the following reasons.

76. First, I accept Ms Dilnot KC's submission that the lynchpin of and springboard for the allegations made against the Defendants in the New Proceedings was the discovery by the Claimants of the role played by EMIF and the IIFL companies in the setting up of EMIF and the facilitation of the intended onward sale of the Hermes shares at a significantly higher value to Wirecard before the Claimants' sale of their shares to GIR and in the benefiting of IIFL entities from the Hermes transaction.

77. That discovery came about by sight of disclosure given by Wirecard in proceedings (ultimately unsuccessful) brought by the Claimants against Wirecard on 18 February 2019, alleging that Wirecard was party to a conspiracy with the Original Defendants party to the Existing Proceedings.

78. That disclosure showed, for the first time (I summarise matters set out more fully in Mr Gadhia's first statement): that IIFL Wealth was behind EMIF and controlling EMIF's transactions; that Wirecard's lawyers described the acquisition of Hermes by EMIF as "the IIFLW acquisition"; that EMIF was controlled in practice by IIFL; that Mr Shah had been significantly involved in the transactions and from an early stage and that IIFL Mauritius, through its Mr Parokot, was directly involved in the due diligence exercise carried out by Wirecard prior to the Claimants' sale of their shares.

79. There was no suggestion by the Defendants that that information could have been obtained any earlier than it in fact was. It was certainly not information which could or should have been obtained by the Claimants before 16 February 2016. As Mr Gadhia explains, and as seems to me to be at least realistically arguable (whatever potential criticisms could be made about insufficiently aggressive steps being taken immediately after 27 November 2015), following the report of the Wirecard purchase in late 2015, the Claimants "were just beginning to investigate the possible fraud committed by Ramu and Palani [the Ramasamys]. They had not even considered the possible involvement of the IIFL Defendants (and had no reason to do so)" (Gadhia 2, para. 26).

80. Further, that information has caused the Claimants to investigate the potential benefit to the IIFL Defendants of the Hermes sale. That has led to further information which is also relied upon by the Claimants as showing that the Defendants (or some of them) received considerable financial benefit from the resale of the Hermes shares to Wirecard and the Wirecard transaction: see Gadhia 1, section C.18.

81. Second, I reject Mr Pillai KC's submission that the EMIF aspect was essentially 'evidential' only and of minor importance in pleading the essential facts of the causes of action in respect of the current claims against the Defendants because the Claimants' case of attribution could and should have been pleaded against them before 16 February 2016 simply on the basis of the roles and offices which Mr Shah occupied in the IIFL Defendants (as well as those occupied by Mr Vakil and Mr Parokot). It was submitted that essentially all that the Claimants have in fact relied upon (and could therefore before 2016 simply have relied upon) was the fact that Mr Shah (principally, but also the others) held offices in the IIFL Defendants and that information was publicly available and could and should have been relied upon and pleaded as the basis for the claims against the IIFL Defendants very early on.

82. In my view, this confuses the fact that, as officers of the companies, it *could* be said at any time that the actions of Mr Shah and the others, when in the scope of their employment and duties or acting on the instructions of the Defendants, were ones for which arguably the Defendants were vicariously liable, without the putting forward of any credible or proper basis for *actually* linking the wrongful acts of Mr Shah (et al.) with the Defendants.

83. I agree with Ms Dilnot KC that without knowledge of the actual role played by the Defendants in the transactions at issue in this case, it was not possible for the Claimants properly to plead attribution vis-à-vis the IIFL Defendants. It would have been a very bold pleader to assert, without any suggestion that EMIF was controlled by the Defendants and without any evidence of prior involvement of these IIFL entities in the sale of the shares and the intended on-sale to Wirecard, that those IIFL companies were liable for the actions of Mr Shah simply because he was their officer. Any such plea would have been met with an immediate (and very likely successful) strike-out application.

84. The basis on which the present case of attribution is founded is the materials discovered in the Wirecard disclosure. It is rather more than realistically arguable, in my view, that that claim based on attribution could not have been pleaded without the Wirecard information and therefore was unavailable between 27 November 2015 and 16 February 2016.

85. As it is put by Mr Gadhia (Gadhia 1, para. 169: my emphasis):

> "The Claimants' case is that <u>in the circumstances I have described</u>, Amit's [Mr Shah], Sarju's [Mr Mahroof] and Mr Parokot's actions and knowledge are to be attributed or imputed to each of the IIFL Defendants, and/or that they are vicariously liable for them. The key facts on which the Claimants rely are the employment relationships and/or directorships between each of these individuals and the IIFL Defendants, <u>and the fact that these three (as well as Mr Rohit Kumar) appear to be the principal natural persons through whom the IIFL Defendants acted in connection with the transactions</u>. In fact, <u>Amit now accepts that he was involved in the transaction as an "*officer of the IIFL group*"</u>." [The last sentence refers to the fact that in the Existing Proceedings Mr Shah has denied that EMIF was in any way involved with the IIFL Group.]

86. The Particulars of Claim are similarly founded not just upon the mere fact of the offices held or roles played but that, given the transaction described and the role played by the IIFL Defendants with EMIF in it, the acts done were within their scope of employment: e.g. paras. 13 (Mr Shah); 14 (Mr Vakil); 15 (Mr Parokot); 17 and 19.

87. Third, when the individual causes of action making up the broad claim for "the fraud" are considered, as Mr Pillai KC rightly submits they must be, the position is even clearer. I take the four causes of action relied upon against each of the Defendants in turn.

88. *Deceit / Fraudulent Misrepresentation*. I do not consider that that these claims could have been fully discovered and brought before 16 February 2016. Put another way, I consider that there is a realistic prospect of success of the Claimants arguing that the essential facts for the cause of action in relation to "the fraud" could not have been

discovered so as to be pleaded before 16 February 2016. But even if they could and should have been as against the Original Defendants in the Existing Proceedings, for the reasons set out above, they could not have discovered and pleaded against the IIFL Defendants, nor could the basis of attribution now relied upon in the New Proceedings have been discovered before that date. While the fact of Mr Shah or the others being officers of IIFL Wealth, IIFL Singapore, IIFL Mauritius could easily have been discovered because it was publicly available information in 2015 (see the details given in Bagshaw 1, at paras. 55 to 62), that of itself was no ground for asserting a cause of action and it is only the information as to the active involvement of these IIFL companies in the Wirecard and GIR transactions and the use by them of EMIF that enabled (and justified) the attribution claims to be made against the Defendants

89. *Intimidation*. The Defendants submitted that this cause of action could not benefit from the postponement of the limitation period by section 32 in any event for two reasons.

90. First, section 31(1)(a) applies the postponement only in respect of claims where fraud is a juridical part of the claim: *Beaman v ARTS Ltd* [1949] 1 KB 550, 558; *Sixteenth Ocean GmbH v Société Générale* [2018] EWHC 1731 (Comm) at [133] and [135]. A claim for intimidation is not a fraud-based claim.

91. Secondly, section 32(1)(b) is inapplicable because no fact relevant to the Claimants' right of action has been deliberately concealed by the Defendants because it is, as it was put by Mr Pillai KC, a necessarily "overt tort", the elements of which are apparent when it occurs.

92. Ms Dilnot KC accepted the first point but not the second.

93. While the act of intimidation by Mr Shah was overt, she submitted that the fact that it was being done by him acting for the IIFL Defendants whose role in the Wirecard and GIR transactions was (necessarily deliberately given their intention to benefit from the "flip") concealed from the Claimants and which was such as to render them vicariously liable for that intimidation fell squarely within section 32(1)(b). I consider that the Claimants have a realistic prospect of success on this point.

94. Once that threshold point is passed, then the question is once again one of attribution and vicarious liability and is accordingly decided by my decision in relation to deceit above.

95. *Conspiracy and Joint Tortfeasance*. I take these causes of action together as they are closely allied. These claims (see Particulars of Claim, paras. 130 ff.) rely upon the active participation by the IIFL Defendants in the deceit and intimidation by their furthering of the same through the use of EMIF and funding provided to GIR (inter alia), which constituted their active participation in a common design between them and the Original Defendants: see Particulars of Claim, paras. 133 and 134.

96. I reject the argument by the Defendants (Skeleton, para. 59) that "All that has changed is that the Claimants now plead that Mr Shah's actions are generally attributable to all three Defendants […]" and that "The other amendments generated by the Wirecard disclosure and shown by the 'redline' which allege (as put in (Gadhia 2, para 15) the "true extent of the IIFL Group's involvement with the fraudulent scheme" do not add any essential facts; it is not suggested by the Claimants that the allegations of

conspiracy and joint tortfeasance in the Existing Proceedings were (and are) incomplete and unviable".

97. This misses the fact that while the original pleas were viable as against the Original Defendants, the new materials widen those able to be identified as having participated in the conspiracy etc. and give rise to previously unknown and undiscoverable claims against *additional* participants, namely the IIFL Defendants.

Conclusions

98. For the reasons set out above, the first ground of the Defendants' application fails.

Ground (2): Failure to make full and frank disclosure

99. The second ground of the Defendants' application is that the Claimants, when applying for permission *ex parte*, failed to comply with their duty to make a full and fair presentation of material matters which "might reasonably be thought to weigh against the making of the order sought" : Commercial Court Guide (2022), Appendix 9, para. 6(c)). Eight matters were originally relied upon, as set out in Mr Bagshaw's first statement. As summarised in Appendix 1 to the IIFL Defendants' skeleton argument, there are now only seven (the eighth, as to collateral use of the Wirecard disclosure in these proceedings, was not pursued before me).

100. The context in my view is important. This was an application by the Claimants to serve out made upon the basis of the well-trammelled allegations already in play in the Existing Proceedings against the Original Defendants. The IIFL Defendants were now said to have been involved in the same facts and matters making up those allegations on the basis of the revelations of the role of those Defendants provided by the 2019 disclosure in the Wirecard proceedings. That basis either gave rise to a properly arguable case (a) of that involvement and (b) of its non-discoverability by 16 February 2016 for section 32 purposes or it did not.

101. I consider that the approach taken by the Defendants to the first four instances of alleged unfair or misleading presentation is founded (erroneously) upon their argument that any case against the IIFL Defendants need only simply have relied upon the fact of Mr Shah (and Mr Vakil and Mr Parokot) being officers and therefore of any case of attribution being pleadable immediately on the basis of the publicly available information to this effect.

102. *Breach 1* relates to the 2010 Meeting at which Mr Shah and Mr Vakil were introduced as being officers of other IIFL companies than IIFL UK. I do not consider that this was material, given that what was relied upon was not only the fact of the posts held but, principally, the involvement of the IIFL Group shown by the Wirecard disclosure: see Gadhia 1, para. 192(4).

103. *Breaches 2, 3 and 4* relating to matters after 16 February 2016 which showed that IIFL entities other than IIFL UK were being or should have been considered by the Claimants as potential defendants. I do not consider that these materials (pre-action correspondence in 2017; a letter as to Mr Shah's employment by IIFL Wealth discovered in 2019; the draft 2020 Defence of Mr Shah in the Existing Proceedings) had any bearing on the key matter addressed fully by Mr Gadhia of whether the

Claimants could and should have discovered the claims against the IIFL Defendants before 16 February 2016. Alleged breaches (2) to (4) concern the position if Indian law applied and various other dates needed to be considered. On an *ex parte* application of this sort, it was unnecessary for the Claimants, having alerted the Judge to the possibility of Indian law being argued to apply (see Gadhia 1, para. 190), then to carry out an alternative exercise applying Indian law to the facts.

104. As to *breach (5)*, it is suggested that it was misleading of the Claimants to rely upon what was said to be "a large volume of critical documentary material [from the Wirecard disclosure] which forms an important part of the basis" for the allegations made against the IIFL Defendants, when Mr Gadhia refers only to a dozen documents (Gadhia 2, para 52(3)). This in my view exemplifies the wrong approach to allegations of unfair presentation which seeks to identify each and any inaccuracy as potentially material. It cannot sensibly be said that this description (if inaccurate) is "of such weight that their omission may mislead the Court": MRG (Japan) Ltd v Engelhard metals Japan Ltd [2003] EWHC 3418 (Comm) at [28].

105. *Breach (6)* relates to the alleged failure of the Claimants to refer to the fact that in their Reply in the Existing Proceedings where it was alleged by the Ramasamy Defendants that Indian law applied to the claim the Claimants merely put them to proof but did not deny that Indian law applied. There is perhaps some slight force in the fact that the Judge should have been told that the Claimants' case on applicable law being English law had firmed up since the Existing Proceedings, but given the terms of Mr Gadhia's reference to Indian law (Gadhia 1, para. 190), I am not persuaded that the omission was either unfair or, more importantly, material.

106. *Breach (7)* alleges that the Court was not taken through each of the four claims separately. While it is correct that each cause of action requires separate analysis (see earlier in this Judgment), this is a groundless allegation. In circumstances where, as was made clear in the supporting witness statement and as I have analysed, the over-arching issue for each cause of action was that the single fact of each of the IIFL Defendants' active involvement in "the fraud" giving rise to each cause of action was not discoverable until the Wirecard disclosure, the Claimants' case was fairly and fully presented. It was not necessary to go further.

107. For these reasons, I reject the second ground of the Defendants' application. The matters relied upon are either not made out at all or are trivial points of detail which cannot sensibly meet the materiality test.

Disposal

108. The Defendants' application is accordingly dismissed.