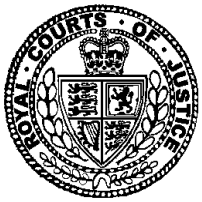

Neutral Citation Number: [2018] EWCA Civ 2025

Case No: A3/2017/0148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE BIRD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/09/2018

Before:

LADY JUSTICE GLOSTER
and
LORD JUSTICE SALES

- -

Between:

Playboy Club London Limited	**Appellant**
- and -	
Banca Nazionale Del Lavoro SpA	**Respondent**

- -
- -

Simon Salzedo QC and Fred Hobson (instructed by **Simkins LLP**) for the **Appellant**
Jeff Chapman QC and Andrew de Mestre (instructed by **Bird & Bird LLP**) for the **Respondent**

Hearing date: 22 May 2018

- -

Approved Judgment

Lord Justice Sales:

1. This is an appeal from the decision of HHJ Bird, sitting in the High Court, by which he struck out a claim by the appellant ("the Club") against the respondent ("BNL") for damages for the tort of deceit ("the deceit claim") in relation to a credit reference in relation to a customer of BNL which was provided to a company associated with the Club ("Burlington"). The Club had previously brought a claim against BNL for damages for negligent misstatement in relation to the same credit reference ("the negligence claim"). The Club won that claim at first instance before HHJ Mackie QC sitting in the High Court ([2014] EWHC 2613 (QB)), but then lost on appeal on the ground that BNL did not owe the Club a duty of care in relation to the credit reference provided to Burlington ([2016] EWCA Civ 457). That result was recently confirmed by the Supreme Court in *Banca Nazionale del Lavoro SpA v Playboy Club London Ltd* [2018] UKSC 43. The issue in the present proceedings is whether it is an abuse of process for the Club to bring the deceit claim in a separate action commenced after it brought the negligence claim.

2. BNL contends that the Club could and should have brought the deceit claim at the same time as the negligence claim. Both claims could then have proceeded to a single trial at which all the issues between the parties would be determined. BNL says it is an abuse of process for the Club to have held back its claim in deceit as it did, and now to seek to have it determined after it has lost the negligence claim.

3. The Club accepts that a claim in deceit in relation to the credit reference could properly have been included in the action by which the negligence claim was brought. However, it submits that on the material available in advance of the trial in that action it would have been a speculative and weak claim in deceit (albeit one which could properly have been advanced) and, given the particular responsibility on counsel and a party in relation to pleading fraud, it cannot be said that it was incumbent on the Club to include a deceit claim in that action. After trial commenced in that action, significant new evidence has become available to the Club which has materially strengthened its case in deceit. The Club maintains that it is, therefore, no abuse of process for it to have commenced a separate action against BNL in relation to the deceit claim.

Factual background

4. In September 2010, a business development manager of BNL, Ms Paola Guidetti, arranged for an account to be opened with BNL in the name of Mr Hassan Barakat. No monies were deposited in the account and there was no significant movement of funds across it.

5. The Club operates a casino. It offers a cheque cashing facility to its customers, subject to a satisfactory bank reference being obtained.

6. Mr Barakat wished to gamble at the Club's casino. On 11 October 2010 he authorised the Club's associated company, Burlington, to contact his bank, BNL, to obtain a credit reference to allow him to cash cheques at the casino. He nominated Ms Guidetti as his contact at BNL. On 12 October 2010 Burlington's bank sent a fax to BNL, for the attention of Ms Guidetti, asking for a credit reference for Mr Barakat.

7. In reply, on 13 October 2010 a credit reference for Mr Barakat, purporting to be signed by Ms Guidetti, was sent to Burlington's bank ("the reference"). The reference stated:

> "[Mr Barakat] of Via Tanara, 35, Parma 43100, maintains an account number 301 with us to our satisfaction and he is financially healthy and capable to meet his business commitments and all his obligations. Mr Barakat is trustworthy up to the extent of £1,600,000 in any one week."

8. Upon receipt of the reference, the Club granted Mr Barakat a cheque cashing facility. Between 15 and 18 October 2010 Mr Barakat played at the casino. On 17 October he drew a cheque under the facility for the equivalent of £1 million in Euros, using the proceeds to buy gaming chips. On 18 October he drew a further cheque for the equivalent of £250,000 in Euros, again using the proceeds to buy gaming chips. In his gambling he made some losses and some limited gains. On 18 October he cashed in gaming chips to the value of £427,400 and left the casino. When the cheques were presented for payment they were said by BNL to be forgeries and were returned unpaid in November 2010. Mr Barakat was not seen again and it has not been possible to trace him.

9. On 12 March 2013, the Club commenced its action against BNL in respect of the negligence claim. In its Defence, dated 25 July 2013, BNL set out a number of defences. It did not admit that it had received the request for a credit reference for Mr Barakat. It did not admit that the reference was sent to Burlington's bank. At para. 13 of the Defence it was denied that the reference was properly provided by or on behalf of BNL, and in that regard it was stated that the reference contained a number of errors and anomalies as to its form and substance, including at paras. 13.3 and 13.4:

> "13.3 The signature on [the reference] is said to be that of an employee of [BNL], Ms Paola Guidetti. However, she has stated to [BNL] that this signature is not genuine.
>
> 13.4 Without prejudice to paragraph 13.3 above Ms Guidetti, who worked for [BNL] in business development, was not authorised or entitled to provide a bank reference on behalf of [BNL]."

10. It appeared from para. 13.3 that BNL proposed as part of its positive case to rely upon an account given by Ms Guidetti that the signature on the reference which purported to be hers was in fact a forgery. The Club sought confirmation of this in a request for further information made under CPR Part 18. In its response dated 6 September 2013, BNL stated at response 8 that it "does not, at present, advance such a positive case but reserves the right to do so in the future". I have some difficulty in following the relationship between that statement and what had been pleaded in para. 13.3 of the Defence. So did the Club: in its Reply, at para. 6.1, it stated that in light of that response "the relevance of paragraph 13.3 [of the Defence] is not understood." It seems that BNL was seeking to keep its options open, in a rather questionable way in pleading terms, to advance a positive case at trial that the signature on the reference was a forgery.

11. The trial date was set for early July 2014. Disclosure in relation to the negligence claim was largely completed by mid-February 2014. The disclosure given by BNL included a complaint dated 12 July 2013 made by BNL to the Italian police, with two informal translations, in respect of the cheques given to the Club by Mr Barakat. Neither party put a formal translation of the complaint before the court, nor was it suggested that a formal translation would have had any bearing on what we have to decide.

12. The first translation of the complaint referred to the negligence claim brought by the Club in respect of what was described as "an asserted bank reference" and to the cheques cashed by Mr Barakat. A footnote (not, it seems, part of the text of the complaint to the police) stated that Ms Guidetti had been responsible for arranging the opening of the account of Mr Barakat with BNL, and described her as a "BNL employee who was later dismissed for justified cause on June 2012 after some internal verifications" (i.e. before the Club commenced proceedings on the negligence claim; the dismissal was not stated to be related to the incident with the Club). The translation of the complaint said that Ms Guidetti's signature on the reference "has been declared as 'apocryphal'" (meaning, forged) and noted that "This circumstance should be verified during [the proceedings brought by the Club]". At the end of the translation, this text appeared:

> "It is necessary to declare, moreover, that Mrs Guidetti – ex employee – may be implied [*sic*] in other anomalous cases concerning subscription on warranties related to [BNL] which have later been rejected by [BNL] itself and denounced."

13. The second translation of the complaint was fuller and more precise. The reference was described as "an alleged 'bank reference'". It was said to be "questionable from many procedural and substantive aspects", which were then set out. They broadly corresponded to those set out in para. 13 of BNL's Defence. As in the Defence, according to the second translation BNL referred to the signature on the reference, "ascribable to the former employee Mrs Paola Guidetti" and noted that it "was described by [her] to be 'forged', which would have to be specifically investigated as part of [the proceedings brought by the Club]". In similar manner to the first translation, the second translation included this text:

> "With regard to the name of the former employee, Mrs Paola Guidetti, the alleged signatory of the 'bank reference' in question who … identified and acquired the documentation for the subsequent opening of the current account on behalf of … Hassan Barakat at the time the cheques which subsequently proved to be forged were drawn, it is stated that said name [sc. that of Ms Guidetti] was implicated in other anomalous events relating to signatures on guarantees/sureties ascribable to [BNL] which, however, the latter disclaimed and reported."

14. It appeared from the two translations that BNL was maintaining to the Italian police, as it was maintaining in the Defence, that Mr Guidetti's signature on the reference had been forged. It also appeared that Ms Guidetti had been implicated in other, different anomalous events and had been dismissed by BNL at a time which did not appear to be related to the incident involving the Club or the claim brought by the Club.

15. Upon review of disclosure by BNL, on 28 February 2014 the Club's solicitors (Michael Simkins LLP) wrote to BNL's solicitors Bird & Bird LLP ("Bird & Bird") to raise various queries on the documents. As regards the reference in the first translation to the dismissal of Ms Guidetti "for justified cause", disclosure was sought of her personnel file, including any documents relating to her dismissal.

16. Meanwhile, witness statements were exchanged on 21 March 2014. BNL did not serve a witness statement from Ms Guidetti. Instead, it served witness statements from Piero Turlon, who had been an officer of BNL working in its Office of Fraud Prevention and Protection until his retirement in 2014, and from Eugenio Colleoni, an officer of BNL responsible for supervising BNL's handling of incidents relating to IT security and fraud.

17. Mr Colleoni commented on the reference, highlighting certain respects in which it appeared to be aberrant in form. At para. 10.2 he said:

> "I understand that Ms Guidetti has denied to BNL that it is her signature on the reference. She said this in an email to Paola Bombardini and Guiseppina Lo Bello dated 10 March 2011 [exhibited]. This is, in my view, supported by a comparison of the signature on the reference with Ms Guidetti's specimen signature held by BNL [exhibited]. The two signatures do not match at all."

18. It appeared from this that, notwithstanding its response 8 in its CPR Part 18 response, quoted above, BNL did propose to mount a positive case at trial that Ms Guidetti's signature on the reference had been forged. Mr Colleoni also gave further reasons to support his view that "the reference was never in fact prepared by or sent from BNL."

19. The impression that BNL proposed advancing a positive case at trial that Ms Guidetti's signature had been forged was reinforced by paras. 21 to 25 of the witness statement of Mr Turlon. He quoted from the same email from Ms Guidetti, in which she stated that the signature on the reference was forged, and then went on at para. 23 to say:

> "This is consistent with Mr Colleoni's analysis of the signature on the reference, as articulated in paragraph 10.2 of his … witness statement. Further, I note that as a Business Development Officer, Ms Guidetti would not have the authority to sign even a bank 'guarantee' as considered [earlier in his statement], let alone a reference in a form which would be exceptional within BNL's banking practice, and in relation to such substantial sums of money."

20. Bird & Bird replied to the letter of 28 February from Michael Simkins LLP by letter dated 11 April 2014, which included the following:

> "[BNL] has confirmed to us that Ms Guidetti was dismissed for reasons unconnected with the alleged reference, or with any of the claimants, or with Mr Barakat. Accordingly, Ms Guidetti's dismissal is irrelevant to these proceedings, and the claimants are not entitled to a copy of Ms Guidetti's personnel file. …"

21. Michael Simkins LLP responded by letter dated 24 April 2014. They noted that Bird & Bird had not provided any explanation why Ms Guidetti had been dismissed and asked them to confirm "whether the conclusion of Ms Guidetti's employment was in any way connected with the events from which this claim arises." They also objected to the last two sentences in para. 10.2 of Mr Colleoni's witness statement, set out above, on the basis that Mr Colleoni was not an expert witness competent to give evidence about whether Ms Guidetti's signature on the reference was a forgery; nor had any directions been given for expert evidence to be adduced about that.

22. In Bird & Bird's reply dated 9 May 2014 they provided no further explanation regarding the circumstances of Ms Guidetti's dismissal, but reiterated that it "is irrelevant to these proceedings." They agreed to serve a revised version of Mr Colleoni's witness statement with the last two sentences of para. 10.2 removed, but said that submissions would be made at trial about Ms Guidetti's signature on the reference, i.e. to suggest that it was forged: "The fact that the two signatures are completely different is plain on the face of the documents [i.e. the reference and the specimen signature of Ms Guidetti held by BNL, as referred to by Mr Colleoni], and is a matter of fact that Counsel will be bringing to the attention of the judge."

23. Thus, again, BNL made it clear that it was proposing to advance a positive case at trial that Ms Guidetti's signature on the reference was forged. This was also explained by Bird & Bird in a second letter of 9 May 2014, in which they said that in light of the witness statement of Mr Colleoni BNL "is preparing an amendment to its Defence to advance a positive case that the request was never received by [BNL] and that the reference was not sent by them". The statements in these letters were of a piece with BNL's case in para. 13.3 of the Defence and as set out in the witness statements of Mr Colleoni and Mr Turlon. BNL's position for trial appeared to be shaping up in this way notwithstanding that response 8 in BNL's CPR Part 18 response struck a discordant note. BNL never explained how that discordancy was to be understood or resolved. It just ignored it in the correspondence leading up to trial.

24. In the event, despite Bird & Bird's second letter of 9 May, BNL did not apply to amend its Defence. No explanation was given for this. Perhaps BNL and its advisers thought that they had already said enough in the Defence, the witness statements and in correspondence that the judge would not stop them from seeking to advance such a positive case of forgery of Ms Guidetti's signature on the reference if they wanted to.

25. In his skeleton argument for trial dated 1 July 2014, Mr Hobson, who represented the Club (Mr Salzedo QC did not appear below), understandably tried to make capital out of response 8 in BNL's CPR Part 18 response in an effort to foreclose BNL from developing a positive case that the signature on the reference was forged; he also pointed out that BNL had not served a notice under CPR Part 32.19 to challenge the authenticity of the reference. But there is no doubt that in its Defence, in its witness statements and in the correspondence BNL was seeking to keep its option open to contend that Ms Guidetti's signature was indeed forged, and the Club and its legal advisers had to decide how to frame their case in the light of that. This is relevant to the issue of abuse of process which we have to decide on this appeal.

26. By letter dated 14 May 2014, Michael Simkins LLP disagreed with Bird & Bird's contention that the circumstances of Ms Guidetti's dismissal were irrelevant to the

proceedings. They again invited BNL to explain why she was dismissed and to disclose documents relating to her dismissal.

27. Bird & Bird replied by letter dated 20 May 2014. They again stated that Ms Guidetti was dismissed for reasons "wholly unconnected with this case". They referred again to the positive case which BNL proposed to advance that the request for the reference was not received by BNL and was not sent by BNL (i.e. on the footing that Ms Guidetti's signature on the reference had been forged), and said that in the light of that "it should be all the more clear that Ms Guidetti's dismissal is irrelevant". Accordingly, they again refused to give disclosure of documents relating to Ms Guidetti's dismissal.

28. Under cover of a letter dated 2 June 2014, Michael Simkins LLP sent Bird & Bird further documents which they had obtained from Burlington's bank, comprising a fax cover sheet from the bank to BNL dated 12 October 2010, marked for the attention of Ms Guidetti, and a transmission verification report. They chased for a copy of BNL's amended Defence, if one was to be produced. Bird & Bird replied on 9 June 2014 to say that they would be assessing with their client whether any amendment was needed to the Defence and would revert as soon as practicable in that regard. They never did. Nor was disclosure given of Ms Guidetti's personnel file and documents relating to her dismissal, as might have been expected (or further explanation given why disclosure was still being refused) in light of Bird & Bird's letter of 20 May 2014, if BNL was going to change its position regarding the genuineness or otherwise of Ms Guidetti's signature on the reference.

29. Skeleton arguments for trial were exchanged on 1 July 2014. The trial hearing was scheduled to begin on 7 July. I have referred to the position of the Club in Mr Hobson's skeleton argument. The skeleton argument for BNL was prepared by Mr de Mestre (who, like Mr Hobson, appeared without a leader at first instance). BNL's skeleton argument continued to indicate that it would be contending that the signature on the reference was forged: see paras. 55 to 58. Again, reference was made to Ms Guidetti's email to BNL asserting that her signature was a forgery as part of a positive case by which BNL was seeking to persuade the judge that he should not find that the reference emanated from BNL, and this and other facts were said to "suggest that the reference was produced by someone who only had historic knowledge of [BNL]" (i.e. was someone other than Ms Guidetti). It is highly questionable whether this position was properly open to Mr de Mestre in light of the way the pleadings had developed (or, as regards amendment of the Defence, had not developed). However, the important point is that going in to the trial BNL was still seeking to persuade the court that the signature was or might well be a forgery. Mr Hobson could not be sure that a late application to amend the Defence would not be made, relying on all the earlier indications of BNL's position in that regard, as set out above, if the judge appeared to be inclined to accept the pleading point made in Mr Hobson's skeleton argument.

30. The hearing of the negligence claim began on 7 July 2014. There were very brief opening remarks by counsel before witnesses were called. HHJ Mackie QC asked Mr de Mestre what position BNL was taking in relation to the status of the reference. Mr de Mestre said that BNL "simply don't admit it" (which in context meant, did not admit that it was genuine, bearing Ms Guidetti's true signature) and that BNL did not accept it emanated from BNL. He did not seek to qualify anything said in his skeleton argument. The judge expressed some scepticism about BNL's position on this but the issue was left up in the air in this way.

31. Witnesses were called and examined on 7 and 8 July. The parties then had a day to prepare their closing submissions, which were presented on 10 July.

32. In closing, Mr Hobson made powerful submissions to the effect that it was not now open to BNL to invite the court to reach factual findings with a view to establishing that Ms Guidetti's signature on the reference was forged. HHJ Mackie QC, however, did not treat the issue as foreclosed against BNL by reason of the pleadings or the absence of a notice to challenge the authenticity of the reference. Instead, in his judgment at [26], he found as a fact that Ms Guidetti's signature on the reference was genuine and dismissed BNL's attempt to rely on her email in which she claimed it was forged. It is noteworthy that the judge understood that throughout the trial, including through closing submissions, Mr de Mestre was seeking to maintain a case that the court should decline to find that the signature on the reference was genuine.

33. Mr Turlon gave evidence on 8 July. Under cross-examination by Mr Hobson about the complaint to the Italian police referred to above, he gave revealing answers about the circumstances in which Ms Guidetti had come to be dismissed by BNL. The circumstances involved a transaction in which a client of BNL wished to make a payment to a counterparty using bank drafts, which bore a BNL stamp and a signature purporting to be that of Ms Guidetti – as Mr Turlon put it, "just like in this case". The bearer of the draft asked BNL whether the signature was valid, and, as Mr Turlon put it:

> "Miss Guidetti stated that that was not her signature. The bank was able to prove that she had lied in this specific circumstance."

34. Mr Turlon said that this was a completely different matter from the one before the court, but I do not think it is difficult to see that it has some bearing on the Club's case. HHJ Mackie QC thought so too. As he said at [26], it was puzzling why BNL should rely on what Ms Guidetti had said in her defensive email in relation to the present case (i.e. asserting that her signature on the reference was a forgery), "given what emerged from cross examination about [the complaint BNL had filed with the Italian police]". As HHJ Mackie QC said, "[Ms Guidetti's] role in the present case suggests gross impropriety on her part, and it seems, not just on this occasion".

35. I return to the significance of this new information from Mr Turlon in the discussion below. At this point, however, I should observe that in the present appeal Mr Chapman QC for BNL does not suggest that, after obtaining these answers from Mr Turlon in cross-examination, Mr Hobson should immediately have applied to amend to plead deceit in the action then before the court. That is entirely realistic on Mr Chapman's part: it would not be reasonable to expect counsel in the middle of a short trial in a negligence action to analyse and digest some stray new information which emerges in cross-examination and then apply in closing submissions to amend the particulars of claim to plead a new case in deceit. Mr Chapman accepts that the outcome of this appeal must depend upon the position of the parties by the time of the commencement of the trial hearing.

36. HHJ Mackie QC handed down his judgment on 29 July 2014. He awarded damages to the Club on the basis of the negligence claim. BNL obtained permission to appeal to this court. Mr Salzedo QC was instructed along with Mr Hobson to represent the Club. The Club's legal team reviewed the position in light of all the available evidence. By

letter from Michael Simkins LLP dated 15 October 2014 the Club indicated that it considered it had a claim in deceit in respect of the reference and would commence proceedings in respect of that claim. The letter referred to Mr Turlon's evidence in cross-examination about Ms Guidetti's lie about the genuineness of her signature in another case and to HHJ Mackie QC's judgment at [26].

37. In August 2015, the Club obtained evidence which it says indicates that in the summer of 2010 Ms Guidetti had been involved in a fraud committed on another London casino, Les Ambassadeurs. The Club says that the facts of that case were very similar to the fraud which it alleges in its deceit claim: in June 2010 a customer of Les Ambassadeurs, a Mr Gilioli, applied for a cheque cashing facility with that casino and authorised it to obtain a bank reference from his bank, BNL; the contact person at BNL was again Ms Guidetti; in July 2010 BNL provided a credit reference signed by Ms Guidetti confirming Mr Gilioli's creditworthiness; and Mr Gilioli cashed a cheque with the casino which was later dishonoured.

38. On 5 April 2016, shortly before the hearing in this court of BNL's appeal against the decision of HHJ Mackie QC in respect of the negligence claim, the Club issued new proceedings in relation to its deceit claim. In that claim the Club alleges that Ms Guidetti knew that the representations contained in the reference were false or was recklessly indifferent to their truth or falsity, in other words that she behaved fraudulently and dishonestly in signing and sending the reference.

39. On 18 May 2016 this court allowed BNL's appeal in respect of the negligence claim, holding that BNL owed no duty of care to the Club.

40. On 30 June 2016 BNL issued its application to strike out the Club's deceit claim on grounds of abuse of process.

41. In the judgment under appeal to us, handed down on 16 December 2016, HHJ Bird acceded to that application and struck out the Club's deceit claim as an abuse of process. The judge held that following disclosure in relation to the negligence claim the Club was aware of facts which would allow an inference of fraud to be drawn and which were not consistent with honesty, so that a plea of fraud would not have been improper: [34]. He did not regard the new information which emerged in Mr Turlon's cross-examination or regarding the incident with Les Ambassadeurs as significant: [33]. The judge said that the delay between having the relevant information necessary to plead fraud (well before the negligence claim was tried) and the actual pleading of the deceit claim went "well beyond what might be regarded as prudent or sensible": [35]. The Club's failure to plead the deceit claim earlier "was neither commercially reasonable nor forensically legitimate": [36]. The judge did not accept that the pleaded position of BNL in relation to the negligence claim, referring to Ms Guidetti's denial that her signature on the reference was genuine, was relevant, since BNL had said that it was not advancing a positive case that the signature was forged: [37] (the judge said that it was clear from the Reply that BNL was not advancing such a positive case, but that involved a reference back to what BNL had said in response 8 in its CPR Part 18 response). In the judge's assessment, the Club could and should have pleaded its deceit claim before the trial of the negligence claim.

Discussion

42. A claim in deceit does not depend upon a finding that a duty of care was owed. The rules of causation and remoteness of loss are different in certain respects which are arguably relevant to the possibility of the Club obtaining relief pursuant to the deceit claim even though it has lost on its negligence claim. For the purposes of this appeal BNL accepts all this, and does not contend that the fact that the Club has failed in its negligence claim has the consequence that the deceit claim must fail also. Rather, BNL's case is that it is an abuse of process for the Club to bring its deceit claim after pursuing its negligence claim through to trial, because the Club could and should have instituted its deceit claim before the trial of the negligence claim.

43. Mr Salzedo for the Club accepts that the Club could have instituted the deceit claim before trial of the negligence claim, in the sense that counsel for the Club could properly have pleaded such a case without violation of any of the professional standards applicable in respect of advancing a plea of fraud. In other words, there were sufficient oddities and questionable features in relation to what had happened regarding the giving of the reference (including as pleaded in para. 13 of BNL's Defence) that it would have been professionally proper for counsel for the Club to plead that an inference should be drawn that Ms Guidetti had indeed signed the reference and had done so knowing that it was false or reckless as to whether it was true or false. However, Mr Salzedo's submission is that HHJ Bird was wrong to say that the claim in deceit *should* have been instituted before the trial of the negligence claim. A claim in deceit based on the material available before trial would have been speculative and relatively weak, particularly in light of the positive indications from BNL that it would say at trial that Ms Guidetti's signature on the reference was forged. It cannot be said that it was incumbent on the Club to plead a case in deceit before the trial of the negligence claim. The Club was entitled to be cautious and to prefer to take care not to over-state its case. The information obtained from Mr Turlon's cross-examination about the reason for Ms Guidetti's dismissal and in relation to the Les Ambassadeurs incident was not available prior to the trial of the negligence claim and is highly material to the deceit claim which the Club now wishes to pursue. It cannot be said that it is an abuse of process for the Club now to pursue that deceit claim, based as it is to a material degree on those new items of evidence.

44. The parties are agreed that the relevant principles are those set out by the House of Lords in *Johnson v Gore-Wood & Co. Ltd* [2002] 1 AC 1, in particular at 30-31 per Lord Bingham of Cornhill in the following well-known passage:

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v Henderson*: A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v Henderson* [(1843) 3 Hare 100] has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced

> by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

45. In my judgment, and with respect to HHJ Bird, he was wrong to strike out the Club's deceit claim. It is not an abuse of process for the Club to institute and pursue that claim after the trial of the negligence claim.

46. Although a deceit claim could have been introduced by the Club alongside the negligence claim before the trial of that claim, it cannot properly be said that such a deceit claim *should* have been so introduced – i.e. on pain of losing any later opportunity to plead a case in deceit, no matter what further evidence pertaining to fraud might emerge. The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in

fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and this may affect the court's reaction to other parts of its case. Moreover, as Birss J observed in *Property Alliance Group v Royal Bank of Scotland* [2015] EWHC 3272 (Ch) at [40], allegations of fraud "can cause a major increase in the cost, complexity and temperature of an action." For these reasons parties are well-advised, and indeed enjoined according to usual pleading principles, to be reticent before pleading fraud or deceit. Although the Club could have pleaded deceit before trial of the negligence claim, in my view it behaved reasonably and entirely properly in deciding not to do so on the speculative and inferential basis which would have been necessary at that stage.

47. Contrary to the view of the judge, I consider that the new evidence derived from Mr Turlon's cross-examination at trial and regarding the Les Ambassadeurs incident is highly material to the deceit claim which the Club now wishes to pursue. I also think that the judge gave inappropriate weight to BNL's statement in response 8 of its CPR Part 18 response, that it was not advancing a positive case that Ms Guidetti's signature on the reference was a forgery. Further, I think the judge was in error in saying that following disclosure in the negligence action the Club was aware of facts which "were not consistent with honesty" ([34]).

48. As regards BNL's position leading up to and throughout the trial, I have set out in some detail above how, notwithstanding response 8 notwithstanding response 8, BNL did in substance maintain a positive case that Ms Guidetti's signature on the reference was forged. The Club was entitled to assess what position it should adopt on the question of whether to plead deceit in the light of this.

49. The potential reputational consequences for a bank of a pleading of fraud against it are particularly serious, since trust in a bank is such an important foundation for its business. Banks are expected to take care to ensure that their staff are honest, and it is a serious matter not just for the bank employee but for the employing bank for a party to assert a formal claim in legal proceedings that a bank employee has been dishonest. On the material the Club had available to it before trial, it was entitled to think long and hard about whether to allege fraud on the part of Ms Guidetti, and to conclude that it would not be prudent or appropriate to do so. The same oddities and questionable features in relation to the reference which BNL now says should have led the Club to plead a claim in deceit by inference were being relied upon by BNL up to and throughout the trial to support its case that the true inference was that Ms Guidetti's signature on the reference was not genuine. They did not ineluctably point to an inference of fraud. They were matters which were capable of being consistent with honesty on the part of Ms Guidetti: if she had not signed the reference, she had not been dishonest.

50. The evidence of Mr Turlon in cross-examination about the reason for Ms Guidetti's dismissal by BNL and the evidence about the Les Ambassadeurs incident is strongly supportive of the Club's present deceit claim in a way which the material available before the trial of the negligence claim was not. The judge was dismissive of the evidence of the Les Ambassadeurs incident because the Club had intimated in correspondence that it was going to plead a claim in deceit before that evidence became available. But in my view the judge should have assessed whether the deceit claim as pleaded was an abuse of process, and therefore should have attached significant weight

to the evidence about the Les Ambassadeurs incident. In any event, the evidence of Mr Turlon in cross-examination was itself highly material and the judge should have given it much greater weight than he did. It indicated that Ms Guidetti was prepared to lie to her employer when challenged about the genuineness of her signature on official bank documents, to deny that it was hers. She had acted dishonestly. She could not be presumed to be an honest bank employee. As HHJ Mackie QC observed in his judgment at [26], once this was known little or no weight could be attached to Ms Guidetti's protestation in an email in relation to the present case that her signature on the reference was forged. Moreover, the distinct possibility or even probability that she had lied about that is capable of lending support to the Club's present case in deceit that she had lied to the Club in signing the reference, in that this seems to indicate that she had this motive for seeking to mislead others about her involvement.

51. In assessing whether it is an abuse of process for the Club to institute and maintain its deceit claim after the trial of the negligence claim, I consider it is important that the new evidence from Mr Turlon and in relation to the Les Ambassadeurs incident came into the Club's hands after the material time, i.e. after the commencement of that trial. This is not a case in which a party has deliberately decided for tactical reasons to keep material up its sleeve in relation to a deceit claim until after it sees what happens with its negligence claim, and then institutes later proceedings in deceit relying on material which was already available to it at the earlier stage. To proceed in that way might well be an abuse of process: see *Johnson v Gore-Wood* at p. 31B per Lord Bingham, quoted above; and *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823, [77] (Sedley LJ) and [79] (Sir Anthony Clarke MR). But in this case, the fair inference is that the Club has proceeded to bring the deceit claim by reason of new evidence becoming available which is highly material and strongly supportive of that claim.

52. I say this is the fair inference, because the Club has not waived legal professional privilege in respect of the legal advice it received before and after the trial of the negligence claim. The Club is not obliged to waive privilege and it is appropriate to determine the strike out application by BNL on the basis of such inferences as can fairly be drawn from the objective and known facts of the case regarding the Club's conduct.

53. The Club was entitled to treat the new evidence as a decisive matter which justified it in bringing its deceit claim after the trial of the negligence claim. The new evidence means that the Club is in a much stronger position to allege deceit on the part of Ms Guidetti, acting for BNL, than it was in prior to that trial.

54. The burden is on BNL as defendant to identify reasons why bringing the second claim is manifestly unfair: *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646, at [100] per Simon LJ (with whom the other members of the court agreed). The courts will not lightly shut out a party from pursuing a genuine claim, unless abuse of process can clearly be made out: *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823, at [65] per Lloyd LJ. "It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process …": *Michael Wilson & Partners* at [48(5)] per Simon LJ.

55. In this case, there is no manifest unfairness to BNL in allowing the Club to proceed with the deceit claim. On the contrary, in my opinion, in the circumstances of this case it would be unfair to the Club to treat it as being precluded from bringing its present

deceit claim based on the significant new material, not available to it previously. It is in accordance with the overriding objective set out in CPR Part 1 that the Club should be permitted to proceed with its deceit claim.

56. The issue of whether there was deceit by Ms Guidetti, acting for BNL, is plainly distinct from the issue of whether BNL was negligent: see e.g. *Paragon Finance Plc v D.B. Thakerar & Co.* [1999] 1 All ER 400 at 418f-h, where Millett LJ makes the point that in English law there is an important distinction between cases of fraud and dishonesty, on the one hand, and of negligence and incompetence, on the other. The issue of whether there was deceit by Ms Guidetti has not previously been decided between the parties and it is just and appropriate that the Club should be allowed to proceed to take its case on that issue to trial. In my opinion, it cannot be said that the Club's conduct in bringing its deceit claim amounts to "unjust harassment" of BNL, to use Lord Bingham's phrase in *Johnson v Gore-Wood*, quoted above.

57. For the reasons I have given, in my judgment the Club is not abusing the process of the court in bringing and pursuing its deceit claim. I would therefore allow the appeal.

Lady Justice Gloster:

58. I agree.