UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 10

Neutral Citation Number: [2007] EWHC 1044 (Ch)

Case No: HC06C04095

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

4th May 2007

Before :

MR JUSTICE LEWISON

Between :

J D WETHERSPOON PLC	**Claimant**
- and -	
(1) VAN DE BERG & CO LIMITED	
(2) CHRISTIAN MICHAEL BRAUN	
(3) RICHARD HARVEY	
(4) GEORGE ALDRIDGE	**Defendants**

Miss Catherine Newman QC, Mr Hugh Evans and Mr Alec McCluskey (instructed by **DLA Piper UK LLP**) for the Claimant
Mrs Jane Giret QC and **Mr Marc Dight** (instructed by Turbervilles) for the First and Second Defendants
Miss Clare Hoffmann (instructed by **Mundays LLP**) for the **Third Defendant**

Hearing dates: 18, 19, 20 April 2007

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE LEWISON

Mr Justice Lewison:

Introduction

1. In the 1990s JD Wetherspoon was increasing its pub estate. It had retained Van De Berg & Co Ltd ("Van De Berg") to act for it as its property finder and adviser. Van De Berg was set up by Mr Chris Braun, who was one of its directors. Richard Harvey and George Aldridge were also directors. The arrangement between JD Wetherspoon and Van de Berg at the relevant time was that Van De Berg were paid an annual retainer and a success fee for every property that they successfully introduced to JD Wetherspoon.

2. In this action JD Wetherspoon allege that in relation to a number of transactions, all of which were completed before 1998, Van De Berg and Messrs Braun, Harvey and Aldridge made secret profits behind JD Wetherspoon's back. The typical pattern that is alleged relates to the acquisition of interests in vacant property suitable for conversion into a pub. What is said is that instead of informing JD Wetherspoon that a particular freehold was available for sale, Van De Berg, Mr Braun and Mr Harvey advised JD Wetherspoon to enter into a lease of the property in question, while at the same time arranging for the freehold to be acquired by other business associates or clients. The effect of the grant of a lease to JD Wetherspoon turned a vacant property into a valuable investment with a relatively secure cash flow, and thus substantially increased the freehold value. This in turn enabled the acquirer of the freehold to make a quick and substantial profit, in some cases by selling the freehold to JD Wetherspoon itself; which in effect paid for the enhancement of the freehold value attributable to the value of its own covenant.

3. These three defendants apply to strike out the claim on the ground that it is statute barred. The two personal defendants also apply for summary judgment on the basis that there is no cause of action raised against them which has a real prospect of success. There is one further defendant, Mr Aldridge, who was also a director of Van De Berg at the relevant time. Unlike the other defendants he has served a defence but does not join in the present applications. There will, therefore, be a trial of the allegations against him, irrespective of the outcome of these applications.

The approach

4. Both the application to strike out and the application for summary judgment are summary applications. The application for summary judgment is made by defendants against a claimant, which is less usual than an application by a claimant for judgment against a defendant. The authorities deal mainly with applications by claimants. The correct approach on applications by defendants is, in my judgment, as follows:

   i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

   ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

   iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

   iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

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

   vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

   vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts.

5. In my judgment the same approach is warranted both in relation to the allegation that the causes of action are statute barred and also in relation to the allegation that no valid cause of action has been pleaded against the personal defendants.

6. Since different limitation periods apply to different causes of action, I propose first to consider what causes of action are pleaded against the various defendants, before considering which (if any) of them are undoubtedly statute barred.

Two sample transactions

7. In order to illustrate what this case is about, I will first describe two sample transactions about which JD Wetherspoon complain. I should make it clear that what I am summarising are J D Wetherspoon's allegations; not proved or admitted facts

Canterbury 1

8. On 20 October 1995 Mr Harvey wrote to the agents for the owners of 5/9 Burgate in Canterbury. The letter contained an offer to buy the freehold for £725,000. Although the offer appeared to have been made by JD Wetherspoon, in fact they knew nothing about it and the offer was made without authority. Nearly four months later, on 12 February 1996, Mr Braun wrote to the agents again with an increased offer of £950,000, but this offer was subject to obtaining planning permission for change of use and an on licence. Again, the offer purported to have been made on behalf of JD Wetherspoon; and again JD Wetherspoon knew nothing about it. However, in his letter Mr Braun explained that J D Wetherspoon had a 100 per cent track record in obtaining licences. This was designed as an inducement to persuade the owners to agree to accept the offer. In fact they did accept the offer, on 15 February 1996, presumably thinking that they were about to contract with J D Wetherspoon, although the interest on offer was not in fact the freehold but a long lease at a nominal rent. Just over two weeks later, on 4 March 1996, Mr Harvey wrote to the agents saying that the lease was to be granted to Nickleby Holdings Ltd. Nickleby Holdings was the creature of a Mr Ferrari, a business associate and former colleague of Messrs Braun in a firm of estate agents called Ferrari Dewe J D Wetherspoon knew nothing about this either. On the same day, Mr Harvey wrote to J D Wetherspoon's solicitors (with a copy to J D Wetherspoon itself) saying that J D Wetherspoon had agreed to take a lease of the property at a rack rent of £120,000 per annum. This was the first that J D Wetherspoon had heard of the property; and they agreed to take the lease on Van De Berg's recommendation. By the summer of 1996 J D Wetherspoon had obtained planning permission for change of use and an on licence. On 4 December 1996 Nickleby Holdings bought the long lease for £950,000 and simultaneously granted an underlease to J D Wetherspoon at a rent of £120,000 per annum.

9. Within a month or two Van De Berg began marketing the long lease on behalf of Nickleby Holdings. It was sold in May 1997 for £1.3 million. Thus within the space of five months, Nickelby Holdings had made a profit of £350,000.

Folkestone

10. At the beginning of 1997 J D Wetherspoon passed on to Van De Berg particulars of a freehold for sale in Folkestone. The asking price was £150,000. Two months later, on 5 March 1997, Mr Harvey wrote to J D Wetherspoon's solicitors (with a copy to J D Wetherspoon) saying that J D Wetherspoon had agreed to take a lease of the property at a rent of £40,000 per annum. The landlord was named as a company called Peachey. In fact there was no such company at the time; but a company with that name was incorporated a week later on 12 March 1997. Peachey was another company which belonged to Mr Ferrari.

11. On 11 July 1997 Mr Harvey wrote to J D Wetherspoon's solicitors saying that J D Wetherspoon had agreed to buy the freehold from Peachey for £400,000. At that time

Peachy did not own the freehold and had no contractual interest in it. On 8 September 1997 Peachey contracted to buy the property for £150,000; and simultaneously contracted to sell it on to J D Wetherspoon for £400,000. Both sales were completed on 30 October 1997. Thus Peachey made an immediate profit of £250,000.

The nub of the complaints

12 The nub of the complaint is that J D Wetherspoon's trusted agents acted behind their backs in that, rather than arranging for J D Wetherspoon to acquire a freehold or long lease at a favourable price, they instead arranged for the interest to be acquired by a business associate or another client, and got J D Wetherspoon to take a rack rented lease instead. They did this, at least in part, by concealing the true state of affairs from J D Wetherspoon, and in some cases by telling lies to third parties in that they falsely represented that they were making offers on behalf of J D Wetherspoon when in fact they were not. Although J D Wetherspoon cannot at this stage point to a smoking gun, they strongly suspect that the defendants have profited from the deals, at least by receiving commission, if not greater rewards.

The causes of action

13. Miss Newman QC, who appeared with Mr Evans and Mr McCluskey for JD Wetherspoon, said that there were essentially four causes of action pleaded:

i) Breach of contract;

ii) Negligence;

iii) Breach of fiduciary duty; and

iv) Deceit.

14. The first two of these causes of action are common law causes of action, and are pleaded against Van de Berg alone. A cause of action for breach of contract accrues when the contract is broken; and all the relevant breaches took place more than six years before the action was begun. A cause of action in negligence accrues when the breach of the duty of care causes damage. It is not suggested that damage occurred as a result of a breach of this duty any later than the completion of the various transactions of which complaint is made. They were all completed more than six years before the action was begun. I pass over the claim of breach of fiduciary duty for the moment and consider the claim in deceit.

Deceit

15. The paradigm case of deceit is where:

i) A makes a false representation to B;

ii) A either knows the representation is false or does not care whether it is true or false;

iii) A intends B to act on the representation;

iv) B acts on the representation; and

v) In consequence B suffers a loss.

16. Miss Hoffmann, who appeared on behalf of Mr Harvey, submitted that a claim in deceit would not lie against an individual who was merely acting on behalf of his employer, or on behalf of a company of which he was a director. If in the course of his duties he made a false representation, the liability was that of the employer or company rather than the personal liability of the employee or director. This submission is, in my judgment, inconsistent with the decision of the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* [2003] 1 AC 959. At least for the purposes of these applications I proceed on the basis that a claim in deceit will lie against the personal defendants, if the other ingredients of the cause of action are present.

17. Although the Particulars of Claim in the present case contain numerous allegations that the defendants told lies, they are all allegations that the defendants told lies, not to JD Wetherspoon, but to other people. JD Wetherspoon had no knowledge of the lies at the time, and therefore did not rely on them. Miss Newman accepts that the mere fact that the defendants told lies to third parties (assuming for the sake of argument that they did) does not give JD Wetherspoon a cause of action in deceit. JD Wetherspoon's real complaint is not that it was told lies at the time of the relevant transactions, but that the defendants kept silent about what was really going on. As a general rule mere silence, however morally wrong, will not support an action for deceit: *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211. However, there are exceptions to that general rule. One such exception is (or at least may be) where the person against whom the claim is made has a duty of disclosure and fraudulently fails to do so: *Conlon v Simms* [2006] 2 All ER 1024. Viewed in that way it seems to me that there is an arguable cause of action in deceit if:

i) Any particular defendant had fiduciary obligations to JD Wetherspoon;

ii) Those obligations included an obligation to disclose either (a) the availability of freeholds or (b) the defendants' own financial interests in transactions relating to those freeholds; and

iii) The defendants dishonestly failed to make disclosure.

18. I consider that the facts alleged are capable of giving rise to this cause of action.

Breach of fiduciary duties

19. I turn therefore to consider which (if any) of the defendants owed fiduciary obligations to JD Wetherspoon. Mrs Giret QC did faintly suggest that Van de Berg itself did not owe any fiduciary duty to JD Wetherspoon. The submission was made on the basis that unless an agent had power to bind his principal legally, he was not a "full blown" agent. To put it no higher, I do not consider that she is undoubtedly correct. The relationship of agent and principal is a paradigm example of a relationship that carries fiduciary duties, including the core duty of loyalty. In *New*

Zealand Netherlands Society "Oranje" Inc. v. Kuys [1973] 1 W.L.R. 1126, 1129-1130, Lord Wilberforce said:

> "The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v Boardman* [1967] 2 A.C. 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v Boardman,* at p. 123: 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'"

20. I cannot see that it is a necessary condition that the agent should have power to bind the principal in order for these duties to arise. Many agents (e.g. solicitors or estate agents) do not.

21. For the purposes of these applications, therefore, I proceed on the basis that Van De Berg owed JD Wetherspoon a duty:

i) Not to place itself in a position where its own interests could conflict with those of JD Wetherspoon;

ii) Not to prefer the interests of a third party to those of JD Wetherspoon in so far as those interests related to matters within the scope of Van De Berg's agency;

iii) Not to use its position as an agent, or information which came to it in that capacity, to its own advantage without the informed consent of JD Wetherspoon.

22. Both Mrs Giret and Ms Hoffmann pointed out that it was not alleged that Van De Berg had an exclusive retainer for J D Wetherspoon. Thus it was submitted, it could not have been a breach of any duty of loyalty for Van De Berg to arrange deals for other clients: compare *Kelly v Cooper* [1993] AC 205. Put like that, that may well be right, although the fact that Van De Berg, unlike most estate agents received an annual retainer rather than just a success fee, might lead to a different conclusion. But, more to the point, that is not J D Wetherspoon's complaint. Its complaint is not that Van De Berg arranged a deal for one client rather than another. Rather, its complaint is that having identified J D Wetherspoon as the potential occupier of a particular property Van De Berg deliberately presented it with a less favourable deal than it could have obtained. In my judgment that is capable of amounting to a breach of the duty of loyalty. In addition, the making of offers purportedly on behalf of J D Wetherspoon, but without authority, if made in order to entice a property owner to

enter into negotiations with a view to "switching" the transaction to another client or a business associate, is capable of amounting to a breach of the duty not to use its position as agent to its own advantage without the informed consent of J D Wetherspoon. It is not suggested that J D Wetherspoon gave informed consent. I therefore also proceed on the basis that the facts alleged are capable of amounting to a breach of those duties.

Personal fiduciary duties

23. The next question I must consider is whether it is clear that the individual directors of Van Den Berg did not owe personal duties of loyalty to JD Wetherspoon. It is common ground that as directors of Van den Berg the individual defendants owed the usual fiduciary duties of directors to that company. It is also common ground it is not legally impossible for a person to owe fiduciary duties to more than one corporate entity. Ms Hoffmann submitted that in the present case there would be a potential conflict between the duties undoubtedly owed by Mr Harvey to Van De Berg and any duties that were imposed on him personally as regards J D Wetherspoon. If, for example, he considered that it would be in Van de Berg's interest to break its contract with J D Wetherspoon, a duty of loyalty to J D Wetherspoon would prevent him from acting in the best interests of Van de Berg. If this proposition were undoubtedly correct, it would undermine many cases in which fiduciary duties commonly arise. Take the familiar case of a solicitor. A solicitor owes fiduciary duties to his client. If he is not a sole practitioner, he owes fiduciary duties to his partners too. No one has suggested that the existence of the one set of fiduciary duties precludes the existence of the other. If the partnership decides to convert itself into an LLP, fiduciary duties will be owed to the LLP. But that, as it seems to me, should not alter the fiduciary duties owed to the client.

24. Mrs Giret and Ms Hoffmann both relied on the decision of the Privy Council in *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 and in particular the statement of Henry J that:

> "Put shortly there was no mutuality giving rise to the undertaking or imposition of a duty of loyalty."

25. From this they argued that unless it was alleged that the personal defendants had personally entered into contractual relations with J D Wetherspoon, there could not be the requisite mutuality. I do not agree. The point in *Arklow* was that there was no relationship at all between the claimant and the defendant. If there was no relationship at all, there could be no relationship of trust and confidence. But that is not what is alleged in this case. It is expressly alleged that J D Wetherspoon had a relationship of trust and confidence with the personal defendants. Whether that is established at trial remains to be seen. But if it is, then a duty of loyalty may well be held to have arisen.

26. Ms Newman drew my attention to the case of *Satnam Investments Ltd v Dunlop Heywood Ltd* [1999] 3 All ER 652. That was a case in which a company carrying on business as surveyors and property consultants owed fiduciary duties to a client; and Mr Murray, an individual director of Dunlop Heywood, owed the same fiduciary duties. As Mrs Giret pointed out, the point does not seem to have been argued. But Nourse LJ regarded it as "plain" that concurrent fiduciary duties were owed both by

the company and its director. At first instance (unreported 25 July 1997) Chadwick J had reached the same conclusion based on the "circumstances". The circumstances which led him to that conclusion were that Dunlop Heywood, of which Mr Murray was a director "had been involved as agents and consultants to Satnam over many years, in the assembly of [the] site and in negotiations with the planning authority They had been active in relation to [a] public inquiry" In the view of Chadwick J those circumstances "plainly" gave rise to a relationship of trust and confidence between Satnam and Mr Murray. The facts alleged in the present case are similar to those found in the *Satnam* case In the present case I am asked to say that far from being *plain* that the circumstances gave rise to a relation of trust and confidence between the personal defendants and J D Wetherspoon, it is *unarguable* that they did. I decline so to hold.

27 I add two comments. First, in the case of Mr Braun it is J D Wetherspoon's evidence that he was retained as its agent before the incorporation of Van De Berg; and that J D Wetherspoon paid the set up costs of the incorporation. Thus any relationship of trust and confidence may well have pre-dated the existence of Van De Berg. If it did there is no obvious reason why that personal relationship should have been extinguished on incorporation. Second, where relationships of trust and confidence are concerned, the court may be more willing than in other cases to pierce the corporate veil: *Conway v Raitu (Note)* [2006] 1 All ER 571; *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612 at paragraph 35.

28. Whether the particular circumstances of this case gave rise to personal duties of loyalty on the part of Messrs Braun and Harvey will depend on the facts. The facts have not been found I do not consider that this part of the case is bound to fail.

29. I proceed therefore on the basis that Mr Braun and Mr Harvey owed personal duties of loyalty to J D Wetherspoon which mirrored those of Van De Berg itself In my judgment the facts alleged against them are capable of amounting to a breach of those duties.

Limitation

30. I now come to the question of limitation. All the defendants have raised limitation defences, although they have done so in witness statements rather than in formal pleadings. It is common ground that where a limitation defence is raised, it is for the claimant to show that his claim is not statute barred: *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15. However, I am asked to determine this issue against J D Wetherspoon summarily, without a full investigation of the facts. I remind myself that I should be cautious about making a summary determination where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

31. The first relevant provision of the Limitation Act 1980 is section 21 which provides (so far as relevant):

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

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

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

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

32. The second is section 36 which provides (so far as relevant):

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

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

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

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

33. The third is section 32 which provides (so far as relevant):

"(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."

34 The precise scope of section 21 has been explained in recent cases. In *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, Millett LJ identified two kinds of use of the expression "constructive trust":

> "The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff."

35. In the first class of case the constructive trustee really is a trustee. In the second class of case the defendant is not a trustee at all, but is liable to account in equity as if he were. In *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131, 157, having referred to *Paragon Finance*, Mummery LJ (giving the judgment of the court) said:

> "[89] A similar distinction to that drawn in the law of trusts is drawn in cases of breach of fiduciary duty. The fiduciary relationship has developed by analogy from the trust relationship to cover cases in which a person has assumed responsibilities for the management of another person's assets. There is a distinction between—
>
> 'those whose fiduciary obligations preceded the acts complained of and those whose liability in equity was occasioned by the acts of which complaint was made.' (See [1999] 1 All ER 400 at 414.)
>
> [90] For limitation purposes the two classes of trust and/or fiduciary duty are treated differently. The first class of case arising from the breach of a pre-existing duty is, or is treated by analogy as, an action by a beneficiary for breach of trust falling within s 21(1) of the 1980 Act. This means that there is no limitation period for the cases falling within s 21(1)(a) or (b); but that there is a six-year limitation period for cases falling within s 21(3).
>
> [91] In the second class of case s 21 would not apply, but a limitation defence to a claim might be available by analogy with common law claims, such as tort (for example, deceit) or breach of contract, even though the liability is exclusively equitable, as may be the case with breaches of fiduciary duty in the absence of a contract."

36. It may be that *Gwembe* is not the last word on this subject (see *Halton International Inc v Guernroy Ltd* [2006] EWCA Civ 801 per Carnwath LJ). However, it is binding on me; and in any event this is a developing area of law which is another reason for being cautious about summary decisions.

37. In the present case the allegation is that Van De Berg and the personal defendants assumed obligations of loyalty by their appointment as J D Wetherspoon's agents. Their appointment as agents was lawful and is not impugned. What is alleged is that in breach of those pre-existing duties of loyalty they have diverted opportunities to enter into favourable transactions from J D Wetherspoon to other clients. In my judgment that (if proved) is capable of constituting a breach of fiduciary duty of the first category Accordingly if the breach of duty is fraudulent within the meaning of section 21, the claim is not statute barred. In relation to eight of the transactions complained of the allegation is one of fraudulent breach. In the case of the remaining two (Chingford and Leamington Spa) fraud is not alleged, but a deliberate and conscious breach of fiduciary duty is.

38. So far as the eight transactions are concerned, I consider that if the facts are proved, there is a real prospect that section 21 (1)(a) will be held to apply; and that the claims will not be statute barred. At any rate I am satisfied that the position is not so clear that the claim should be summarily dismissed. In *Paragon Finance* Millett LJ distinguished between intentional and inadvertent wrongdoing; but he did not go so far as to say that *any* intentional wrongdoing amounted to fraud (although fraud would of course amount to intentional wrongdoing). So far as the remaining two transactions are concerned, a plea of a deliberate and conscious breach of fiduciary duty is not, in my judgment, a plea of fraud. Accordingly, the claims relating to these two transactions are, in principle, subject to a six year limitation period under section 21 (3) unless that period is extended by section 32.

39. Section 32 is also the provision relied on in relation to the claims for breach of contract and negligence alleged against Van De Berg itself.

40. The relevant part of section 32 is that which deals with deliberate concealment. There are two limbs to that part of section 32 The first requires deliberate concealment in the ordinary sense of the words. The concealment may take place at any time during what would otherwise have been the running of the period of limitation: *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] 1 AC 102. In such a case time does not begin to run until the concealment has been discovered: *Sheldon* at page 145 per Lord Browne-Wilkinson. The second limb deals with deliberate breach of duty. This has been the subject of authoritative consideration by the House of Lords in *Cave v Robinson Jarvis & Rolfe* [2003] 1 AC 384. The House decided that section 32 (2) applied to cases where the breach of duty was deliberately committed, in the sense that there was intentional wrongdoing: see Lord Millett at page 392. Intentional wrongdoing is alleged in the present case. The other ingredient needed to bring section 32 (2) into play is that the breach is committed in circumstances where it is unlikely to be discovered "for some time". Although the quoted phrase is imprecise, it seems to me that the implicit contrast that it is setting up is one between a breach of duty that would be immediately discovered (e.g. the infliction of a physical injury) and one that would not. If that is right, then the alleged involvement of Van De Berg and the personal defendants in transactions in which they had secretly preferred the interests of other clients over those of J D Wetherspoon falls into the latter class. The

very secrecy demonstrates that. At all events it cannot be safely concluded that they do not fall into that class until the facts are known. Section 32 (1) then poses the question: when could the claimant have discovered the concealment with reasonable diligence? Given that deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time *is* deliberate concealment for this purpose, it seems to me that the statutory question, where section 32 (2) is in play is: when could J D Wetherspoon have discovered the breach with reasonable diligence?

41. Millett LJ pointed out in *Paragon Finance* that:

> "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."

42. Like all such statements, it must be read in context. In the *Paragon Finance* case, the claim arose out of mortgage fraud The claimants were alerted to the fact that there were frauds at the development in question in July 1990 and the *modus operandi* was explained to them by the police in December 1990. What they did not know was that the defendant solicitors were implicated in the fraud, although by January 1991 they had carried out a review of a number of transactions in which the defendants were involved and placed them on a "referral list". They concentrated their efforts on recovering possession of the flats; and it was not until March 1997 that they applied to amend to plead fraud. It is in that context, where the trigger for an investigation had already occurred, that it made sense to speak of a "reasonable degree of urgency". If there is no relevant trigger for an investigation, then it seems to me that a period of reasonable diligence does not begin.

43. In the present case J D Wetherspoon raised concerns with Van De Berg about the Folkestone transaction in particular in 1998. Mr Martin wrote to Mr Braun on 19 August 1998 and copied his letter to Mr Harvey and Mr Aldridge. He said that he was concerned that the returns on capital on leasehold properties acquired in 1996/7 were below historic trends. He said that he had an area of concern about the use of "property dealers" that J D Wetherspoon were using, who seemed to be making a lot of money in circumstances in which J D Wetherspoon should have been able to acquire the freeholds themselves. He gave Folkestone as one example of this. He also said that he had been told by other agents that J D Wetherspoon had been paying excessive prices for some properties and he expressed concern about the involvement of Ferrari Dewe. Mr Braun replied on 26 August in a five page letter. The general thrust of his letter was that nothing was amiss. He defended the use of dealers on the

basis that they were ahead of the game and often secured properties before agents like himself came to hear of them. As an explanation of the role that Van De Berg are alleged to have played in the transactions complained of this explanation was untrue, since it was Van De Berg who introduced the dealers rather than the other way round. So far as Folkestone was concerned he said that "we were offered this site on a leasehold basis by the successful purchaser". What he failed to mention was that the lease was "offered" before the purchaser was even incorporated and that it was Van De Berg who introduced the purchaser. These facts, if true, were relevant to J D Wetherspoon's causes of action. He assured Mr Martin, in fulsome terms, of Van De Berg's "undivided commitment and loyalty"; said that "our probity is beyond reproach"; that Van De Berg was "a worthy trustee of the values and interest of JDW"; and referred to "our openness and undivided support".

44. This letter appears to have been calculated to put Mr Martin off the scent; and it did. Bearing in mind a fiduciary's duty to disclose his own wrongdoing, this letter amounted to deliberate concealment. But even in the absence of such duties, I still consider that it amounted to deliberate concealment. Mrs Giret and Ms Hoffmann objected that J D Wetherspoon knew that it had not acquired the freeholds, because reports on title in their own files would have shown them that. Those same reports would, in many cases, have shown that J D Wetherspoon was taking a lease from a new freeholder, in some cases simultaneously with completion of a freehold sale. But that misses the point. Of course J D Wetherspoon knew that it had not acquired freeholds (or knew that it had acquired them following recent purchase by its own immediate vendor). But what it did not know was *why* the transactions took the form that they did. If Mr Braun's letter had been true, then the reason why the transactions took the form that they did would not have involved any breach of the duty of loyalty; nor any breach of contract or negligence. But if the facts alleged are true then Mr Braun's explanation was not. It therefore concealed facts relevant to J D Wetherspoon's causes of action. In my judgment that amounts to deliberate concealment. It was not suggested that it is impermissible to "mix and match" deliberate concealment in both its primary and its extended sense. But even if it is, then Mr Braun's letter amounts to deliberate concealment in the primary sense. It took place during the period of limitation and would therefore have prevented time from running until the concealment could have been discovered with reasonable diligence.

45. It was not suggested that, once J D Wetherspoon were alerted to the possibility that Mr Braun's explanation was untrue, it acted otherwise than with reasonable diligence.

46. Ms Hoffman had a further point. Any deliberate concealment must be concealment by a defendant or his agent. She says that there is no evidence that Mr Braun or Van De Berg were Mr Harvey's agent. Consequently Mr Harvey cannot be affected by Mr Braun's letter. However, J D Wetherspoon's letter was copied to him; and he never sent an independent reply. Mr Martin (J D Wetherspoon's Chairman) suggests that Mr Braun probably discussed the letter with Mr Harvey. If so, it may well be that the letter was intended to be the joint response of both Mr Braun and Mr Harvey (as well as the response of Van De Berg). Whether that was so will, in my judgment, have to wait until the outcome of the fact-finding exercise; that is to say, the trial.

47. If I am wrong about the scope of section 21, then this may be a case in which the equitable claims are subject to limitation periods applied by analogy under section 36.

But even so, I consider that section 32 gives (or may well give) J D Wetherspoon an escape route.

48. In my judgment the limitation defence advanced by Van De Berg and the personal defendants is not so clear as to warrant the summary dismissal of the claim.

Result

49. I will dismiss the applications