Neutral Citation Number: [2021] EWHC 2950 (Ch)

Case No: FL-2019-000017
Case No: FL-2021-000004
Case No: FL-2021-000006

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

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

Date: 05 November 2021

Before :

MR JUSTICE MILES

- -

Between :

ALLIANZ GLOBAL INVESTORS GmbH & Ors.	**Claimants**
- and –	
RSA INSURANCE GROUP LIMITED (formerly RSA INSURANCE GROUP PLC)	**Defendant**

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Peter de Verneuil Smith QC, Shail Patel and William Harman (instructed by **Brown Rudnick LLP**) for the **Claimants**
Tom Adam QC, Simon Hattan and Jacob Rabinowitz (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 22 and 25 October 2021

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APPROVED JUDGMENT

Handed down today at 10AM by email, as per Covid-19 protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be 10AM on the 5 November 2021.

Mr Justice Miles :

Introduction

1. I heard the third case management conference on 22 and 25 October 2021. Most of the time was spent on the Defendant's application to strike out or for summary judgment and this is my judgment about that.

2. The claims are brought under section 90A of the Financial Services and Markets Act 2000. There are three sets of proceedings making materially identical allegations. Claim FL-2019-000017 was issued on 8 November 2019, Claim FL-2021-000004 on 11 May 2021, and Claim FL-2021-000006 on 18 June 2021. I shall explain the reason for these three sets of claims in a moment.

3. The Claimants in the original claim comprised over 70 institutional investors, whose claims are funded by Woodsford Litigation Funding Limited. The Defendant (sometimes referred to below as RSA) was at the material times a UK listed public company which operated a global insurance business via its subsidiaries.

4. In broad summary, the Claimants claim to have suffered loss and damage as a result of acquiring, continuing to hold or disposing of interests in shares in the Defendant in reasonable reliance on allegedly misleading or untrue statements and/or omissions made by the Defendant in relevant published information (under para. 3 of Schedule 10A FSMA); and/or as a result of alleged dishonest delay by the Defendant in publishing relevant information (under para. 5 of Schedule 10A FSMA). The Defendant denies all liability.

5. There is no dispute that between 2009 and 2013 the Defendant's Irish trading subsidiary, RSA Insurance Ireland Limited (RSA Ireland), engaged in (a) inappropriate accounting practices, with an impact on RSA Ireland's finances of £35m; and (b) deliberate manipulation of insurance claim reserves through the under-reserving of large loss claims by £37m. There is a dispute as to whether under-reserving of other claims by £128m was the result of any misconduct or inadequate corporate governance.

6. The Defendant disclosed the misconduct within RSA Ireland in announcements to the market in November and December 2013, following which its share price dropped significantly.

7. The Claimants' case in more detail is (A) that from 2009 to 2013 the Defendant (a) published statements that were rendered untrue or misleading by (i) the fact that the financial misconduct within RSA Ireland had occurred/was occurring and (ii) the alleged fact that inadequate corporate governance and controls existed within RSA Ireland and the Defendant; (b) omitted to disclose such matters and/or (c) delayed publishing information in respect of them); and (B) that various senior executives within the Defendant knew or were reckless as to the falsity of the published statements and/or knew the omissions to be dishonest concealment of a material fact and/or acted dishonestly in delaying the publication of relevant information.

8. The allegedly misleading misstatements are said to have been made primarily (but not exclusively) in the Defendant's Annual Reports. It is said that these Reports (i) read as

a whole, were untrue or misleading because they gave the false impression that there was prudent reserving and effective corporate governance and controls processes within RSA Ireland and/or the Defendant; (ii) contained specific statements which were untrue or misleading in light of the alleged misconduct and corporate governance failings within RSA Ireland and/or the Defendant; and (iii) contained financial statements that were false as a result of the misreporting of RSA Ireland's profits.

9. The Defendant denies that its Annual Reports or other relevant published information contained false or misleading statements. The Defendant (i) denies that it is sufficient for the purposes of s.90A FSMA to rely upon an impression given by published information as a whole, as opposed to specific statements; (ii) denies that any specific statements were untrue or misleading; and (iii) reserves its position, pending further analysis, as to whether any relevant financial statements were materially inaccurate.

10. So far as concerns the allegedly inadequate corporate governance, the Claimants allege that it is to be inferred from the financial misconduct at RSA Ireland that both it and the Defendant lacked proper governance systems and controls. The Defendant denies that, contending that it had adequate corporate governance and controls, but that these were deliberately subverted by a small number of senior individuals in RSA Ireland.

11. The Claimants also allege that the Defendant's published information omitted material information required to be included, and that the Defendant omitted to publish information, pursuant to s.118C(2) FSMA and the Disclosure and Transparency Rules in the FSA (later FCA) Handbook. The Defendant denies that it omitted any such information. It contends that it was not aware of the alleged misconduct within RSA Ireland until after the publication of the information relied upon; and reserves its position as to the materiality of any information said to have been omitted.

12. In order to establish liability under s.90A it is necessary to establish that "persons discharging managerial responsibility" within the Defendant (PDMRs) knew of or were reckless as to the alleged falsity and/or misleading nature of the relevant statements, and/or knew that the alleged omissions comprised a dishonest concealment of material facts. The Claimants allege that Mr Simon Lee (the CEO of the Defendant), Mr Philip Smith (the CEO of RSA Ireland), Mr Paul Donaldson (who held various executive roles in the Defendant during the relevant period) and Mr Chris Rash (CFO International Business, Head of Group Financial Planning and Analysis, and subsequently Group Chief Accountant of the Defendant) were PDMRs of the Defendant and that they had the relevant state of mind.

13. It is common ground (i) that Mr Lee was a PDMR of the Defendant and (ii) that Mr Smith knew of significant financial misconduct in RSA Ireland. However, the Defendant denies that at any material time any of Mr Smith, Mr Donaldson or Mr Rash were PDMRs of the Defendant; and that at any material time any of Mr Lee, Mr Donaldson or Mr Rash knew of or behaved recklessly in relation to the alleged false or misleading statements, or knew of any dishonest concealment of material facts. The Defendant contends that any relevant misconduct within RSA Ireland was concealed from the Defendant and its PDMRs.

14. The Claimants say that they acquired shares in the Defendant and/or continued to hold them in reasonable reliance on the relevant published information.

15. The Claimants are all professionally managed institutional investors. They say that they fall into three reliance categories (RCs): those who allege that their employees or agents read and relied upon the Defendant's published information (RC1); those who allege that they relied on other sources of information (such as analysts' reports or financial news services) which acted as a conduit for the published information (RC2); and those who allege they relied on the accuracy of the price of shares in the Defendant (RC3). The Claimants also advance a case of presumed reliance, i.e., they contend that there is a legal presumption that they made investment decisions in reliance on the published information and the price of the shares depended on that information. The Claimants contend that they have suffered loss as a result of their reliance. Some of the Claimants allege only presumed reliance and on not on any of the RCs.

16. The Defendant contends that the claims are unfounded. Its counsel described them as opportunistic and speculative. However the only application before me was about limitation rather than the broader merits.

17. As already explained there are now three overlapping sets of proceedings making the same allegations. The second and third set of proceedings (the New Claims) were brought in 2021. In the New Claims, the claims of 82 of the 92 Claimants overlap entirely with the claims brought by 35 of the 60 existing Claimants, in the sense that the claims are brought in the alternative by new entities in respect of the same securities.

18. The solicitors for the Defendant naturally sought an explanation for the New Claims. The Claimants' solicitors rather belatedly explained that the primary rationale for issuing the New Claims was said to be "an abundance of caution… in anticipation that the Defendant may seek to challenge the standing of certain [existing] Claimants".

19. Before and at CMC 2 on 20 July 2021 the Defendant indicated that it was likely to bring a limitation application in respect of the new claims.

20. At CMC2 I also gave directions requiring all of the Claimants to serve further particulars of their standing to bring the claims.

21. On 10 September 2021, the Defendant served its Defence to the New Claims. Para. 1A pleads that each of the New Claims is time-barred on the basis that the new Claimants had discovered, alternatively could with reasonable diligence have discovered, material enabling them to allege the facts necessary to advance their claims substantially before 11 May 2015. The Claimants responded by relying on the postponement of the primary limitation period under s.32 of the Limitation Act 1980 until 20 December 2018, being the date the CBI announced the results of its investigation into RSA Ireland, alternatively 18 June 2015, being the date of publication of the decision of the EAT. I shall return to these events below.

22. On 24 September 2021 the Claimants served their Further Particulars of Standing (the FPoS). For 16 of the 60 Existing Claimants, the FPoS indicated that the relevant Claimant either "admits that it does not have standing to bring its claim" or "intends to apply to substitute itself with [a New Claimant]". As already noted, the Claimants' solicitors had already explained that many of the new Claimants were bringing claims in the alternative, against the possibility that the existing Claimants did not have standing.

23. The limitation application was issued on 17 September 2021. It was supported by the first statement of Mr Clarke (a solicitor); on 1 October 2021 the Claimants served the third statement of Mr Shrimpton (also a solicitor); and on 8 October 2021 the Defendant served Mr Clarke's second statement.

Legal principles

(a) Strike out/summary judgment

24. The Court may strike out a claim if the statement of case discloses no reasonable grounds for bringing the claim or is an abuse of the Court's process: CPR 3.4(2)(a), (b). The Court may give summary judgment against a claim if it has no real prospect of success, and there is no other compelling reason why the claim should be disposed of at trial: CPR 24.2. The applicable principles are well-known, and were summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* and I shall not set them out again here. The test connotes an absence of reality. The burden is on the Defendant as applicant to persuade the court that the action should be dismissed. It was common ground that there is no material difference between the test under CPR 3.4 and CPR 24.2 for the purposes of this application.

25. The Claimants also relied on the proposition that it is not generally appropriate to strike out a claim on assumed facts in an area of developing law. Decisions as to novel points of law should be based on actual findings of fact: *Begum v Maran (UK) Limited* [2021] EWCA Civ 326 at [23].

(b) Section 32(1) of the Limitation Act 1980

26. Section 32 provides (so far as material):

> "(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."

27. There is no dispute that the primary limitation period is six years or that s.32(1)(a) or (1)(b) or (2) are engaged given the nature of the alleged s.90A FSMA claim. The limitation issue turns therefore on the words "the period of limitation [of six years] shall not begin to run until the plaintiff has discovered the fraud [or] concealment … or could with reasonable diligence have discovered it".

28. In *Paragon Finance Plc v DB Thakarar & Co. (A Firm)* [1999] 1 All ER 400, Millett LJ said at p.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. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

29. This passage has been treated as authoritative in a number of later authorities including *FII Group Litigation Test Claimants v HMRC* [2020] UKSC 47 ("*FII*").

30. A "fact relevant to the plaintiff's cause of action" within s.32(1)(b) is a fact without which the cause of action would be incomplete. It is not relevant that the defendant has concealed a fact which, if known, would merely strengthen an existing case: see *Arcadia Group Brands v Visa Inc* [2015] EWCA Civ 883, per Sir Terence Etherton C at [49].

31. "Discovery" of a fact for the purposes of s.32 has in fraud cases generally been held to occur when the claimant is aware of sufficient material to be able properly to plead that fact: see e.g. the first instance decision in *OT Computers* (sub. nom. *Granville Technology Group Limited (In Liquidation) v Infineon Technologies AG* [2020] EWHC 415 (Comm)), Foxton J at [28]. In *FII* the Supreme Court decided that a slightly earlier date is appropriate in s.32(1)(c) (mistake) cases, being (in line with the law on s14A) the time when the claimant knows "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence". The Supreme Court stated that this was "not the occasion on which to review the formulation used in the fraud cases", as did the Court of Appeal in *OT Computers*.

32. The Defendant reserved its right to argue hereafter that the test preferred by the Supreme Court in *FII* should also apply to cases of fraud or concealment but was content at the present hearing to proceed on the basis of the statement of claim test.

33. What is necessary under the section is knowledge which enables the claimant to make (or believe he can make) an allegation. He does not have to have certainty. See *Granville*, [25]-[38].

34. What must be discovered is the fraud actually alleged in the claim; it is not sufficient that the claimant could with reasonable diligence have discovered that there was some other fraud or wrongdoing: see *Boyse v Natwest Markets* [2021] EWHC 1387 (Ch) at [29]. As Teare J put it in *Cunningham v Ellis* [2018] EWHC 3188 (Comm) at [87]:

> "For these purposes, that which must have been discovered or discoverable by the claimant before the limitation period will begin to run is knowledge of the essential facts constituting the alleged fraud. It is not sufficient that the claimant knows that there has been some unspecified deception (see McGee at [20-013] and *Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727) or only of a fraud "in a more general sense" as opposed to the precise deceit" (see *Horner v Allison* [2014] EWCA Civ 117 at paragraph 14)."

35. When considering whether a fraud has been "discovered" the courts should take care to avoid the use of hindsight or attributing strands of information which have emerged over time greater significance than they would reasonably have assumed to a claimant contemporaneously: *FDIC v Barclays Bank* 2020 EWHC 2001 (Ch) at [44].

36. The Court of Appeal recently reviewed the authorities in *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501. At [47] Males LJ said this:

> "…although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

37. This shows that it may help to analyse the events in two stages: is there anything to put the claimant on notice of a need to investigate, and what would a reasonably diligent investigation then reveal? But the claimant has to act with reasonable diligence at both stages. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. Reasonable diligence is required throughout.

38. The main legal debate concerned the extent to which the court should take into account the characteristics or circumstances of the claimant. This question arose in *OT Computers*. Males LJ cited the passage from *Paragon* set out earlier. He also cited a passage from *Peconic Industrial Developments Ltd v Lau Kwok Fai* [2009] 5 HKC 135 at [30] where Lord Hoffmann NPJ preferred to leave open the issue of "the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown",

noting that "It does not follow that because an objective standard is applied, he must be assumed to have been someone else".

39. Males LJ also referred to *Hussain v Mukhtar* [2016] EWHC 424 (QB), where Martin Chamberlain QC (sitting as a deputy High Court judge) suggested that this did not mean that personal characteristics such as naivety and inexperience in financial matters should be taken into account, as to do so would involve a departure from the objective standard which the cases require. Males LJ agreed that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naive, shy, nervous, uncurious or ill-informed, are not relevant. But he said that it did not necessarily follow, as Lord Hoffmann NPJ said in *Peconic*, that the claimant must be assumed to be someone or something which he is not.

40. The Court of Appeal went on in *OT Computers* to decide that it was relevant that the claimant company (which had previously been in business) was in administration at the time when the information said to provide the means of discovery entered the public domain. They held that the steps or actions that would be reasonably expected of an administrator differed from those that would be expected of the directors of a trading company. At [59] Males LJ said this

> "The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant - the actual claimant and not a hypothetical claimant - is not disadvantaged by the concealment. In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests. Rather, claimants in a similar position should be treated consistently. However, a claimant in administration or liquidation which is no longer carrying on business is not in a similar position to claimants which do continue actively in business and it is unrealistic to suggest otherwise."

41. The question can be seen as turning on the level of abstraction of description of the characteristics of the claimant. The relevant claimant in *OT Computers* could be described as a company with a specific business or as a company in administration. The court preferred the second description.

42. In the present case the Defendant submitted that the Claimants here were all professionally managed institutional investors and that they should be held to that standard. The Claimants submitted that that was too general a description. The various Claimant funds comprise a spectrum. At one end are actively managed funds where the managers make decisions about specific companies based on specific research into public information. At the other end are tracker funds where investment decisions are based on the market capitalisation of the issuers making up an index and where the managers do not monitor the individual underlying investments. The Claimants said that, applying *Paragon*, there was a range of kinds of business carried on by the

Claimants. Or in the language of *OT Computers* there were variations in the "position" of the Claimants.

43. The Claimants also noted that there is a wide variation in the losses said to have been suffered by the funds. These range from around £3,000 to £23 million. The Claimants relied on *Peconic* to say that what a given claimant would reasonably have been expected to do will depend on the loss they had suffered. The Claimants noted that the Defendant had brought the application on a blanket basis without differentiating between different kinds of funds.

44. I shall return to this debate and its implications for the present application below.

(c) Pleading fraud

45. In *FDIC*, Snowden J discussed the principles concerning fraud claims at [36]-[39]. They are well-known and include that the pleading of fraud or deceit is a serious step. A party should not make speculative claims in fraud without a solid foundation in the evidence. An allegation of fraud or dishonesty must be sufficiently particularised.

46. The Defendant submitted that a barrister may plead an allegation of fraud if there is "reasonably credible material which establishes an arguable case of fraud" (BSB Handbook, r.C9.2.c). I do not consider that that is materially different from the approach in *FDIC*.

The issue

47. There has so far been no disclosure and the Defendant does not seek to establish that the new Claimants actually discovered the fraud. The issue before the Court is whether the new Claimants have a real prospect of establishing that they could not with reasonable diligence have "discovered" before 11 May 2015 sufficient facts to enable them to plead the claim.

Further factual background

48. I shall now summarise the main factual material referred to by the parties in the course of their arguments.

49. On 5 November 2013 in the context of an Interim Management Statement covering group performance in a number of jurisdictions and across its various business lines, the Defendant referred to "developing trends across the motor market" and "adverse bodily injury trends" in Ireland.

50. On 8 November 2013 the Defendant announced the suspension of Mr Smith, Mr Burke and Mr O'Connor by RSA Ireland "pending the outcome of an investigation into issues in the Irish claims and finance functions".

51. On 10 November 2013 the Defendant announced a review by PwC "of the issues identified last week in [RSA Ireland's] claims and finance functions". It was said that the review "will focus on the financial and regulatory reporting processes and controls within the Irish Business and the Group oversight of the Irish Business during the relevant period".

52. On 28 November 2013 the Defendant announced that Mr Smith had resigned and confirmed that it was working with the CBI on this investigation. Mr Smith was to leave without any severance payment being made.

53. On 28 November 2013 the Guardian reported Mr Smith's claims that he was being made the "fall guy". In the article Mr Smith's reported comments did not suggest that he accepted any blame for wrongdoing within RSA Ireland or that anyone senior within the Defendant was aware of the wrongdoing. The article speculated that Mr Lee's position as CEO of the Defendant was precarious. The Irish Examiner carried a similar story on 29 November 2013 again quoting Mr Smith as saying he was the fall guy. The article repeated that Mr Smith was not getting any severance payment.

54. On 13 December 2013 the Defendant announced the "Completion of Reserve Review and Management Changes". The reserve review concluded that the Irish reserves would need to be strengthened by £130m. The "management change" was the departure of Mr Lee, the Group CEO. The Chairman thanked Mr Lee for his contribution to RSA and his strong leadership.

55. There was press comment about Mr Lee's resignation. On 13 December 2013 the Times reported that "a financial scandal in Ireland claimed the job of [the Defendant's] chief executive after less than two years in the job". On 4 February 2014 the Guardian commented: "[s]enior executives have been sacked and… Simon Lee stood down" in connection with "accounting irregularities at RSA's Irish division, which have left it with a £200m black hole in its finances".

56. On 7 January 2014 the Defendant issued an announcement, stating that the PwC report would be received by the Board on Wednesday. The Defendant stated, "we remain confident in our view that the financial and claims irregularities identified in November 2013 were isolated to Ireland".

57. On 9 January 2014 the Defendant made an announcement that:

    i) The Board and PwC had concluded that there had been "inappropriate collaboration amongst a small number of senior executives in Ireland".

    ii) PwC had described RSA's Group Control Framework as appropriate. It concluded that "there were no obvious indicators relating to the issues identified in the Irish business that were ignored, at either Regional or Group level".

    iii) KPMG and RSA Group Internal Audit had concluded that the financial and claims irregularities were isolated to Ireland.

    iv) Following an internal disciplinary process, Mr O'Connor and Mr Burke were "dismissed for their roles in relation to large loss and claims accounting irregularities".

58. On 6 February 2015 the Insurance Post published an article headed "Ireland performance was 'too good to be true' says RSA CEO Hester". By then Mr Stephen Hester had become CEO of the Defendant. He was not involved in the business in the relevant periods. The article recorded Mr Hester as saying that RSA Ireland's results were known by RSA to be "too good to be true" but that "Inside RSA people [seemed

to think] that's very nice, let's keep off and let them keep doing it" (square brackets in original).

59. As noted above, Mr Smith said in late 2013 that he had been made the scapegoat. He brought constructive dismissal proceedings against RSA Ireland in the Irish Employment Appeals Tribunal (the EAT), saying that he had been forced to resign after an unfair investigation and the public allegations made against him. There were public hearings in March 2015 which led to a series of newspaper reports from several sources including Reuters, The Irish Daily Mail, The Irish Times, the Irish Independent and RTE, including these:

    i) On 9 March 2015, Reuters published an article entitled "RSA's 'Irish Treasure' helped support group – former executive" which said: "RSA viewed surpluses generated by its business in Ireland as "treasure" that could be used to support underperforming parts of the wider group, the former chief executive of the Irish division said on Monday. RSA's Irish business was left without a safety net after it was directed to release over 250 million euros… in reserves to support the group's results between 2007 and 2011, Philip Smith told a constructive dismissal hearing in Dublin. "This Irish reserve margin was almost unique in terms of its scale, such as it became termed 'the Irish Caves'," Smith said, adding that former RSA Chief Executive Simon Lee would call the Irish reserves "treasure" to be used as the group saw fit."

    ii) On 10 March 2015, the Irish Daily Mail published an article entitled "UK parent 'looted Irish reserves', says ex-CEO", which reported Mr Smith's evidence that "Simon Lee would refer to the Irish reserves as 'treasure in Irish caves' to be used as the group saw fit".

    iii) The same day the Irish Times reported that "Smith told the hearing of how some EUR255 million in reserves were released in the Irish business on the instruction of its parent, who saw Ireland as a 'treasure cave'", and that these funds were claimed to have been "used to flatter the group's results" … "[t]he nub of Smith's defence is that the issues that arose in the Irish business were known to his bosses at… group level at all times".

    iv) The same day the Irish Independent reported that Mr Smith had told the hearing that "[u]nder group direction, RSA in Ireland released EUR250m in prior year reserves to support group results and to offset under performance"; and that "senior managers in the group had instructed him" that the so-called "treasure in the Irish caves" was "a group asset", to be "used as the group saw fit".

    v) The same day Reuters published an article headed "RSA bosses knew of Irish problems before scandal erupted – former executive" which stated: "According to [Mr Smith's] resignation letter… he said he never took any steps to cover up reserving issues from his colleagues in Ireland or at group level. … 'The reserving issues now being investigated in retrospect was always an open practice, not done surreptitiously or in a secret manner. Equally no attempt was ever made to cover up from colleagues at RSA group level,' the letter said. 'On the contrary and on a number of specific occasions I recall that some cases were discussed with senior personnel at group level where the decisions were made collaboratively to post less than was being suggested by the external advisor.'"

vi) On 11 March 2015 the Irish Times reported Mr Smith's evidence that "his bosses in the UK had agreed with its approach to reserving on certain cases".

vii) Also on 11 March 2015 RTE reported the evidence of the RSA Ireland CFO, Mr Rory O'Connor. He gave evidence that Mr Smith had insisted on the reserves but that he had not blown the whistle because Mr Smith "seemed to be protected by his relationship with… Simon Lee". Mr Smith was reported as saying that he believed there was a climate of fear and anxiety regarding the scale of the British oversight and some people were running for cover as the blame game kicked in.

viii) On 12 March 2015 Reuters reported the evidence of Mr O'Connor that Mr Smooth had persistently under-reserved for large claims in violation of company policy to make the Irish business look good. Mr O'Connor said he decided not to blow the whistle on Mr Smith because that he would not have been supported given "strong relationship Philip Smith had with senior figures in the RSA Group, with [former group chief executive] Simon Lee, with [former chief accountant] Chris Rash". (Square brackets in original). It said that "earlier this week, Smith's resignation letter was read out at the tribunal in which he said that senior executives from the group were aware of the reserving issue".

60. In June 2015 the EAT (consisting of three members) gave its decision. RSA Ireland had been represented by solicitors and counsel. Two of the Defendant's employees, a senior in-house lawyer and the head of human resources gave evidence about the investigation in late 2013. RSA Ireland did not call Mr Lee or any other directors of the Defendant.

61. The judgment of the EAT does not follow the usual method of making clear findings of fact. It is not easy to distinguish recitations of evidence from findings. The tribunal also unfortunately used initials rather than full names, and this may have led to some confusion in particular in relation to Mr Rash (see further below). The judgment has therefore to be treated with some caution. For present purposes however it suffices to record the following:

i) Mr Smith gave evidence that Mr Lee had reserving issues concerning large losses referred to him from time to time. The tribunal recorded that the evidence about that was not contested.

ii) From 2011 onwards there was a more formal process called Gateway 50 for setting reserves for large claims. The attendees at Gateway 50 meetings included a number of employees including the Commercial Underwriting Director. From other documents it is known that this was a Mr Colin Ryan. The attendees at Gateway 50 meetings included "CR". The tribunal recorded that all the attendees held posts within "the respondent company".

iii) The tribunal concluded that "It is nonsense to suppose that nobody other than these individuals [i.e. the Gateway 50 attendees] knew about this. The respondent's suggestion that the reason it was not picked up in the numerous audits were because the auditors were not put on notice of it is incredible."

iv) Under the heading of "loss" the tribunal was satisfied that "[Mr Smith] was aware of the practise [of setting reserves] as were at least two dozen other employees most of which were in Ireland but some of which were in the UK

group. Whilst as CEO he did have responsibility to ensure that practises which could attract Central Bank criticism did not develop or continue, this practise was one that was known, and known for a very protracted period of time, by too many high ranking company employees to lay the blame solely at the feet of the claimant".

v) RSA Ireland had destroyed Mr Smith's reputation and the tribunal awarded him €1.25m.

62. The Defendant announced on 6 July 2015 that it would appeal the EAT's decision. It stated that "Contrary to the impression given by the Tribunal decision, no one at RSA Group level had any prior knowledge of the inappropriate large loss reserving practices which emerged in RSA Ireland. RSA Group would never have condoned such practices … We continue to believe that Mr Smith's case is without merit and in the circumstances have no option but to appeal the judgment." In January 2016 the appeal was settled. The details of the settlement were not disclosed. Press coverage at the time stated "The Circuit Court in Dublin has today ordered by consent that RSA's appeal will be allowed, with the effect that all findings in the earlier decision of the [EAT] have been vacated. The terms of the settlement are confidential."

63. On 20 December 2018 the Central Bank of Ireland (the CBI) announced that it had taken Enforcement Action against RSA Ireland, imposing a fine of €3.5m. The announcement included these points:

i) There had been serious breaches relating to the failure by RSA Ireland to establish and maintain technical reserves in respect of all underwriting liabilities assumed by it; the failure to have administrative and accounting procedures and internal control mechanisms which are sound and adequate; and the failure to have robust governance arrangements. RSA Ireland had admitted these breaches.

ii) The breaches arose from serious shortcomings in RSA Ireland's internal controls and corporate governance frameworks enabling certain individuals within RSA Ireland to deliberately manipulate claims with under reserving of multiple large loss claims from 2009 until 2013. This was done by recording claim reserve estimates on RSA Ireland's claims database which was significantly lower than the claim handler's recommended reserve estimate and significantly delaying the recording of recommended claim reserve estimate increases.

iii) The CBI's investigation also identified weaknesses in RSA Ireland's accounting procedures and internal finance control mechanisms. The extensive issues identified within RSA Ireland's claims and finance functions led to an understatement of €78.2 million in the firm's technical reserves as at 30 September 2013.

iv) The investigation found that failure in RSA Ireland's corporate governance framework, particularly in its internal reporting structures, allowed the under-reserving of large loss claims to go undiscovered and unchecked for several years.

v) Details were given of the deliberate manipulation of large loss claim reserve estimates. These amounted to some €29.3 million as at 30 September 2013. The accounting irregularities involved unsubstantiated manual adjustments to the firm's calculations of its technical reserves.

vi) The CBI concluded that the company failed to have administrative and accounting procedures and internal control mechanisms which are sound and adequate for the purposes of the relevant Irish regulations. This included certain individuals within the claims function having authority to approve large loss claim reserve estimates at varying thresholds up to €5 million. The firm's reserve review process was regularly circumvented by certain individuals within the company to avoid unreserved claims appearing in a notification or review list.

vii) RSA Ireland had failed to ensure that it had adequate administrative and accounting procedures or internal control mechanisms in place to identify and prevent the accounting irregularities in its finance function during the relevant period. These included a large number of manually maintained spreadsheets being used in the financial reporting process which increased the risk of errors omissions and manipulation of figures being reported by the finance function

viii) There were also breaches of the Corporate Governance Code for Credit Institutions and Insurance Undertakings 2010. The CBI found that the RSA Ireland had failed to ensure that its governance arrangements were sufficiently robust to enable effective internal reporting and ensure that accurate and reliable information was provided to the necessary decision-makers. The company also failed to ensure that reporting between key control functions, senior management, the board and committees, and at Group level, was accurate and reliable

ix) In deciding on the appropriate penalty the CBI took into account the seriousness of the failure of the company to maintain adequate technical reserves; the systematic nature of the weaknesses in the company's internal controls governance frameworks and the extended period of time over which breaches occurred, spanning the period from 2009 to October 2013.

Summary of the parties' arguments

64. The Defendant submitted (in outline) as follows.

i) The Claimants are all professional managed institutional investors and the test of reasonable diligence should hold them to that standard. The Court should not parcel out the Claimants by their individual characteristics and situations, according to the way they happened to run their funds.

ii) Claims under s.90A begin by alleging that the issuer's published information was untrue or misleading, and then proceed by alleging that that was to the knowledge of a PDMR.

iii) By mid-January 2014 at the latest a reasonably attentive investor in each Claimant was on notice of the need to investigate a s.90A claim. Any reasonably

attentive investor would have been aware of the published information of the Defendant.

iv) The facts stated in these announcements were more than enough to alert a reasonably attentive investor in the Claimants' position to the need to investigate the possibility of a s.90A claim. They indeed gave the Claimants all that was needed to plead the elements of the allegations which they now advance about RSA's published information being false. The only missing element to complete the cause of action was the guilty knowledge of a PDMR.

v) Given that RSA had announced to the market that the Irish impropriety involved "senior executives", PDMR knowledge at group level was obviously something to investigate, focusing particularly on Mr Smith.

vi) Turning to the second analytical stage the Claimants could without taking exceptional measures have discovered the remaining elements of the fraud. Specifically having been put on notice of the possibility that there might be a s.90 claim, the Claimants could and would (acting with reasonable diligence) at least have conducted regular internet searches in relation to the Irish misconduct announced in 2013 and/or set up an automatic alert in relation to the Irish misconduct. Either measure would have brought the Irish EAT proceedings to the attention of a reasonably diligent investor on notice of a possible s.90A claim concerning the Irish misconduct. Mr Smith was claiming from late 2013 to have been a scapegoat and was therefore pointing the finger at others.

vii) The press reports in March 2015 contained all the information which the Claimants now rely on in support of their case about the PDMRs. They produced a detailed table which went through the allegations made in the particulars of claim and the matters disclosed publicly in 2015. I shall come back to my conclusions about this exercise below.

viii) Mr Shrimpton's evidence that the judgment of the EAT in June 2015 marked a step change from the information that was previously available should be rejected. The EAT judgment was flimsy in its reasoning, was inadmissible, and added nothing substantial to the allegations already reported by Mr Smith in the press.

ix) Likewise the CBI announcement in 2018 did not amount to a real or material change from the earlier information. It was concerned with RSA Ireland and indeed concluded that executives there had circumvented the controls and procedures. The Claimants have selectively plucked out the bits they like and ignored the inconvenient truths in the announcement.

65. The Claimants submitted (in outline) as follows:

i) As a general point, summary determination of limitation cannot fairly be carried out given (i) the factual differences of the Claimants which require investigation and understanding, (ii) that disclosure of the way the Claimants actually conducted their business (including the kinds of inquiries they made) has not happened, and (iii) that there has been no disclosure of relevant materials by the Defendant.

ii) The various funds have different approaches to investment decisions and strategy, and this impacts upon what would be considered reasonable diligence or "exceptional measures" for the various kinds of funds.

iii) This case is analogous to the decision in *DSG Retail Ltd v Mastercard Incorporated* [2020] EWCA Civ 671 where the Court of Appeal held that in order fairly to decide whether there had been a trigger event based on press articles disclosure was required.

iv) When considering what was reasonably discoverable by the Claimants, including when they should have been put on notice, it would be material to know if any other investors raised queries about press coverage of the EAT proceedings in 2015. Similarly, if RSA's response to any queries was to diffuse concerns with reasoned rebuttals. It is unfair to determine the Application without that disclosure.

v) In any event on the facts it is well arguable that the Claimants were not put on inquiry as to a possible claim by the announcements of late 2013/early 2014.

vi) Even if those announcements had operated as a trigger, the information provided in the press coverage in March 2015 would not have enabled the Claimants to plead their claims.

vii) The Claimants were only able to plead their claim after the EAT decision and the CBI announcement. The EAT decision was a judgment of an independent judicial body which heard evidence and reached conclusions about what had happened in the under-reserving process, and who was involved. The CBI's findings were independent findings by RSA Ireland's regulator. They explained what the under-reserving process actually was and identified specific large loss claims which were inappropriately reserved. These enabled Claimants to make specific allegations as to the misconduct which occurred and which PDMRs of RSA knew about. The particulars of falsity relied upon by the Claimants were only possible following the CBI Announcement.

Analysis

66. This is a summary hearing, not a full (or even mini) trial. The question is whether the Claimants have a real prospect of succeeding at trial under s.32. Rather than reciting the full CPR 24 test over and again I shall ask whether the Claimants have a "realistic case" under s.32, using that shorthand to import the summary judgment test. (I add the perhaps obvious point that any conclusion that the Claimants have a "realistic case" should not be taken as indicating any view as to the ultimate merits; it does not mean that the case is better than evens or strong. It means only that the case has reality and is not fanciful.) I also repeat that the burden of persuasion is on the Defendant.

67. Both parties adopted the two stage analysis. I shall follow this analytical approach while keeping in mind Males LJ's insight in *OT Computers* that there is only one statutory test and that the requirement of reasonable diligence applies throughout.

68. But before turning to the sequence of events the submissions of the parties raise some general or framework points.

69. The first concerns the nature of the evidence on this application about (i) how a reasonably attentive institutional investor would monitor information about the issuers of shares held by it; and (ii) the steps it would have taken to investigate possible claims once on inquiry.

70. The evidence adduced by the Defendant consists of the statement of Mr Clarke and the various announcements and press articles he exhibits. He explains the nature of the searches used to find those documents. There is no evidence of any market practice. In my judgment there is force in the Claimants' submissions that this provides an unduly fragile evidential basis for the application; and that there are reasonable grounds for believing that a fuller investigation of the facts at trial might affect the court's determination at trial (see *Easyair* at [15]). The following points appear to me significant:

    i) There is no evidence about the way institutional investors generally monitor their investments. I think that the court would be assisted by disclosure of documents and (tested) witness evidence showing how institutional investors monitor their investments, what information they typically consider and what kinds of searches they usually make. The court's approach to what a claimant acting with reasonable diligence could have discovered may well be guided and assisted by evidence about its usual practices. *OT Computers* illustrates this. The evidence of the administrators about their usual approach to monitoring information in the public domain assisted the court in reaching a conclusion on what the claimant could reasonably have discovered.

    ii) The Defendant submitted that it is self-evident that a reasonably attentive institutional investor would read (at least) official market announcements made by issuers of shares. But the Claimants take issue with that, at least for institutions at or close to the tracker end of the spectrum. There is no evidence (first or even second-hand) from a market practitioner about this. While I can see some attraction in the Defendant's submissions that reasonably attentive investors would read announcements, I do not think that the position is sufficiently clear that I can simply assume it to represent market practice.

    iii) Nor is there any evidence about the way that institutional investors monitor press reporting. The Claimants point out that there were some 10,000 press articles a year about RSA and that Mr Clarke's selection is only a tiny fraction. It is easy with hindsight to see the significance of some articles now but there would have had to be some way of fishing them out of the surrounding ocean of information. There is to my mind a real question whether investors would have been expected to conduct the google searches now proposed by Mr Clarke. The court has no evidence on this issue.

    iv) The evidence also shows that some of the exhibited articles were behind paywalls. It is not now known whether those paywalls applied in 2013 or 2015.

    v) Some of the articles (including the February 2015 report of Mr Hester's comments) were in specialist insurance publications. There is no evidence to demonstrate that investors in the position of the Claimants would reasonably have been expected to have followed these kinds of publications.

vi) I also think that the court could potentially be assisted by evidence about the reaction of the Defendant's shareholders generally to the publications in 2013/14 and press reports in March 2015. Shrimpton 3 notes that in 2013 alone the Defendant had 449 meetings with its institutional investors. When considering what was reasonably discoverable by the Claimants, including when they should have been put on notice, it is potentially material if no investor raised queries about press coverage of the EAT proceedings in 2015. Similarly it might affect the court's approach if the Defendant's response to any queries tended to diffuse investors' concerns by reasoned rebuttals. There has been no disclosure on these issues.

vii) For completeness, I do not accept the Claimants' submission that the *DSG* case establishes that a court could never reach a summary conclusion under s.32 before disclosure had taken place. I do not think that the decision stands for such a broad principle. But I do consider on the present facts that the court may well be in a better position to assess the cogency of the s.32 case at trial than it is on a summary application and that there are reasonable grounds for thinking that further evidence might affect the outcome.

71. I also note that the issues of discovery and reasonable discoverability under s.32 are factual. The cases show that the court has to undertake a careful factual investigation. Even in cases where the court is concerned with the constructive discovery limb it will do so against the background of the actual knowledge and usual practices and processes of the claimant.

72. The second general point concerns the variety of Claimants. The test under s.32 falls to be applied after ascertaining the nature and business of the claimant, the resources reasonably available to a person or company in its position, and the scale and impact of the losses it has suffered. The Claimants submit that they fall on a spectrum from actively managed funds to trackers where investments are made on the basis of the market capitalisation of issuers contained in a given index. The Claimants also have a variety of research resources. Some had no or very little research capacity. The Claimants' claimed losses also range from tens of millions of pounds to a few thousand pounds. For some funds the losses constitute a negligible fraction of their funds under management. Mr Shrimpton also explains that there is variation in the extent to which tracker funds might deviate from an index based on factors such as corporate governance concerns.

73. In more detail, Mr Shrimpton listed in Annex 1 to his statement a number of tracker funds which were not organised or operating in such a way that they had the resources to monitor the types of investment information relied upon in the Defendant's evidence. In Annex 2.1 he listed Claimants which held a very small proportion of shares in the Defendant – for all of these their holding in the Defendant represented less than 0.176% of the total assets under management. The Claimants listed in Annex 2.2 to his statement had no or fewer than five employees mandated to conduct research on investments held by the fund.

74. The Defendant submitted that these differences do not matter. The Claimants are all self-described "professionally managed institutional investors" and the objective test embodied in s.32 does not warrant a finer grained approach. The Defendant argued that to for the court to descend from this level of (self) description would be to hold some

Claimants to a lower standard of diligence than others and that would be unfair and contrary to the purpose of the section as explained in *OT Computers*. They say that the Claimants are really trying to say that badly run funds should be held to a lower standard and that that approach runs against the grain of the policy of s.32. The Defendant accepted that a retail investor would arguably be in a different position to an institutional one. But, it argued, institutional ones were to be treated alike; it said that they all had the same status and only differed in personal approach.

75. The Defendant said that the Claimants also had the shared status of having claimed to have relied on the Defendant's published information, at least insofar as it affected the price of the shares at which they transacted.

76. I consider on this point that the Claimants have a realistic case that they have a number of different kinds of businesses, purposes, sizes of holdings and losses and that some or all of these features will affect the steps they could reasonably have taken to discover the fraud. It seems to me that at least some of these features may well be relevant to the court's approach to the reasonable diligence test. I think that the Claimants have a realistic case that, in considering the position of these Claimants (not hypothetical ones), the court should bear these characteristics in mind. I do not think that it is clear that these features of their varying approaches to monitoring investments should be seen as akin to personal traits (such as naivety or inexperience, indolence or indifference). The Defendant accepted in argument that retail investors might not be in the same position as institutional ones for the purposes of s.32. Once that is accepted, it is to my mind not plain and obvious that all institutional investors, however different their businesses, fall to be lumped together. I think it realistically arguable that there are intrinsic and characteristic differences of position as between the various kinds of institutional fund (as explained in the evidence).

77. Moreover the suggested distinction between status characteristics and personal ones is not supported by the caselaw and does not appear to me to help much. It is not for instance clear on which side of this line the amount of the loss suffered by the claimant would fall.

78. I also consider that the fact that the Claimants all claim to have relied on the published information is not an answer to their contention that the various kinds of fund (actively managed, tracker etc.) occupied different positions for the purposes of working out what "reasonable diligence" would have required of them in being attentive to possible claims or investigating them. The Claimants' contention is based on the kinds of business the funds were engaged in and the fact that they all say they relied in a way capable of triggering a s.90A claim does not appear to me to undermine or affect the force of their argument. Moreover, as already explained, the Claimants say that they relied in a number of different ways (described as RCs 1-3 and presumed reliance).

79. The claimed losses cover a wide range too. The Defendant says that the alleged losses are to be treated as a unifying or assimilating factor: all the Claimants suffered a loss large enough to justify bringing a claim. I again consider that the Claimants have a realistic case for saying that there may be differences in the kinds of investigations a fund might take depending on the proportion the relevant shareholding bears to its funds under management. It is not plainly and obviously an answer to say that the particular claimant has now decided to join in the present action: there are now numerous other

claimants to share the costs burden. It seems to me reasonably arguable that the Defendant is relying on inadmissible hindsight.

80. I also agree with the submission of the Claimants that the issue of which characteristics the Court should take into account under s.32 is a developing and difficult legal question and that it would be far better to reach findings on the basis of the facts found at trial rather than at a summary hearing.

81. For these general reasons I agree with the Claimants' submission that the s.32 issues in this case are not properly amenable to summary determination.

82. But in case I am wrong about this I turn to the sequence of events, applying the two analytical stages suggested by *OT Computers* and adopted by the parties.

83. The first stage is whether there were events sufficient to put the Claimants on notice of a possible claim. I have summarised the parties' submissions above. I have reached the conclusion that the Claimants have a realistic case that the announcements at the end of 2013 and 2014 and the sharp fall in the Defendant's share price, were not sufficient to put them on inquiry of a possible claim that the Defendant had misled them in its earlier published information. My reasons follow.

84. In the first place, I do not think that the court can conclude to the summary judgment standard that all of the Claimants would have read the Defendant's announcements. I have already covered this point above. Some of the tracker funds operate on the basis of market capitalisation and could have operated their business model knowing nothing or little about the underlying issuers. Absent market evidence I consider it possible that they would not reasonably have informed themselves of market announcements. For similar reasons the fall in the share price may not have operated as trigger for such funds. Such market movements are consistent with many causes other than fraud. Trading targets may be missed and unexpected things happen. Moreover, as already explained, the scale of the holdings of shares in the Defendant (absolute and proportionate to funds under management) and the losses said to suffered by the funds vary greatly.

85. But even assuming the Claimants were all aware (actually or constructively) of the announcements, I think they have a realistic case that the contents of the announcements would not have put them on notice of a possible claim against the Defendant and of the need to investigate further.

86. To my mind the Claimants have a realistic case that a retail investor who was aware of the Defendant's announcements would have read them together and would not for instance have reacted to the earlier ones in November 2013 and disregarded the later ones, including that of 9 January 2014. The listed securities market is highly regulated. The duty not to make untruthful statements is engrained in the law and in regulations and forms the basis for the admission of securities to the public markets. Shareholders would therefore have assumed that the Defendant was honestly informing it of its discoveries and investigations in late 2013 and early 2014.

87. In its announcements of late 2013 and 2014 (read together) the Defendant told the markets that:

i) There had been significant wrongdoing within the Irish subsidiary, not in the Defendant itself. There had been inappropriate collaboration amongst a small number of senior executives in Ireland.

ii) PwC had undertaken an independent investigation and reported to the Defendant's board.

iii) PwC viewed RSA's Group Control Framework as appropriate. It concluded that there were no obvious indicators relating to the issues identified in the Irish business that were ignored, at either Regional or Group level.

iv) KPMG and RSA Group Internal Audit had concluded that the financial and claims irregularities were isolated to Ireland.

v) Mr O'Connor and Mr Burke were dismissed from RSA Ireland for their roles in relation to large loss and claims accounting irregularities.

vi) Mr Smith had left RSA Ireland without severance pay.

vii) Mr Lee had resigned from the Defendant and had been thanked for his contribution to the business.

88. To my mind the Claimants have a realistic case that a reasonable investor would have thought that the Defendant had taken proper steps to investigate, including instructing a reputable, independent consulting firm; and that they had concluded after proper investigation that RSA Group and Regional Management did not know and by implication could not have known (due to the lack of obvious indicators) about the misconduct in Ireland. I also think that the Claimants have a realistic case that investors would have concluded that KPMG and the internal auditors had properly satisfied themselves that the wrongdoing was isolated in Ireland. The Claimants also have a realistic case that PwC was satisfied that the Group's Control Framework was appropriate.

89. I think then that the Claimants have a realistic case that a reasonable investor would have thought the Defendant, after internal and third party investigations, had concluded that the misconduct was confined to Ireland, that management there had colluded to circumvent Group controls and the Defendant's own senior management were not aware of the wrongdoing. The Claimants also have a realistic case that there was therefore nothing to cause them to suppose that there was a possible claim under s.90A against the Defendant.

90. The Defendant submitted that the denial by a defendant of wrongdoing is not enough to put a claimant who would otherwise be on notice off the need to make inquiries or investigations. It relied on *FII* at [203] to say that the fact that a defendant disputes an element of a cause of action does not mean that the cause of action will be postponed until the dispute has been resolved. But to my mind the Claimants have a realistic argument that there is a factual difference between a mere denial of a possible claim by a private party and a considered market announcement by a regulated issuer of securities. There is also to my mind a potentially material difference between a mere denial and the announcement of the results of a careful investigation by an independent and reputable firm of accountants.

91. The Defendant also pointed out that the Claimants have pleaded that the 9 January 2014 announcement "provided no explanation as to how a £200,000,000 shortfall in the Irish business could have arisen (by implication) without the Group's knowledge." The Defendant argued that the Claimants seek to belittle the announcements when making their claim but now rely on them when it comes to limitation. There is some force in this submission, but I do not think it is an answer. The question has to be approached without the benefit of hindsight and from the perspective of a person in the position of an investor at the time the announcement was made. The Claimants have now decided to assert a fraud claim in the light of the totality of the information available, including later materials. The context for this comment is therefore different from that in which an investor would have read the announcement itself.

92. I am therefore satisfied that the Claimants have a realistic case that the announcements of late 2013 and early 2014 were not enough to require them to investigate a possible claim against the Defendant.

93. The press comments at around that time do not change this conclusion. They showed in summary that Mr Smith was contending that he was a fall guy or scapegoat. But they did not report wrongdoing by him or say anything to implicate senior management within the Defendant. And these stories were before the 9 January 2014 announcement, in which the Defendant reported on PwC's investigation and its conclusions and gave other information to suggest that the problem involved rogue management in Ireland.

94. In the light of this conclusion I consider that the Claimants have a realistic case that reasonably attentive investors would have concluded that there was nothing to investigate further at least (possibly) until the findings of the regulatory investigation by the CBI that had been mentioned in the announcements. If the Claimants are right about this there would have been no reason to undertake further investigations.

95. But for completeness I shall also address the parties' submissions about the further events on the assumption that the Claimants were indeed on notice of facts creating the need to carry out further investigations.

96. The Defendant's case (already summarised above) is that the Claimants acting reasonably would have made searches or used alerts which would have yielded the press coverage of the EAT proceedings. They say that that press coverage gave the Claimants the missing pieces of the forensic jigsaw and that they could therefore have pleaded their case before 11 May 2015.

97. The first question under this head is whether there is a sufficiently clear case that the press coverage would have come to the Claimants' attention.

98. I am satisfied that the Claimants have a realistic case that they (or at least some of them) would not have come across the 2015 press coverage:

    i) The articles did not appear for over a year after the announcements. I consider the Claimants have a realistic case that a reasonable investor would not have been looking out for press articles about RSA Ireland over a year later. There is an insufficiently clear or compelling evidential basis to reach such a conclusion.

ii) As already explained there was no evidence before me as to the approach of investment funds to searching newspaper articles. I have already noted that there were 10,000 articles about RSA a year and to pick out these particular ones investors would have had to have searched or used alerts with key terms of the kind suggested by Mr Clarke. I have already explained that I do not think that the evidence on this point is sufficiently clear-cut to reach the summary judgment standard.

99. I also consider that the Claimants have a realistic case that, even if they had read the articles, they would not have been a position to plead a case under s.90A. The following features of the articles appear to me to be significant (again I am not of course expressing a view on the overall merits of the arguments; only on whether the Claimants have a realistic case):

i) The articles reported various claims made by Mr Smith during the proceedings; that he had been "cast to the wolves", "pushed under the bus", that RSA had raided the "treasure cave" etc. They gave the impression of an aggrieved former employee seeking financial compensation. A reasonable investor would have taken them in that spirit.

ii) The articles did not name any person at group level who was said to have known about the Irish misconduct. In the Defendant's tabular presentation of the pleaded case against the contents of the articles one of the key pleaded allegations is that Mr Lee was actually aware of the improper reserving practices within RSA Ireland. That was not stated in any of the 2015 press reports of the EAT proceedings. Instead it was a conclusion arguably reached by the EAT in its June judgment. (If the EAT did not make such a finding the tribunal said that Mr Smith's evidence on the point was not contested.)

iii) The Defendant relied on the passages in the articles saying that Mr O'Connor had not blown the whistle because of the strong relationship between Mr Smith and Messrs Lee and Rash. But a reasonable reader could potentially have read that as supporting the conclusion that those individuals did not know about the wrongdoing; if they had already known there would have been no question of blowing the whistle.

iv) The articles did not make any reference to any evidence or claims from Mr Smith regarding misconduct other than the under-reserving of large loss claims.

v) The articles reported Mr Smith's case that unspecified personnel at group level knew about the reserving practices in large loss claims. This allegation had been denied by RSA in January 2014, and continued to be denied by RSA during and after the proceedings.

vi) The reports of Mr Smith's evidence were general and lacking in specificity.

vii) There was no clear reporting of Mr Smith's own role in the under-reserving. Two of the articles reported comments from Mr O'Connor, saying that Mr Smith had pressured him, but he himself had been dismissed for misconduct. While the gist of Mr Smith's case involved admitting his involvement in some kind of

under-reserving, that still left the question of precisely what under-reserving, how much, and when.

viii) The Claimants have a realistic case that the articles did not provide the basis for alleging that Mr Smith was a de facto director of the Defendant; Mr Smith's allegations as to group knowledge were vague and denied by the Defendant.

ix) The Claimants also have a realistic case that the press articles would not have enabled them to plead any claims in respect of anything other than under-reserving within RSA Ireland. They did not say more about the control or reporting failures which the Claimants have now pleaded.

x) I have also borne in mind the need for a pleading of fraud to be based on evidence and to be properly particularised.

100. The Defendant made the general point that the Claimants themselves have pleaded the contents of a number of the articles in support of elements of their case and that they cannot now cast doubt on their credibility and cogency. I think this point again arguably suffers from the use of hindsight. A comment made in a pleading now (in the light of the totality of the evidence available to the pleader) does not mean that that a reasonable investor, considering the articles at the time (and without the later evidence) would have considered that there was sufficient to plead a case of fraud.

101. For these reasons I conclude that the Claimants have a realistic case that the 2015 press articles would not have been sufficient to enable them to plead their fraud case.

102. As already explained, the Defendant submitted that the EAT decision and the CBI announcement could not have constituted a step change in the information available to the pleaders. The Defendant submits that the EAT decision involved flimsy reasoning and added nothing of substance to the existing sum of knowledge. They say that the CBI announcement gave further information about the underlying wrongdoing in RSA Ireland but also indicated that local Irish management had circumvented internal controls and reporting requirements. The Defendant said that the Claimants are picking out those parts of the documents which favour its case while ignoring the real message. The Defendant also says that the case advanced is both inferential and speculative. This is illustrated by the allegations about PDMRs.

103. It is natural on any examination of a case under s.32 to ask what it was in a sequence of events that enabled it to plead its case. But I do not think that it is necessary to reach any firm conclusions on that point. The Claimants and their legal team have decided that they have sufficient material to plead and advance a fraud case. Some of it is based on inferences from the findings of the EAT and the announcement of the CBI. There may well at the end of day be force in the Defendant's description of the pleading. But the application is restricted to the limitation point and not the overall merits of the case.

104. For these reasons I have concluded that the application fails.

105. I finally return to the allegation that Mr Rash was a PDMR of the Defendant. Counsel for the Claimants confirmed that this allegation was based solely on the finding in the judgment of the EAT that "CR" was party to Gateway 50 reserving decisions. As I have said it is a shame that the EAT used initials rather than names. In any case other parts

of the EAT decision suggest that "CR" was Colin Ryan rather than Chris Rash. The application bundle also contained parts of the PwC report (which has been disclosed to the Claimants). It lists the attendees at Gateway 50 meetings and includes Colin Ryan and not Mr Rash. At the end of the hearing it was agreed that the underlying minutes of the Gateway 50 meetings would be provided and Counsel for the Claimants agreed that the Claimants would carefully consider the position. They should do so. The allegation about Mr Rash is a serious one. It is not only that Mr Rash is a PDMR but that he knew of the Irish misconduct. If it is based on misreading of the EAT decision and nothing more the allegation should be dropped.