Neutral Citation Number: [2017] EWHC 2655 (Ch)

Case No: A30BM001

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 31/10/2017

Before :

HHJ DAVID COOKE

- -

Between :

Dr Navdeep Dhaliwal	**Claimant**
- and -	
Iklaq Hussain (aka Ikhlaq Hussain) (1)	**Defendants**
Jaspal Singh Bachada (2)	

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- -

Stephen Whitaker (instructed by **Brindley Twist Tafft & James**) for the **Claimant**
Richard Oughton (instructed by **Aspen Court**) for the **Defendants**

Hearing dates: 19-22, 25-26 September 2017

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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.

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HHJ DAVID COOKE

HHJ David Cooke:

Introduction

1. On 27 December 2007 the claimant entered into a contract to purchase from the defendants a dental practice at Lichfield Rd, Wednesbury, one of a number of such practices operated by them in partnership. The contract was completed on 11 January 2008, when the claimant paid the agreed price of £625,000, which was apportioned as to £245,000 for the freehold premises, £80,000 for fixtures, equipment and stock and £300,000 for goodwill.

2. The claimant seeks damages for

   i) Misrepresentation, alleged to be fraudulent, alternatively actionable under s 2(1) Misrepresentation Act 1967. The statements concerned were made in replies to precontract enquiries given by the defendants' solicitors acting on the sale (who were not the firm now representing them) and were, the claimant says, to the effect that the practice had ceased to do NHS work after March 2006, such that its turnover of £404,000 shown in accounts provided to her in the following year from April 2006 was entirely from private patients. In fact (and unknown to her) the practice had a residual income from NHS work during that year and the income from private patients was only £229,000. The difference was important because the ability to do NHS work had ceased entirely by April 2007 so that the turnover she inherited was limited to that from private work and much lower than she had expected. As a result she says the goodwill was worth nothing, or at any rate very much less than the £300,000 paid for it.

   ii) Breach of an express warranty that the financial position of the practice had not materially deteriorated since 31 March 2007, the date of the last set of accounts provided to her, in that by that date the individual dentists who (unusually) held the benefit of the remaining NHS contracts had all left the practice, with the result set out above that it had lost its ability to do NHS work.

   iii) Breach of contract in that consumable stores, which the claimant says were to be sold to her under the contract, had all been removed before completion and had to be replaced by her at an estimated cost of £5,000.

3. The claim form bears an issue date of 2 January 2014, over 6 years after the contract, and a point was taken as to limitation. However Mr Oughton does not pursue that as it is now accepted that the claim form and fee were received at court on 13 December 2013 so that the claim is deemed to have been "brought" for limitation purposes on that date (PD7A para 5.1).

4. The defence does not deny that the representations were made (though it disputes in some respects the meaning attributed to them by the claimant) or the facts which the claimant relies on to show falsity. It is denied the claimant relied on the representations and asserted that she instead relied on her own forecasts and assumptions based on her obtaining a new contract for NHS work. Breach of warranty is denied on the basis that the claimant is alleged to have known that the dentists who held the NHS contracts had left by April 2007. This implies, but does not expressly plead, that she knew that there were NHS contracts after March 2006 held by

individuals, a matter she denies. It is denied that the defendants were obliged to leave any consumable stock at completion, and in any event that they in fact had failed to do so.

5. Loss is denied, on the basis that the assets acquired are said to have been worth £675,000 at completion (more than the price paid), and any subsequent trading losses are said to be due to the claimant's own mismanagement. In particular the premises are said to have been worth £350,000 or more rather than the £245,000 apportioned in the price. This leads to a further argument that the contract is unenforceable for illegality because, the defendants say, the claimant dishonestly understated the value of the premises in the contract to avoid or reduce liability for Stamp Duty Land Tax.

Factual background

6. In 2007 the claimant was a relatively recently established dental practitioner. She graduated in 2000 and soon after moved to the West Midlands, initially working as an assistant or associate for other dentists. She combined her professional work with a career as an international athlete, which continued until 2012. In 2004 she explored buying a practice of her own and was shown a number that were for sale by Mr Gerry Blatter, a specialist broker for dental practices. In the end she did not buy any of these but found premises herself in Walsall and set up her own practice from scratch there.

7. By 2007 the claimant was looking to expand and approached Mr Blatter to see if he had any other practices for sale in the Walsall area. In August 2007 he introduced her to the defendants' practice in Wednesbury.

8. The defendants were both also qualified dentists. They each had their own practices, and from about 2002 also began to acquire other dentists practices, which they managed in partnership together. Mr Hussain said they realised they had a skill in taking over and reorganising such practices, modernising the premises and introducing modern computer systems and recruiting qualified dentists and support staff to run them. Over time they bought and sold a number of such practices. By 2006 Mr Bachada thought they owned about 6, including the Wednesfield practice and another in Droitwich. Mr Hussain thought there were only 4 at that stage.

9. Dentistry work at the defendants' jointly owned practices was all or mostly done by associate or assistant dentists rather than the defendants themselves. Associates are self-employed and work under a contract with the practice principals under which they are paid a percentage, typically 50%, of the fees received for the procedures they carry out. Assistants are employed by the practice, but also typically paid a salary calculated as a percentage of fees generated.

10. Dental work may be carried out either under the NHS or on a private basis. Broadly, under the NHS, the dentist is paid a fixed fee by the NHS for each procedure. Certain patients, such as children, pensioners and those on benefits, pay nothing towards their treatment. Others may pay a contribution, which may result in the dentist receiving an amount in addition to the basic NHS fee. Private patients pay the whole charge for their treatment, which is set by the dentist. Some practices voluntarily limit their private charges to the level of the NHS fee, but others can and do charge more.

11. Prior to April 2006, any qualified dentist in good standing could register to provide services under the NHS. They would submit a claim for the work done and be paid accordingly. There was no limit on the amount of NHS work they could do and claim

for. A new practitioner, such as the claimant, could therefore set up practice and advertise their ability to take on NHS patients. This was attractive, because in some areas there was a shortage of NHS practitioners so that patients unable or unwilling to pay at private rates had difficulty finding a practice to treat them.

12. From 1 April 2006 however the NHS system was revised and it became necessary for a dentist to have a contract with a Primary Care Trust (PCT) to provide NHS dental services. These contracts were awarded for a fixed amount of work over a year, expressed as Units of Dental Activity or UDAs, for which a contracted amount would be paid in monthly instalments (having deducted any contributions paid by the patients themselves). The contracts were normally awarded to the principal of a dental practice, who was then responsible for providing the clinical and other staff to perform the contracted service at that practice address. These were referred to as General Dental Services (GDS) contracts. The practice would submit returns showing the work done. At the end of the year there might be a clawback if the contracted amount of work had not been done, but no additional payment from the NHS if it had been exceeded.

13. It followed that the basic position was that if a practice was not awarded a contract by its PCT it was unable to carry on NHS work after 1 April 2006. This was known to all dentists at the time, including the claimant and defendants.

14. The claimant's case and evidence is that she arranged to meet Mr Blatter at the premises on a Sunday in August 2007 to be shown the practice. She was told by him this arrangement was necessary for reasons of confidentiality so staff would not be aware the practice was for sale. He showed her, but did not allow her to retain (again for reasons of confidentiality), copies of profit and loss accounts for the practice for the years ended 31 March 2006 and 2007. These showed turnover of (in round terms) £790,000 in the first year and £404,000 in the second. He explained to her that the reason for the drop was that the practice had no NHS contract and had converted from being an NHS practice to a private practice. She understood this to mean that the practice had not been awarded a contract by the PCT at 1 April 2006 and so had been obliged to operate as an exclusively private practice from and after that date. Her understanding therefore was that the turnover of £404,000 in the year from 1 April 2006 was all from privately paying patients.

15. What she was not told, she says, is that unusual arrangements were made under which the practice was in fact able to carry on some NHS work after 1 April 2006, such that in the year thereafter its stated turnover of £404,000 included (in round terms) £174,000 of NHS work and only £230,000 of private work. This came about in the following circumstances.

16. In January 2005 the NHS Dental Fraud team raided the defendants' practice at Droitwich pursuing investigations of alleged fraud against the NHS by the defendants including false accounting and unjustified claims for dental services. As a result, the Wolverhampton PCT (in whose area Wednesfield falls) was not willing to award a contract to the defendants as principals of the Wednesfield practice. The defendants clearly fought hard against that refusal; I had evidence from Ms Harvey who at the time was in charge of the relevant section of the PCT who said there had been many meetings and discussions about it. The defendants unsuccessfully appealed to the NHS Litigation Authority and launched (but withdrew) judicial review proceedings.

17. Instead, with a view to ensuring availability of services for the patients, the PCT awarded Personal Dental Services (PDS) contracts to five individual dentists who had worked as associates at the Wednesfield practice, with a total annual value of £431,000. These contracts were not therefore under the control of the defendants and the fees claimed under them were due from the NHS to the individual dentists, but arrangements were made to share them with the defendants in a mirror of the pre-2006 position. In the event, all of the contract holders left the practice over the course of the following year. Various payments were made under those contracts by the PCT totalling £173,916, which were accounted for as if they were turnover of the practice in the year to 31 March 2007 (it seems doubtful that this can have been a correct treatment, but nothing turns on it for present purposes). By 31 March 2007 however all of the contract holders had left and there was no remaining NHS work done at the practice.

18. All of this was of course well known to the defendants. None of it, according to the claimant, was revealed to her. She therefore proceeded on the understanding that the practice she was looking at had a purely private turnover of £404,000 in that accounting year.

19. At her meeting with Mr Blatter the claimant says she may have been shown, but again not given, a set of particulars of the practice prepared by Mr Blatter. She recalls it as a single sheet of paper with a price at the bottom. She was told by Mr Blatter that the practice had been allowed to be run down by the current owners but that if she worked in it herself instead of leaving it to associates she could build it up again. After the meeting she negotiated with Mr Blatter on the telephone and agreed a price of £675,000. The defendants say their asking price was £695,000, which she haggled down to £675,000. The claimant cannot recall this but accepts in her witness statement she agreed to pay the asking price or something slightly less, which would be consistent with Mr Blatter initially asking £695,000.

20. The claimant intended to finance the purchase by borrowing. At the time Lloyds Bank was very willing to lend up to 100% of the purchase price of dental practices, and she was introduced through her accountant to Mr Paresh Patel, the manager of a branch in Harrow specialising in such lending. She arranged to meet him in September. On 18 September 2007 Mr Blatter wrote sending her copies of profit and loss accounts for the periods to 31 March 2006 and 2007, which she believes was in response to a request in preparation for her meeting with Mr Patel. These documents, she believes, were the same as those she was shown by Mr Blatter at the premises. The defendants' evidence was that their accountants maintained accounts for their partnership business as a whole on a Sage system, but that each practice was treated in that system as a separate department, so that a report could be produced for one or more departments separately. The documents shown to the claimant were not formal accounts in the sense of having been adopted or filed for any purpose, but were a departmental profit and loss report for the Wednesfield practice. The defendants did not suggest that this meant (or that the claimant was told) that they could not be relied on to represent the results of the practice for the periods covered.

21. In fact it appears the copies of the accounts sent to the claimant were produced by the defendants' accountants at about 10.30 on 11 September 2007 (the time and date are printed on them) and sent on 12 September by post to Mr Hussain (see bundle vol 2/p 264). The letter makes clear that he had asked for these reports specifically. They are referred to as "departmental Sage print outs" and headed "Transactional Profit and

Loss". They each have the word "Wednesfield" added in manuscript to the heading, presumably by the accountant to identify the department referred to. All the copies produced, from any source, appear to be photocopies of the documents sent on that date. There may of course have been similar earlier printouts made for Mr Blatter's meeting with the claimant, but these have not survived.

22. The claimant's evidence is that when she met Mr Patel she showed him the two years' figures produced. She had not prepared a business plan but went through the figures, and told him that on the basis that the worst case was that the practice had a private fee turnover of about £400,000 she thought the costs of running it, staffed by associates, would be about £200,000 for the associates and about £100,000 for staff and other expenses. The estimated cost of servicing the loan was £48,000 pa leaving her a profit of about £50,000 pa. There was also the possibility of obtaining an NHS contract, which she said would add further profit, but not something she was counting on.

23. It was put to her that the accounts showed that the practice only made a marginal profit of about £1500 on the turnover of £404,000, but the claimant said that the only figure she relied on as applicable to the practice under her ownership was the turnover. "I do not know what expenses they have put through there", she said. She was confident she could predict the likely actual costs from her experience running her own practice. This corresponded with the evidence of Mr Miller, an expert in valuation of dental practices, who said that at the time valuation was typically based on a percentage of gross turnover because the costs of running a practice, and so the profits its accounts would show, were a matter under the control of the owners for the time being.

24. On 18 September 2007 Mr Blatter also produced a two page Memorandum of Sale, which he sent by post to the claimant (on 25 September, see document 2/277) and to the solicitors instructed by her (on his own introduction) and by the defendants. It states the price agreed to be £675,000 apportioned as to £300,000 to goodwill and £245,000 to the premises, as eventually appeared in the contract. It was accompanied by an inventory of equipment at the premises, dated 16 September.

25. Some documents from the bank's file has been disclosed, which include Mr Patel's memo to his superior regarding the proposition. They also include a copy of the 2006 and 2007 practice accounts and a copy of the Inventory dated 16 September 2007, but not the Memorandum of Sale. There is a document prepared by the claimant headed "Business Plan" which states her intention to grow the profitability and reduce unnecessary expenditure, but does not give any projected financial figures.

26. The bank also disclosed a two page document, undated but on Mr Blatter's headed paper, titled "Confidential information on practice". Among other information this document states the turnover figures for the 2006 and 2007 accounting years and the "Sale Price" which is given as £675,000 with the apportionment corresponding to the Memorandum of Sale. A final paragraph in bold says:

> "Please note, reason for drop in income year 2006 to 2007 was due to the practice converting to being independent from the NHS".

27. The claimant believes she must have been given this document by Mr Blatter and taken it with her to the meeting with Mr Patel. She cannot recall when she received it,

and none of the correspondence disclosed refers to it. It might of course have been included with a letter but not mentioned, or sent with a compliments slip. She says it may be the document he showed her when they met at the premises, though so far as she recalls that had only one page. On the defendants' case that they had initially asked for £695,000, it must have been prepared after Mr Blatter's meeting with the claimant and after their subsequent telephone negotiations had resulted in the agreement of a reduced price of £675,000.

28. Mr Patel gave a favourable indication and said that a loan offer would follow. On that basis the claimant instructed the solicitors Mr Blatter had recommended (not as I say her present solicitors) and thereafter contract discussions proceeded through the solicitors. At no stage did she have any direct contact with the defendants as sellers. She accepts their names were on the documentation but says she did not know of them and was not aware of the raid on the Droitwich practice or any rumours resulting from it.

29. The bank commissioned its own valuation from Mr Chris Vowles, who was provided with the same two sets of accounts. He reported in writing to the bank his opinion that the business had a going concern valuation of £675,000 and a valuation on the bank's required "special assumptions", ie that it had closed down and lost any relevant licences, of £355,000, as at 1 November 2007. Mr Patel referred to the latter as a "bricks and mortar" valuation, or a valuation of the "freehold asset". A copy was given to the claimant. The defendants rely on this valuation to argue that the property was worth £355,000 and not the £245,000 apportioned in the contract. In due course the bank sent a formal loan offer for £675,000, which the claimant accepted.

30. The defendants' solicitors sent a draft contract, and the transaction proceeded on the basis of that document. Unusually, therefore, the warranties given were in a form drafted by the sellers' advisor rather than the purchaser's. The claimant's solicitor sent a form of "due diligence" enquiries before contract (2/203) and made normal conveyancing searches and enquiries. The planning search revealed that the premises had planning permission only for the two surgery rooms on the ground floor and not the three other surgeries fitted out on the first floor. The claimant used this to negotiate a reduction in price of £50,000 with Mr Blatter.

31. The replies to the due diligence enquiries (2/207) were provided by the defendants solicitors on 14 November 2007, and (on her account) discussed by her at a meeting with her solicitors towards the end of November. The questions and answers focussed on in the evidence and submissions were

    i) Q1.1: "[Please let us have…] [c]opies of the Sellers' accounts for the last three years and any draft accounts or management accounts prepared subsequently".

       A: "Copy Profit and loss accounts herewith".

       It is common ground that the accounts sent with this reply were only the two years profit and loss figures previously seen,. There was thus no third year's accounts sent, nor any management accounts for the period since 1 April 2007 so the reply did not provide all that had been asked for. There was no explanation why these documents were not provided, though elsewhere the form of enquiries asked for an explanation if any of the information sought could not be given. The defendants' solicitor's file has been disclosed but does not give any indication why he decided not to give a full answer to this

question or whether before replying as he did he consulted the defendants for instructions.

In my view however the likelihood is that he would have done so. The nature of the enquiries as a whole is such that a solicitor, even if familiar in general with his client's affairs, would not be able to answer with specific information about one of the practices they owned without input from the client. The solicitor must have been provided with the accounts by the defendants, since those he sent were copies of those obtained by Mr Hussain on 12 September. It is possible they had been sent to the solicitor in anticipation of enquiries, but even if that had happened it is difficult to see why the solicitor, if speaking to his client after the enquiries were received, would not have told him that additional accounting information had been asked for.

The likely scenario on receipt of the enquiries, therefore, is either (a) that the solicitor had no accounts, told his client what had been requested and was in turn instructed that only the two full years accounts would be supplied, or (b) already had those accounts, told his client that management accounts had been requested in addition but was instructed that they would not be provided. Either way, the likelihood is that the defendants were told that management accounts subsequent to March 2007 had been requested and it was their decision not to provide them.

ii) Q2.9 "… Particulars of any change in the Business or in the manner of carrying it on during the last 3 financial years".

A: "Practice was changed from mixed private and NHS to purely private in April 2006".

It is this reply that is the foundation of the misrepresentation claim. It was not qualified or expanded upon elsewhere in the replies or correspondence, for instance by reference to the NHS work carried on after 1 April 2006 under the PDS contracts. The claimant said she took this as confirmation of what she had understood from Mr Blatter, ie that the practice had no NHS contract and therefore no NHS work after March 2006.

It is again unlikely that the solicitor would have been able to answer this without consulting his clients, and the defendants do not say that he did so. They say this form of wording was chosen by the solicitor, which must mean that either (a) they gave the solicitor a full explanation of the circumstances and decided in consultation with him to adopt this form of wording, or (b) they told him (at most) no more than that the practice had not obtained an NHS contract from 1 April 2006.

On either basis, the decision to withhold the information that there had been a substantial element of NHS work after April 2006, which had now ceased and resulted in a further loss of turnover not reflected in the disclosed accounts, must have been the defendants'.

32. The defendants' solicitors prepared a revised draft contract stating the price to be £625,000 as renegotiated. The £50,000 reduction was taken off the price of fittings and equipment, which became £80,000. Sch 5 set out a set of statements which, by cl 8 of the contract (2/187) the defendants warranted "save as has been disclosed to the

[claimant] prior to the signing of this agreement, are true and accurate in all respects". The warranty relied on is at para 1.2 of the schedule and reads as follows:

> "The Accounts (of which true copies have been furnished to the purchaser) are complete and accurate in all respects and show a true and fair view of the state of affairs and the financial position of the Business at *[ ]* and the profits of the Business for the financial period ended on that date and since *[ ]* … (b) the financial or trading position of the Business has not materially deteriorated…"

33. The contract does not define the capitalised term "Accounts". The square brackets shown above do not appear in the text but mark the places where, Mr Whitaker contends, a date has been omitted. Mr Oughton realistically accepts that this paragraph must be interpreted so that

    i) "the Accounts" refers to the two years profit and loss accounts that were supplied to the claimant, and

    ii) 31 March 2007, being the date to which the last of those sets of accounts was prepared, is to be read in at both places marked.

34. This contract was exchanged on 27 December 2007, and completion fixed for 11 January 2008. The claimant did not go to the premises or meet the staff until about 2 pm on that date, after completion had taken place. Although Mr Blatter had asked her solicitors if she wanted to be introduced to the staff before the completion date, the claimant says she cannot recall this being relayed to her, so this was the first time she had been to the premises since August 2007 and the first time she had met any of the staff. When she did arrive, on her account, she found:

    i) The defendants' manager Sarah Greenhouse was not there to meet her at 2 pm as arranged. Ms Greenhouse, who gave evidence, says the appointment was at 1.30 and she could not wait beyond 1.50. If she was so pressed for time that even if they had met at 1.30 she could not have stayed longer than 20 minutes with the purchaser, it would seem surprising that she could have expected to achieve much by way of handover and introduction to the staff and operations at the practice in that time.

    ii) There was no consumable stock left. She estimates in her witness statement this cost about £8,000 to replace (the Particulars of Claim refer to £5,000). Ms Greenhouse said she could not recall this, but stock would have been removed if the claimant had not agreed to pay for it. She had, of course, as part of the global figure of £80,000 for fixtures fittings and stock.

    iii) The only staff on site were nurses and receptionists. The three associate dentists had been told there were no jobs for them and had gone home. A few days later they all presented her with grievance letters in similar form saying they had not been paid for their work for December and January. They told the claimant they had little work and had been badly treated and had past difficulties in being paid by the defendants. Although they were relatively quickly paid up to the transfer date by the defendants, the claimant could not establish a good relationship with them. One left immediately. Two worked for a short period and then left, leaving the claimant to find replacements.

iv) Patient treatment plans had been deleted from the computer, leaving the claimant to reconstitute the records and contact patients to prompt them to complete their treatments. Ms Greenhouse subsequently told her this was in order to calculate the amount due to the associate dentists for treatment to date. It seems doubtful this can be a proper explanation; the dentists were paid monthly so such a calculation must have been possible every month while maintaining the patient records.

35. The claimant's solicitors wrote letters of complaint, but did not initially take the matter any further. The claimant herself felt she had been duped and the practice had been effectively closed down before she took over. She put her effort into trying to build it back up, conscious that she had a substantial loan to service. She tried to obtain an NHS contract but was told there was no funding in 2008 or 2009 to award any substantial new contracts, and insofar as small amounts of additional UDAs became available they were added to the contracts of those with whom the Wolverhampton PCT already had contracts. This did not include the claimant, whose contract at her original practice was with Walsall PCT.

36. In 2010 however the Wolverhampton PCT obtained additional funding to offer a new contract for a relatively large block of UDAs. She was approached by a Mr Kamaljit Aulak, a dentist who had existing contracts with Wolverhampton, and agreed that he would make an application for this new contract to be serviced from the Lichfield Road premises, and if successful he would buy the practice from her. She felt that the application stood more chance if made by him as an existing provider. It was successful, and in July 2010 she agreed to sell the practice to Mr Aulak for £200,000, apportioned as to £150,000 for goodwill and £50,000 for stock and equipment. She retained the premises, granting a lease to Mr Aulak for 20 years at an initial rent of £24,000 pa, rising by fixed amounts every 5 years. The claimant's evidence is that she suffered trading losses of just under £72,000 in the period until she sold the practice, which she seeks to recover along with costs of the purchase and sale and in servicing the loan in the meantime.

37. It was not until some years later that she was alerted by a fellow dentist to the fact the defendants' Droitwich practice had been raided and that they had been subsequently prosecuted, convicted and imprisoned for fraud against the NHS at that practice. She also found out that they had been successfully sued for fraudulent misrepresentation in the sale of another practice. It was this that led her to take advice from her present solicitors and ultimately bring this claim.

The witness evidence

38. I heard evidence of fact from the claimant and both defendants. In addition Tracy Harvey, at the time in charge of awarding dental contracts for the Wolverhampton PCT, gave evidence for the claimant about the introduction of the contract system, the contracts awarded to the associate dentists at the Wednesfield practice and the amounts actually paid under them. I accept her evidence unreservedly. A brief statement by Mr Taunque, the claimant's accountant, was agreed but does not assist materially with the issues. Sarah Greenhouse, at the time the defendants' practice manager, gave evidence, limited to the circumstances at the time of completion of the sale and immediately after. A witness summary in the form of a previous statement, signed but without a statement of truth, was served for Emma McNee, a nurse at the practice, but she did not attend trial. I admitted the statement as untested hearsay, but it has not assisted me in any of the conclusions I have reached.

39. Mr Blatter made two witness statements and attended to give evidence for the defendants. His first witness statement dealt with the circumstances of the sale but in truth contained little direct recollection of events, consisting mostly of reconstruction by reference to what he would normally have done on such a sale. His second contained limited and highly circumscribed statements as to relevant documents currently held by his firm. In his oral evidence he was able to expand somewhat, but his recollection was rather poor and he was in some respects hesitant and seemed to have difficulty understanding the import of some of the questions put to him, though I am satisfied he did his best to do so and to give helpful answers. He is now quite elderly. I will refer to some aspects of his evidence below; in general where factual matters were in dispute it tended to support the claimant's version of events rather than the defendants'.

40. In closing, Mr Oughton effectively invited me to disregard the evidence of his own witness by referring to letters (not amounting to medical evidence as to his ability or reliability as a witness) indicating that Mr Blatter suffered from Lewy Body Dementia, together with internet articles about that condition. I rejected that extraordinary submission. Many of Mr Blatter's answers were clear, and appeared to be genuine recollection rather than rationalisation, even if some others may have been. If it had been necessary to rely on Mr Blatter's evidence alone to establish any contested fact I would have been cautious in placing great weight on it, but in the event as appears below it is sufficient to note that on the relevant issues Mr Blatter's evidence does not make out the defendants' case and, if anything tends to undermine it.

41. The claimant in my view was giving her honest and best recollection of events now some time ago. Where her recollection was incomplete she was prepared to say so. Her account in general, in my view, corresponded with such contemporary documentation as there is. Her credibility was attacked on the basis, for instance, that some of the things she told the bank she intended to do when applying for a loan were not done, but she would not be the first person to have painted a somewhat rosy picture to a potential lender and even if she could be said to have done so that was not enough to cause me to regard her as unreliable in general.

42. I did not however form a good impression of either of the defendants as witnesses. Their joint witness statement was very brief and in my view gave a highly selective account of the relevant events which skated round most of the relevant factual issues. It did not, for instance, confirm important statements of fact pleaded in the defence, such as the statement that Mr Blatter had given the claimant at their first meeting a copy of his "Confidential Information" particulars stating a price of £695,000 and an apportionment of £350,000 to the property and £215,000 to goodwill, that at that meeting the claimant had been uninterested in the 2006-7 turnover but very interested in the higher level in the previous year, that she had later been given a copy of the 2004-5 accounts and that she actually knew the defendants themselves valued the goodwill at only £215,000. None of these matters was confirmed by Mr Blatter's witness statement either, and since they relied on things said and done by him the defendants had given no explanation in their evidence as to how they could make and verify their statement of case in these respects.

43. In answering cross examination, in my view, both defendants were throughout evasive. Mr Bachada had a tendency to deal with (admittedly sometimes over long and compound) questions by picking out one minor point in them and saying

something in reply limited to that point, thereby ignoring the intended thrust of the question. Mr Hussain frequently interrupted questions, launching off into a long statement about matters irrelevant to the question being asked. Both of them, when dealing with their own actions and motivations in the sale process, gave answers that in my view were implausible and untrue.

The Misrepresentation Claim

44. It is common ground that the relevant elements of actionable misrepresentation are:

i) The defendants (or their agent acting with their authority) must have made a statement of fact (as distinct from a pure statement of opinion or future intention) which is false.

ii) The statement must have been intended to be relied on, or made in such circumstances that it would appear likely that it would be relied on.

iii) The claimant must have been influenced by and acted in reliance on the statement (but it need not necessarily be the sole cause of her actions).

iv) She must have suffered loss as a result of acting in such reliance.

v) If the claim is for fraudulent misrepresentation, equivalent to deceit, it must be shown the defendants knew the statement was untrue, or made it without believing it was true, or recklessly, without caring whether it was true or not (*Derry v Peek* (1889) 14 App Cas 337).

vi) Even if fraud in this sense is not shown, the defendants are made liable by s 2(1) of the Misrepresentation Act 1967 unless they can show that they believed honestly and on reasonable grounds that the statement was true.

False statement of fact

45. As to the first element, the statement relied on was made by the defendants' solicitor, rather than personally by them. The Defence pleads that the exact wording was settled by the solicitor, but does not allege either that it was made without the defendants' authority or that they did not know at the time what the terms of the reply were. It is therefore to be treated as if it had been made by the defendants themselves.

46. Whether a statement is true or false requires an evaluation of the meaning of the statement made, which is not solely a question of looking at the actual words used. The question is, what would those words convey to a reasonable person receiving them, and that in turn requires to be addressed in the context in which the words were used and the surrounding facts. This is no more than the normal process of interpretation routinely engaged in by the court. It is similar to the exercise performed in interpreting a contract, but not identical, because the question is what one person, the representee, would have understood by the words used by another rather than what two or more parties may be taken by a reasonable observer to have agreed by exchanges between them.

47. An express statement of one thing may imply something additional to the actual words used. Determining what if anything is to be implied is also a process routinely engaged in by the court, and one which has been said to be very similar to that of

interpretation in that it also requires consideration of what the words used would, in the context used, convey to the recipient.

48. The claimant's case is that the statement that "[The] practice was changed from mixed private and NHS to purely private in April 2006" meant, and was reasonably understood by her to mean:

    i) From and after April 2006 the practice was a purely private practice

    ii) The turnover of £404,000 shown in the accounts for the year from 1 April 2006 was wholly private turnover with no NHS element

    iii) The same turnover was derived wholly from private patients. No relevant distinction was drawn between this and (ii) above.

    iv) The sustainable turnover of the practice for the years 2007-8 and after was £404,000.

49. The defendants say that they intended this reply to mean only that the practice itself had not been given an NHS contract from 1 April 2006, but not that it had been unable to do any NHS work at all after that date. Mr Oughton submits that the statement as to conversion of the practice cannot be linked to the accounts provided so as to find that it meant or implied that the turnover of £404,000 was all private.

50. The defendants' subjective intention in making the statement is irrelevant to the question what a reasonable person reading that statement would take it to mean. In my judgment, it is clear that a reasonable person such as the claimant who knew the background of the changes made by introduction of the NHS dental contracts on 1 April 2006 would, unless told that unusual arrangements had been made, be bound to assume that the reply given meant that the practice had no NHS contract and could therefore not do any NHS work after that date. Further, that reply in the context of the reply to Q1.1 which provided copies of the accounts for the period from 1 April 2006 necessarily implied that the turnover in those accounts was all from private work, again unless the claimant had been told of unusual arrangements for continuation of NHS work on some basis.

51. If it had been necessary to do so, I would have held that the context relevant to construing the formal representation and what it implied included the information previously provided to the claimant. That included the explanation by Mr Blatter at the first meeting that the drop in turnover from the 2006 to the 2007 accounting periods was because the practice was no longer an NHS practice, which itself implied that it had done no NHS work in the later year (witness statement at para 8 1/136). Mr Blatter's evidence tended to support the claimant on this; he said it was his understanding there was no NHS work in that year and he had not known about the PDS contracts. The fact that the formal representation was consistent with and confirmatory of previous informal information strengthens the interpretation of and implications to be drawn from its own wording.

52. This does not amount to treating the informal information as itself an actionable representation, which is not pleaded and might have been prevented by an exclusion clause in the contract. That clause however expressly did not apply to the replies to formal enquiries.

53. The defendants argued at trial that the claimant had in fact been alerted to the special arrangements made for PDS contracts, because, contrary to her evidence, when they met at the premises in August 2007 Mr Blatter had given her his Confidential Information on Practice document. They produced a version of that document, said to have been obtained from Mr Blatter's file, which is in the trial bundle at 2/581-2. That they say is the document referred to in the Defence, though what the Defence pleads about it is only that it sets out the price as being £695,000 apportioned as to £350,000 for the property and £215,000 for goodwill. I referred to this at trial as the "695 version". What is crucial for the argument run at trial (but which is not pleaded in the Defence) is that the concluding paragraph of the 695 version reads as follows:

> "Please note, reason for the drop in income year 2006 to 2007 was due to the practice converting to being independent. From April 2006 practice being gradually converted from NHS to private. No NHS after April 2007 all treatment from April 2007 Private on Independent rates"

This, the defendants say, shows that the claimant was told that the conversion from NHS to private was not a sudden one taking place on 1 April 2007 but a gradual one which took place over the 12 months from that date.

54. The claimant doubts the authenticity of this document. She suspects that it was created after 2007 for the purposes of the litigation. She denies ever having received, or seen, a copy of the document in this form. When the litigation commenced, she did not herself have a copy of any version of this document, but at a fairly late stage in the litigation (sometime after the 695 version had been referred to in the defence and disclosed by the defendants) she obtained copies of documents from the bank's file which included a similar but not identical Confidential Information document on Mr Blatter's paper, which I have referred to above and which is in the bundle at pages 2/567 and 574. There are a number of differences in the text and layout between the two versions, but the most important are that in the version on the bank's file (which I refer to as the "675 version") the price is given as £675,000 of which £245,000 is apportioned to the property and £300,000 to goodwill, and the final paragraph (which I have quoted earlier) does not contain the last two sentences that appear in the 695 version, referring to "gradual" conversion to a private practice with NHS work not ceasing until April 2007.

55. The defendants did not say anything about the 695 version in their joint witness statement. The case advanced at trial was that they had confirmed Mr Blatter's instructions in writing in a letter dated 31 August 2007 (2/580) which said

> "As per phone call, we are happy with your valuation of the practice and the following split:
>
> Freehold £350,000
>
> Goodwill £215,000
>
> Equipment £130,000
>
> … As you are aware this was an established NHS practice which has recently been converted from an NHS practice to a private practice. Up until April 2006 it was a fully NHS

> practice, between April 2006 – 31 March 2007 the conversion from NHS to private was gradually completed. From 1 April 2007 the practice has been 100 % private."

On the basis of that, they say, it is consistent that Mr Blatter would have prepared the 695 version, and that he would have given it to the claimant when they met.

56. The claimant challenges the authenticity of the 31 July letter as well. It is not of course a document she would have ever received and she has no direct evidence as to when it came into existence, but she suspects that it too has been created after the fact for the purposes of the litigation.

57. The defendants can give no direct evidence of what transpired at the meeting between the claimant and Mr Blatter, as they were not there. Their own witness statement said nothing about what had happened at that meeting, even by way of what Mr Blatter may have told them about it. In cross examination Mr Bachada said he and Mr Hussain had told Mr Blatter "about the NHS situation" and that the conversion of the practice to private had been "tapered". He struggled to explain why the 31 July letter, which if genuine shows that the point had been set out in writing to Mr Blatter, had not been referred to in the defendants' witness statement, but I do not think this absence of reference can be taken as an indication that the letter was created after the witness statement (ie after 25 January 2016), because it had been referred to in the disclosure list served in September 2014, albeit wrongly described as being from, rather than to, Mr Blatter.

58. Mr Bachada said Mr Blatter had told him that he had given the claimant a copy of the Confidential Information sheet. He said Mr Blatter might have sent it to him in advance to approve but could not positively remember. He would not have approved the 675 version because it stated the wrong asking price.

59. Mr Hussain said he would not have approved the 675 version if it had been sent to him. Both defendants said that they thought it must have been produced after the 695 version, showing the price after the claimant had negotiated a reduction. It was put to Mr Hussain that there was no need to prepare a second version showing the reduced price if the buyer had already been given a version with the asking price. He had no convincing response to this. It is in my view a significant point. If Mr Blatter knew the claimant already had a copy of the particulars from their meeting, he would have no reason to send her another at all, unless she asked for it. If she did ask, he would have no need to amend the price- it would suit the purchaser just as well to show any interested person such as the bank that she had negotiated a reduction if that was the case.

60. Even if it might be assumed that for some reason Mr Blatter had prepared a second version with the amended price, there would be no reason to amend the final paragraph so as to omit the explanation about gradual conversion of the practice to private. It would have been obvious in my view to Mr Blatter as an experienced agent that this was an important part of the explanation for the drop in turnover- that would be the only reason why the sellers would have emphasised it in their confirmation of instructions (assuming the 31 July letter was genuine) and why he would have included it in the 695 version of his particulars (assuming that was prepared before he met the claimant). There would be no reason to omit that information in any subsequent version he prepared, and if he did so he would have known that the later version would be at risk of being misleading.

61. I put this to Mr Hussain, and he could offer no reason why Mr Blatter might have made such a change. When his evidence resumed the next day he was anxious to put forward an explanation that he had thought of overnight, which was that the particulars appeared to be prepared from a template held on computer, and when preparing the second version Mr Blatter, or his wife who did typing for him, may have filled it in differently. That is not a credible explanation; Mr Blatter confirmed that he produced his documents on computer, and I assume he may start from a stored template to produce a document for a particular instruction. It would then have to be saved in order to make copies as and when required by interested parties. If he had a document in the form of the 695 version in August 2007 and was asked for a further copy he would at most have to print a further copy of the saved document. If he made changes to that document he would have had to open the saved document to do so and must have had a reason for each of the changes made to the text. The similarities in the text overall make it improbable that the two versions were prepared independently from scratch using a blank sale template. In the unlikely event that the first version was not saved on computer such that the second had to be made from scratch using the template again, the overall similarity indicates in my view that that exercise must have been done with a copy of the first version to hand such that the template could be filled in to correspond with it. If that had happened, therefore, there would have to be a good reason for making any changes during the process, particularly one so significant as omitting the explanation of the gradual change in the nature of the practice.

62. Mr Blatter's first witness statement made on 19 February 2015 said that he had given the claimant a Confidential Information sheet in the form of the 695 version at their meeting. His second witness statement, made on 20 April 2015, said that he had produced the 695 version, that it was the only version that had ever existed (which can be seen to be incorrect now that the 675 version has emerged) and that the information in the final paragraph was in bold because it needed to be brought to the attention of the purchaser.

63. In the witness box however Mr Blatter's evidence was somewhat vague in many respects. He could recall having met the claimant on a Sunday, but not the detail of what they discussed. Nor could he recall the detail of his instructions from the defendants. He accepted that for the most part his evidence of what had happened was what he would have done based on normal procedure.

64. In relation to turnover, he said the change in the practice was obvious from the drop in turnover between the 2006 and 2007 years. He would have asked about that to formulate a marketing strategy. Asked what he was told he said "the situation was there was a change from NHS to private in a short space of time". It was put to him that the turnover of £404,000 was all private, but he said there would have been "a residue of NHS work as the practice winds down and is changing". He knew however that the practice had not got an NHS contract in 2006 and said that is what he would have told the claimant. Mr Whitaker put it to him that if he had told her that, it would follow that the £404,000 must be private turnover. Mr Blatter reiterated that it was a mixture of private and NHS turnover. He did not however say that he had told the claimant about any such mixture.

65. Later in cross examination Mr Whitaker put it to him that he had not told the claimant of any "gradual" change. He responded "that is what happened". He then however confirmed that it had been his understanding that the practice had ceased to be an

NHS practice in April 2006, and that he had only subsequently been told that the associates had been given their own contracts. He confirmed expressly he had not known this at the time he spoke to the claimant.

66. Mr Blatter's earlier answers had in my view not directly addressed the issues. This might have been deliberate evasion or confusion. I prefer to consider it to have been confusion brought about by his having been told later about the continued NHS turnover and struggling to fit that in to his reconstruction of events. However his eventual clear confirmation that he had not known about it at the time means that he cannot have explained it to the claimant. It also makes it highly unlikely in my view that he can have been instructed in the terms of the 31 July letter, which would have caused him to enquire about how the practice could have "gradually" converted under the new contract regime when the general position was that NHS work would cease immediately if a practice had no contract.

67. In relation to the price, Mr Blatter thought that the original asking price was £695,000 but the claimant had refused to pay more than £675,000. He had been told by the defendants to accept that. He confirmed expressly that he had only discussed the total price with the claimant, that he had not broken it down before he prepared the Memorandum of Sale and had no negotiation with the claimant about the breakdown, and that the figure of £300,000 had been his own calculation based on 75% of the turnover of £400,000. All of that agreed with the claimant's evidence, and contradicted the defendants' case that the claimant had insisted on reducing the amount originally apportioned to the property to avoid SDLT.

68. In relation to the two versions of the Confidential Information document, Mr Blatter's difficulties were most evident. He accepted that the 675 version appearing on the bank's file corresponded with what was in the Memorandum of Sale and was probably sent to the bank by the claimant, having been obtained from him. Mr Whitaker put it to him that the 695 version was a later alteration from what had been sent to the bank. He replied "yes". Asked how it came to be produced he said "I don't think I can tell you when. I don't recall it happening". Asked if it was altered in connection with the litigation he again said "yes". Asked if that was about April 2015 when he had made his second witness statement he said "I am not sure" and then "I think I have got the papers wrong" but eventually "that would be right".

69. Drawing all this together, I have grave doubts about the authenticity of the 31 July 2007 letter and the 695 version of the Confidential Information. It is not however necessary for me to make a positive finding that they are not genuine, or how or why they came into existence. It is sufficient for me to find, as I do, that on the balance of probabilities

    i) If the 695 version was in existence when Mr Blatter met the claimant, he did not then or later provide a copy of it to her or give her any explanation about the change in the practice taking place gradually over the 2006-7 accounting year as set out in the final paragraph of that document

    ii) What Mr Blatter told the claimant was, as he understood the position to be, that the practice had become private in April 2006 because it did not have an NHS contract

    iii) Mr Blatter produced the 675 version at or about 18 September when he drew up the Memorandum of Sale. He sent it to the claimant at about that time, who

took it with the other documents he had provided when she saw the bank manager. That was the only version seen by the claimant.

iv) Mr Blatter was responsible for the apportionment of the price that appeared in the Memorandum of Sale. He had not discussed that with the claimant, still less adopted it at her suggestion.

70. It follows that there was no reason for the claimant to read into the representation made in the Replies to enquiries anything other than the meaning and implication set out above, ie that the practice became wholly private from 1 April 2006 and all the turnover shown in the accounts for the following year was private. Further, I accept her evidence that this was in fact what she took it to mean. It is not in dispute that this was a statement of fact. The statement was false on both counts.

71. I do not however accept the further submission that there was an implied statement that the turnover of £404,000 was "sustainable" for the 2007-8 and following years. I do not doubt that a purchaser looks at information given about the past and present position of a business in order to make a judgment about what may happen in the future, or that there may be circumstances in which information given that is in terms as to a historic position may be misleading if it fails to mention subsequent changes, but that does not mean that giving such information necessarily implies that the situation has continued consistently with the past position, still less that any assurance is being given that it will or can do so in the future.

Statement intended to be relied on

72. As to expectation of reliance, it is plain that formal enquiries before contract are made in order to obtain information that can be relied on in entering in to the contract, and that replies to those enquiries are given in circumstances where the purchaser can be expected to rely on them. Reliance might conceivably be denied in the replies or disclaimed in the contract, but in this case the contract reinforced the expectation of reliance because by clause 16.3.2 the claimant as purchaser declared that she had not acted in reliance on any representations "other than…in any written replies given by the Vendor's solicitors to any preliminary enquiries…".

Actual reliance

73. There are in principle two elements, though they overlap somewhat; first that the statement must actually have operated on the mind of the representee, which requires that she must have known of it and taken it into account in some respect, and secondly that it must have influenced her to a material extent (though not necessarily have been the sole or main influence) in acting, or refraining from acting, in some way which is alleged to have caused loss.

74. The claimant was challenged on the first element, on the basis that there was no record that her solicitors had sent the written replies to her or discussed any of them with her at all. It was suggested therefore that she was not aware that the replies she now relied on had been made.

75. The claimant's own evidence was that she had been to a meeting with her solicitors in order to discuss the replies and she recalled having done so. She said in her witness statement that she specifically recalled the replies concerning the accounts (and that she recognised the documents received as the ones she had already seen) and the

change in the practice to private work in April 2006, which confirmed what Mr Blatter had told her.

76. The documents show that on 15 November 2007 her solicitors wrote saying they had received replies to their enquiries and asking her to make an appointment "to go through these and so that I can be updated on the financial position" (2/344). The meeting did not take place until 29 November; in the interim the claimant was awaiting confirmation of a finance offer from the bank, which in turn depended on receipt of Mr Vowles' valuation. On the 29th however there was a meeting, the solicitor's note recording:

    i) That during the meeting he phoned the bank, which confirmed that loan documentation had been signed

    ii) "Then talked about other issues arising from the documents… planning seems to be a problem… [the defendants] must either get planning and building regulations approval or obtain insurance…". This referred to the issue that had arisen from the planning search, ie that the first floor had been converted from residential use to make three additional dentists surgeries without any permission.

    iii) "Looked briefly at other documentation including searches, mining reports, environmental reports, employment contracts and associate contract…".

77. These notes do not refer expressly to the replies to enquiries, but in my view it is very likely they would have been among the items discussed. Not only was the meeting originally requested for that very purpose, but the employment and associates' contracts referred to had been provided with those replies (which also referred to the planning issue, see 2/209). Further, the enquiries to the sellers formed part of a package of measures to assemble information. Other parts of that package such as mining searches are expressly noted. It is not likely that the solicitors failed to deal with all the information they had obtained.

78. The claimant was also questioned about a further meeting she had with her solicitors on 13 December, at which both the partner in charge and his assistant took notes (2/468-71). These too do not mention the replies but concentrate on the planning issue. By this time the defendants had obtained a planning indemnity policy but the claimant said she was concerned that lack of permission for the upstairs surgeries might affect her ability to obtain a PCT contract, and told the solicitors she would speak to Mr Blatter and attempt to renegotiate the price down to £600,000.

79. Interestingly, the partner's notes include the following: "Went through further information that she required- see [the assistant's] notes and manuscript notes". The assistant's notes are in manuscript and also focus on the planning issue. Some of the points made about it seem to be inconsistent with others, though this may reflect the conversation developing through the meeting. Some points are noted about "employment aspects". The final line reads "Monthly management accounts for most recent month available".

80. This may indicate that the claimant either asked the solicitors to obtain, or said that she would obtain, the most recent management accounts. It does not seem likely that she can have been simply telling the solicitors that there were management accounts available- she had not been provided with any, and according to the defendants none

had been produced, although the Sage system could have done so at any time on request.

81. If this note reflects an instruction to the solicitors to ask for management accounts, they do not appear to have done so. They wrote the next day (2/471) asking some questions about employees and payroll that were obviously related to other matters mentioned in the assistant's notes, but making no mention of management accounts. There is no indication the claimant herself made any enquiry of Mr Blatter about such accounts, though she did speak to him about the price. That led to Mr Blatter saying the following day (2/474) that his clients would accept a reduction in price to £625,000, against his advice and only if contracts were exchanged that day or the next, otherwise they would put the practice back on the market. The claimant told her solicitors she could agree to exchange by "next Thursday" (20 December). In the end it slipped over Christmas and the exchange took place on 27 December 2007.

82. Accordingly if the claimant had on 13 December indicated that she wanted to see management accounts, it appears that was not followed up and either forgotten about or not pursued in the pressure to comply with the defendants' demand for an early exchange of contracts.

83. On the present point, however, I accept the claimant's evidence that she did see the replies and took note of them as she said, probably at the meeting with her solicitor on 29 November 2007.

84. As to whether she actually relied on those replies, it was put to her that she had not been concerned with the present position in relation to the amount of turnover or whether it was wholly private, for a number of reasons:

    i) The pleaded case was that she had showed no interest in recent turnover at all in her meeting with Mr Blatter and been only interested in the historic turnover of £700,000 from the prior year. That was not supported in any respect by Mr Blatter's written or oral evidence, and there is no indication how the defendants felt able to plead that case.

    ii) Mr Oughton submitted that she had made her decision to purchase at the meeting with Mr Blatter in August 2007, alternatively on 27 November when she received Mr Vowles' valuation, and so could not have relied on information in the Replies which she became aware of at earliest on 29 November.

    iii) It was suggested that she had been solely relying on the assumption that she would obtain a PCT contract so that she would be able to take on NHS work. In this respect she was taken to the notes of her meeting with the bank and the "Business Plan" document she prepared, which referred to that possibility, as well as her meetings with her solicitors, in which she also referred to that possibility, said she would be contacting the PCT to enquire why no contract had been awarded in 2006 (but did not do so) and instructed her solicitors not to ask any questions about the failure to obtain such a contract. It was pointed out that the reason she gave for seeking a reduction in price as a result of the planning issue was her stated concern that it might mean she could not use the upstairs for NHS work and so might not obtain the benefit of the goodwill she was paying for.

iv) Mr Oughton submitted that the following passage in the assistant solicitor's notes of the meeting on 13 December 2007, referring to the fact that there was no planning permission for the three surgeries on the first floor of the property:

> "Client wants to proceed at £600,000. Does not want to proceed at the current level. Client believes that the property is not making the money. Would be losing 3/5 of the goodwill. May want to approach with a 2 surgery practice and move private practice upstairs."

meant that (a) she had valued the goodwill of the property according to the number of surgeries available rather than the turnover of the practice, and/or (b) she was aware that the turnover figures she had been given were excessive.

v) The claimant could have, but did not, request provision of any management accounts subsequent to the 2006 – 7 financial year.

85. Starting with the second point, it is obvious in my view that the fact that a contracting party has reached agreement in principle to enter into a contract does not preclude her from relying on information subsequently obtained when she progresses that agreement in principle to the point of entry into a legally binding contract. Until that point is reached, she can withdraw at any stage and the necessary degree of reliance can be established by not withdrawing, and ultimately committing herself to be bound by the contract resulting.

86. The third and fourth points are in my view linked. So far as the prospects of obtaining a PCT contract in the future were concerned, the documents in my judgment show no more than that the claimant hoped that there might be scope to obtain a PCT contract which would add to the turnover and profitability of the business, and that she may have been guilty of painting a slightly more optimistic picture of the possibility of doing so to the bank than was justified by the reality.

87. Much was made of the fact that she told the bank that she had already been in contact with the PCT and they were interested in the possibility of granting such a contract when it appears that she had not in fact spoken to them, and of the fact that she told her solicitor not to make any enquiries as to why no PCT contract had been obtained, and that she proposed to speak to the PCT herself to establish that, when it appears that she did not in fact do so.

88. This however in my view does not support Mr Oughton's submission. By the time the claimant began negotiations to buy the Wednesbury practice the PCT contract system had been in operation for over 15 months. By the time the contract was signed, it had been in operation for over 20 months. It is apparent from the evidence of Ms Harvey and Mr Miller that it would have been obvious to anyone with knowledge of the marketplace that new PCT contracts were not freely available, and that some unpredictable event, such as a change of provider being required or additional funding becoming available for an increase in provision, in order that there would be scope to award an additional contract at all. Furthermore, in the event that the PCT was in a position to award a new contract, there would be competition for it. It is simply impossible to conclude, as Mr Oughton's submission would require, that the claimant relied solely on the prospects of obtaining such a contract to the exclusion of all other matters, when she clearly knew the uncertainties that would be involved and had not even initiated any discussions with the PCT, let alone received any assurances that they could be overcome.

89. I am bound to say that I have difficulty in working out exactly what may have been in the assistant solicitor's mind in making the note quoted above. The claimant said in cross examination that the assistant must have misunderstood the point she was making, which was better set out in the equivalent note made by the partner, which read:

> "Insurance policy… client concerned about overpaying for the goodwill in the light of the difficulties. She is concerned that her understanding is that the PCT required three parking spaces and disabled access for any new surgeries and that therefore the three of the five surgeries which are upstairs (and would be covered by the indemnity policy) may not be available for the PCT contract she is hoping to obtain. She will speak to Gerry Blatter and explain her concerns and say she is willing to proceed at £600,000 but not more…"

As I understood it, the claimant's evidence was that her concern was that even if the lack of planning permission did not mean that she was forced to abandon use of the upstairs surgeries altogether, the fact that they did not have the disabled access and associated parking facilities that the PCT required might mean that she could only hope to obtain a PCT contract based on servicing work at two of the five surgeries available to her. That would be consistent with the assistant solicitor's note that she might have to "move private practice upstairs".

90. No doubt this meant that part of the value of the business opportunity, in the claimant's mind, lay in the possibility of expanding the practice by taking on NHS work, and that if that possibility was limited she was not prepared to pay the full price originally agreed. It does not however indicate that she in some way equated the value of the goodwill she was buying to the number of surgeries available (she was still evidently anticipating that she would be able to continue to use all five surgeries, and cannot have thought that she was losing 3/5 of the goodwill since the reduction she was seeking was much less than 3/5 of the price of the goodwill).

91. I am unable to infer from the fact that the assistant solicitor's note includes the phrase "client believes that the property is not making the money" that she knew that the current level of turnover did not correspond with the full years' accounts that she had been given. Whatever that note meant, it is hard to see that the lack of planning permission could have had anything to do with current levels of turnover or profit. No enforcement action had been taken that might have restricted use of the upstairs surgeries and so impacted on turnover. There was no indication that the absence of planning permission had anything to do with the failure to obtain a PCT contract in 2006, or that even if it did have, it could have caused a further drop in turnover more than 12 months later in the period after April 2007. It seems much more likely that, despite the use of the present tense, the note was intended to refer to loss of potential income in the future. That and the reference to "3/5" would be consistent with some future potential problem in relation to three of the five surgeries, even if the solicitor had not properly understood or recorded exactly what that concern was.

92. There is no indication in the documents or other evidence of any other basis upon which the claimant might have come to believe that turnover had fallen further since April 2007. She had not been provided with any information to that effect, nor is it said that she might have inferred it from anything else that she had been told. Conceivably she might have found information from some source other than what was provided to her solicitor, but if so it would be likely that she would have told the

solicitor what it was, and it would have been referred to separately from the discussion about planning permission. Further, if the claimant had any such information it would be more likely to prompt her to insist on having the present position confirmed by disclosure of management accounts and yet she did not do so. As referred to above, it is possible that the question of obtaining management accounts was raised at this meeting, but if so it was not pursued thereafter which does not suggest that there was any real cause for concern in the claimant's mind on this point. I simply cannot infer however, on the basis of this cryptic and possibly confused note, that the claimant knew that turnover had fallen and that it was so unimportant to her that she took no account of it.

93. The last point, absence of a request for management accounts, is also connected. In fact of course there was a request for such accounts, in the enquiries themselves. It was the defendants who did not respond to it, and for the reasons given earlier in my view it is likely that they did so deliberately. Insofar as the matter was not followed up after the replies were received, this may have been a result of naivety on the claimant's part and perhaps, if the point was raised at the meeting on 13 December, may indicate that it was lost sight of when the defendants were pressing for an early completion. Insofar as this suggests that the claimant was not sufficiently concerned to have it verified that turnover had not materially changed since the accounts she had been provided with, in my view the circumstances are more consistent with her having no reason to be alarmed that the situation that had been presented to her might have changed than that she did not care whether it had or had not.

94. I observe (it was not a point she made herself) that she and her solicitors might also have been reassured by the fact that the contract that was under negotiation at the time, drafted by the defendant's solicitors, contained a warranty that the financial position of the business had not deteriorated since the accounts date, so that they could have expected that if that was not the case they would have been told about it expressly by way of disclosure.

95. The claimant's evidence, that she relied upon the financial information and statement as to change to a private practice initially provided by Mr Blatter and then confirmed by the formal replies as showing that despite the lack of a PCT contract the practice had a sufficient level of private income since April 2006 to make the acquisition profitable and worthwhile for her whether or not she was successful in obtaining a PCT contract herself, is in my judgment both plausible and consistent with such contemporary documentation as there is, particularly that from the bank's files. I accept that evidence and find that she relied on that information to proceed with the transaction, both up to and after the point at which it was converted into a formal representation by the replies to enquiries, and continued to do so in the absence of any indication that it was untrue until she exchanged and completed the purchase contract.

Knowledge of falsity

96. Both defendants plainly knew that the practice did not have its own PCT contract and that its continuing NHS turnover relied on the PDS contracts given to the individual associate dentists. They equally knew that those dentists had all left during the course of the 2006-7 financial year, so that NHS turnover had ceased by April 2007. They also knew that as a result the total turnover of the practice had fallen very substantially. Although they both said it was not their practice to obtain monthly management accounts for individual practices, they both accepted that they knew what the monthly turnover was because each month they would go over the figures

for fees generated by each dentist with the practice manager in order to calculate what was due to each of the remaining assistant or associate dentists. These figures were available from the KODAK IT system at the practice itself and so did not require a special request to the accountants to generate a Sage report.

97. It is also accepted that the KODAK system, which was taken over by the claimant, shows that in the period from April to December 2007 the fee turnover equated to an annual rate of about £240,000, so only a marginal improvement at best on the level of private fees in 2006-7 (about £230,000). Mr Bachada accepted in terms that he was aware of this. I am satisfied Mr Hussain must have known it as well.

98. I am satisfied that both defendants knew of the importance to a purchaser of being told both that turnover had fallen further since April 2007 and that part of the turnover in the 2006-7 year was not in practice likely to continue. Mr Hussain accepted that it was important to tell a purchaser both of the fact of a fall in turnover and the reasons for it. Mr Bachada said he agreed with this in hindsight, but it did not occur to him at the time. I do not believe this escaped his attention; both defendants by 2007 were experienced in buying and selling dentists businesses and both knew that the valuation of goodwill was likely to depend on gross turnover. They also knew that the reason buyers paid on that basis was the expectation that in practice they would be able to continue such turnover. It would be obviously relevant to know if the historic turnover figures on which a price was negotiated had since materially deteriorated, and even more so if there was a good reason (such as the inability to do NHS work) why they could not be expected to continue at the previous level.

99. Mr Bachada maintained that he did not consider the continuation and subsequent loss of NHS turnover to be relevant because, firstly, NHS turnover was valued on the same basis as private turnover, and secondly even if the practice had ceased to be able to do NHS work there was a possibility the same patients would return on a private basis. The most he would concede was that buyers would pay a lower rate for such turnover, because of the reduced likelihood of it being maintained.

100. I do not believe that was Mr Bachada's view at the time. It must have been obvious by mid 2007 that a substantial element of the previous NHS turnover was highly unlikely to return because, firstly, those patients entitled to free treatment (at least) would be likely to transfer to another NHS provider and, secondly, the extensive advertising campaign the defendants said they had engaged in had not in fact brought any substantial part of it back to date.

101. Even that concession however shows that Mr Bachada knew the information was relevant to (at least) the price a purchaser would pay. Further, it was in my view inconsistent with the defendants' position that they had expressly instructed Mr Blatter about the "gradual conversion" of the practice to private work and its completion by April 2007. On their case, therefore, this factor was so clearly known by them to be important that they had spelled it out from the beginning. I am not satisfied, for the reasons given above, that they in fact did so. I am however satisfied, and so find, that they knew of its importance.

102. Mr Hussain's position was that he was prepared to disclose any information the buyer asked for and had given Mr Blatter and his accountants instructions to that effect. He sought to blame the claimant for not having asked for management accounts, saying that if she had done so they would have been provided and the position would have been clear.

103. That however was belied by the fact that Mr Hussain himself instructed the accountants as to what financial information they should prepare, and limited it to the two full years' figures. He did so in circumstances in which he admits (and I would in any event have found) he knew that these figures did not represent the current performance and that the difference was important to a purchaser. He avoided (as I have found above, deliberately) revealing the true facts when subsequent management accounts were requested. The obvious inference is (and I find) that he did this in the hope that the purchaser would not persist in that request and so not find out the true position before the sale completed. In that, he turned out to be right, perhaps through a combination of the claimant's naivety and the pressure that was applied for a quick exchange of contracts in December 2007.

104. Mr Oughton submitted that it would be unlikely that the defendants would set out to deceive in this way because the true position would have been likely to emerge if the claimant had insisted on being provided with management accounts (as Mr Hussain had said any purchaser would be expected to) and in any event would have quickly become clear to the claimant after purchase because she would have had access to the actual turnover from the KODAK system. But this in my view cannot overcome the fact that the defendants deliberately gave as misleadingly incomplete picture as they did from the beginning, and avoided revealing the recent turnover when asked for it. I do not doubt that in many cases a more astute purchaser would have made more detailed enquiries or pressed for information that would have alerted them. What the defendants would have done in that situation, or what they might have hoped to do if found out after completion, can only be speculation.

105. The form of reply to enquiry 2.9 was in my judgment plainly intended to convey that the change to private practice had occurred as a single event "in April 2006". This was such an inadequate description of the long and fraught process by which the defendants had fought and lost their battle to get a PCT contract, and the extraordinary circumstances in which there had been a partial continuation of NHS work, that this form of words must in my judgment have been deliberately adopted to avoid revealing those matters. I do not accept the defendants' evidence that they intended to convey, and thought they had conveyed, only that the practice itself had no PCT contract. That inference would be even stronger if, as the defendants maintain, they were so aware of the importance to a purchaser that they had made it clear that there had been an extended period of change in their instructions to Mr Blatter.

106. Drawing all the evidence together, the findings I make are:

i) The defendants knew and intended that the reply would convey that the practice had become wholly private from 1 April 2007.

ii) They knew and intended that this would be taken to mean that the turnover they had disclosed for the following year was all private fees.

iii) They knew that both the above were false.

iv) They knew that if purchasers was aware of the true position it would be likely to make a significant difference to the price they could negotiate.

v) They gave the claimant this reply, and subsequently avoided disclosing the true position, in the hope that they could maintain this deception until after the sale.

vi) The false representation was accordingly made knowingly and with dishonest intent to deceive the claimant, as it succeeded in doing.

107. In the circumstances it is not necessary to go on to consider s 2(1) of the 1967 Act, though I record that Mr Oughton conceded that if I found that there was a misstatement of fact as alleged, the defendants had no reasonable grounds to believe that the facts stated were true.

The warranty claim

108. The warranty claim is pleaded in particular terms, limited to the allegation that the trading position of the business had materially deteriorated since 31 March 2007 because all the dentists who were then given individual PCT contracts had left the practice. Mr Oughton submits that the claimant believed there were no PCT contracts and there can be no liability if she knew the truth of matters the subject of the warranty.

109. Even if that were a correct interpretation of the contract, it is no answer to this case. The claimant believed there were no PCT contracts at 1 April 2007, but the true position was that the practice did have the effective benefit of the PDS contracts. Its trading position was thus enhanced at that date and during the 2006-7 accounting year by the ability to carry on providing some NHS services, and that position had materially deteriorated from what was shown in the warranted accounts because that ability had been lost by the end of the year.

110. There was therefore a breach of warranty as pleaded. The same matter could equally have been pleaded as a deterioration in financial or trading position through the loss of turnover since the reported period, irrespective of the cause.

The illegality defence

111. Mr Oughton's submissions on this point were based on *Saunders v Edwards* [1987] 1 WLR 1116, which he said was authority for the proposition that a purchaser's deliberate overstatement of the (non stampable) consideration attributable to chattels in a contract in order to depress the amount attributed to land and so evade stamp duty rendered the contract for sale of the land unenforceable for illegality. The actual decision in that case was that such illegality did not bar a claim in deceit, which was not founded on the illegal contract, so strictly the statements made as to the effect on contractual claims were obiter. But they had, he submitted, been accepted as authoritative since, by Master Bowles in *Shah v Greening* [2016] EWHC 548 (Ch), a case on SDLT rather than stamp duty, (though that too was obiter as the suggested manipulation was rejected on the facts) and not disputed as representing the position in relation to contractual remedies in the review of the law in relation to illegality by the Supreme Court in *Patel v Mirza* [2016] UKSC 42. He accepted therefore that if the claim for fraudulent misrepresentation succeeded this point could not be a defence but submitted it could be in respect of the warranty claim and the claim under s 2(1) which, he suggested, was more akin to a contract based claim than one in deceit.

112. Mr Oughton relied on the provisions of para 4 of Sch 4 Finance Act 2003, which Act introduced Stamp Duty Land Tax as a new tax, separate from and not entirely replacing stamp duty, and which provides that for the purposes of SDLT consideration attributable in part to a chargeable land transaction and in part to something else is to be apportioned "on a just and reasonable basis". Thus he said if the claimant had insisted on an apportionment that attributed less to the land than she believed it to be worth, she would have contravened the Act and be unable to enforce the contract of sale.

113. In my view it is seriously arguable whether these submissions are correct in law. The provisions of the 2003 Finance Act relied on are not obligations on the parties to transactions requiring them to agree between themselves a "just and reasonable" apportionment of the price paid, but provisions that enable HMRC to levy tax on a just and reasonable apportionment notwithstanding that the contract may provide for a different one. No doubt there may be a separate obligation when making a return to state a just and reasonable apportionment, but the return is made after the contract and is separate from it, so any breach in that regard would arise at that time. This points up the difference between stamp duty, which is a charge on documents such that a misstatement of value in a document directly affects the duty payable, and SDLT which is a tax on transactions and chargeable on the basis of a return made. Of course a misstatement of value in the contract may be a prelude to an attempt to make a dishonest return, but it is it seems to me open to question whether they are to be equated.

114. Further, and contrary to Mr Oughton's submission that *Saunders v Edwards* was cited as apparent approval of the law in relation to claims founded on contract, six of the nine Justices sitting held that (in the words of the headnote) "The rule that a party to an illegal agreement cannot enforce a claim against the other party… if he has to rely on his own illegal conduct in order to establish the claim… should no longer be followed. Instead the court should assess whether the public interest would be harmed by enforcement of the illegal agreement… ". Applying that consideration, I doubt whether the court would ordinarily consider it appropriate to confer a windfall defence on a party who had obtained a substantial financial advantage by giving a false warranty, particularly one known to be untrue, by reason that the innocent party had set out (in fact only embarked on preliminary steps) to achieve a relatively minor collateral tax advantage.

115. But I do not have to determine that issue either in general or in the circumstances of this case, because the proposed illegality defence fails on the facts. I accept the claimant's evidence that she did not discuss the apportionment with Mr Blatter, evidence that he confirmed and which the defendants are in no position to refute, save by their hearsay evidence of what they say Mr Blatter previously told them. Although Mr Blatter was vague on some points this was not one of them, and his direct evidence now outweighs the value of hearsay (particularly from the defendants whom I have found unreliable) as to what he may have said in the past.

116. It was Mr Blatter who came up with the apportionment, in his Memorandum of Sale. If he had in his own mind that a figure of £245,000 for the property would be just below the £250,000 step in SDLT rates that does not establish any intention by the claimant to misstate values to defraud the Revenue. Nor can any such intention be necessarily implied from the fact that the claimant was subsequently shown the £355,000 valuation by Mr Vowles; the apportionment in the contract was consistent

with a value of £300,000 for goodwill being 75% of the stated turnover, a percentage that the claimant considered was normal, Mr Blatter said was his starting point and is not substantially different from Mr Miller's evidence that he would have used 70%.

117. Mr Vowles' figure of £355,000, if it truly represented bricks and mortar alone with no element of goodwill, would not be consistent with a separate value of £300,000 for the goodwill but a total going concern value of £675,000, which he gave but did not break down. It is not in fact clear whether he did intend to exclude all value of goodwill; as Mr Whitaker submitted the bank's "special assumptions" do not expressly state that the premises are to be valued without any goodwill element, and it is conceivable that premises consisting of a dental practice closed down by reason of enforcement of the bank's security would still attract some element of additional value from buyers interested in reopening them and trading in the same business. Mr Vowles had seen the Memorandum of Sale and the apportionment in it. His valuation matched the total (then) agreed price, and he did not comment on, and so may be taken as not objecting to, the apportionment. Accordingly, Mr Vowles' separate "special assumptions" valuation is at least ambiguous.

118. I have no expert evidence of the value of the premises that does seek to exclude goodwill, save that each side called evidence of surveyors as to their value for use as residential accommodation. Neither of their figures exceeded £245,000, so even if the claimant was assumed to have had in mind the possibility of selling the premises for residential use in 2007 that cannot support a case that she must have known the apportionment of £245,000 was unreasonable.

119. I have no expert evidence of the value of the fixtures and equipment at the premises, so despite Mr Oughton's invitation to do so am in no position to find that the £80,000 stated in the contract must have been known to be wrong. That figure was also produced (as I find, again accepting the claimant's evidence) on behalf of the defendants by being inserted by their solicitor in the revised draft contract, after the claimant negotiated a reduction of £50,000 from the total price but without specifying the effect on the apportionment. It does not appear to be inconsistent with the £50,000 negotiated on the sale to Mr Aulak two years later, when the equipment was that much older and the sale was in circumstances of some distress after the difficulties and losses the claimant had suffered. It is true that the reasons given by the claimant for seeking a reduction suggest that the most relevant element to be reduced would be goodwill rather than equipment, but even if that is so it does not lead to the conclusion that the third element, the property, must have been knowingly overstated.

120. Mr Oughton pointed to the fact that the claimant herself had used figures of £350,000 when insuring the property and in compiling a statement of her own assets. She accepted she had taken it from Mr Vowles' valuation. But there could be a number of reasons for adopting it as she did. It may be prudent to insure up to the maximum of a range of possible values, particularly if it may be argued that some element of goodwill value is associated with business premises. She may have wished to portray a favourable picture of her assets with the statement she compiled. Neither motive means it would be improper, still less that it would be known by her to be improper, to apportion a separate value to goodwill in the sale contract or that she must have formed an intention to maintain Mr Blatter's apportionment in order to avoid SDLT.

121. I find therefore that the claimant did not enter into the contract with any purpose of unlawful avoidance of SDLT in mind, whether because she insisted on an improper

apportionment or because she formed such a purpose after seeing Mr Vowles' valuation.

Damages

122. The principle of damages in tort, applicable to the claim for fraudulent misrepresentation, is to put the claimant so far as possible in the position she would have been in if the misstatement had not been made, ie as if she had been told the truth. I accept her evidence that if she had known that the £404,000 turnover figure included substantial NHS fees, she would not have proceeded. She would have been bound to insist on knowing the up to date position, and so would have found out that only about £230,000 of that amount was private turnover, and that income since March 2007 was not significantly higher than that level. She would have known there was little prospect of recovering the NHS element without a new NHS contract, that such a contract could by no means be assumed, and, as she said, that the costs of running the business would make it unviable without it. Her decision to buy was, I accept, based on her analysis that the practice would be profitable without a contract, and the hope that there would be a bonus if she did get one. She would not have gambled on doing so if the contract was necessary to ensure viability at all, as turned out to be the case.

123. It is agreed that in principle her primary loss is to be assessed as the difference between the price she paid and the true value of the asset she acquired, at the date of purchase. It is not suggested there is any relevant difference between the dates of contract and completion for this purpose.

124. I accept Mr Oughton's submissions that it is for the claimant to prove loss and that in a case such as this where a business and premises are acquired together for a combined price, the "value acquired" is properly considered as the combined value of all the assets. Thus in principle it may not be appropriate to look only at the value of goodwill for instance, and assess loss as the difference between the consideration apportioned to goodwill and the value of that asset as if it could be and had been assessed separately at the time. Accordingly if it were shown that the property and/or tangible assets were worth more than their stated prices, that excess would in effect be set against any overpayment for goodwill.

125. The claimant's case is that she will accept that the equipment and premises were at the date of purchase worth the consideration attributed to them, but that the goodwill was worth nothing because the actual turnover was much less than represented and the business was loss making.

126. The claimant called Mr Robert Miller as expert witness on the valuation of dental practices. His report (4/1008) states that he considered the £80,000 attributed to equipment to be at the upper end of expectations, but he was unable to make an accurate assessment as he could not inspect the equipment and had only the sale inventory to go on. The claimant as I say now accepts that figure.

127. Mr Miller did not comment on the value of the property, save to say that residential value would only be a starting point; if it were sold for residential use an allowance of £30-50,000 would have to be made for costs of conversion. The claimant as I say accepts the value of £245,000 attributed in the contract.

128. In relation to goodwill Mr Miller's opinion was that as the practice had a private fee income of £229,298 in the year to 31 March 2007, goodwill would be valued based on that figure at 70%, producing a value of £160,509. In oral evidence he maintained that figure, though he agreed that market practice as to the basis of valuation had varied over time, and that insofar as it had been usual to work on a percentage of turnover, the usual percentage itself had varied over time depending on market conditions and the quality of the turnover. He did not agree that the facts that the turnover was as low as it was, or that the practice as operated by the defendants had been loss making meant that the goodwill was either valueless or worth less than his figure.

129. Mr Oughton submitted that Mr Miller's figure should be adjusted:

i) First by applying his 70% to the annualised rate of turnover shown (after completion) by the computer records for the period April to December 2007, which he calculated at £239,540, 70% of which would be £167,678. But he did not put that to Mr Miller specifically. Mr Miller did say in response to a question whether a purchaser would have regard to the 2005-6 turnover of £700,000 that purchasers would generally only rely on the last year's figures and be worried about a falling trend. It is not attractive to argue that the defendants should have the benefit of a valuation based on information they deliberately withheld from the claimant. In the end however I have come to the conclusion I should not have regard to this figure because, even on the hypothesis that the business was being sold with up to date information to a hypothetical purchaser other than the claimant, without the point having been put to Mr Miller I am not persuaded that the marginal improvement suggested by the interim figures would persuade the purchaser to depart from a price based on the last full year's accounts.

ii) Second by adding in some hope value based on the fact the practice had in the past achieved a turnover of £700,000. Mr Oughton submitted that if it returned to that figure the goodwill would be valued at 100% of that figure at least, and there must be some hope value attributed to the possibility of doing so, which he suggested was 10% of the £550,000 approximate possible increase in turnover. There was no foundation in the evidence for any of the steps in this chain of reasoning. Mr Miller rejected any suggested hope value unless there was some very good reason to think the extra turnover could be obtained, saying that in his experience it was now incredibly difficult to obtain any new NHS contract. Mr Oughton in effect invites me to disregard this and form my own opinion as to valuation, but I could only do that if satisfied Mr Miller must be wrong and that there was some reliable way in which I could make an estimate myself. On the contrary however what Mr Miller said about the lack of expectation of another NHS contract was consistent with all the other evidence I had. It is true that Mr Aulak got one some years later, but that was in exceptional circumstances and the evidence shows that no purchaser could have had any confidence in 2007 of doing so. I reject that suggested addition.

iii) In a similar vein Mr Oughton submitted there must be some value in the fact the practice had records of some 16,000 patients of whom 8,000 had been treated recently. But Mr Miller did not accept that as adding to a valuation based on turnover and there is no basis to conclude he must be wrong. The valuation to be determined is a market valuation, and the evidence before me is that at the time the market valued goodwill by reference to turnover. In the

absence of any evidence that the market would also have recognised some additional value of potential turnover from under-exploited patients on the books (or even that the numbers suggested such potential) there is no basis for me to find any such value.

130. Given Mr Miller's evidence, I find that the value of goodwill at the date of purchase was £160,000, rounding his figure since in practice a transaction would be unlikely to proceed on such a precise figure as he gave.

131. Mr Oughton submitted that I ought to find the property had a higher value than the £245,000 the claimant accepts, because:

i) The defendants' evidence in their witness statement was that they had ascertained the value of the freehold by consulting a local agent (1/167). They did not name the agent concerned or say what value he had advised or on what basis. I can place no weight on that evidence.

ii) The parties had originally agreed an apportionment of £350,000. But I have already rejected that on the facts.

iii) Mr Vowles had given a valuation of £355,000 on the bank's "special assumptions". But the basis of that valuation is ambiguous for the reasons I have given earlier, and any suggestion that it can be relied on as a value of the premises alone is not supported by any other evidence. Neither party has obtained expert evidence of a separate valuation as commercial premises. Each side called an expert in residential property valuation, because of the defendants' contention before trial that the premises had a value for alternative use as a house that exceeded £245,000. However both experts gave values lower than £245,000 and neither was persuaded by any of Mr Oughton's questions to go any higher. In fact I am doubtful whether even the lower figures they gave were realistic; they were instructed to assume that the premises had been converted from commercial to residential use and so ignored the reality that any residential purchaser would have to incur the cost of such conversion himself. There is also the difficulty that if the premises were hypothetically sold for residential use the goodwill of the practice and its equipment would have to be sold separately on the basis that the practice relocated elsewhere, and there has been no evidence what effect that would have on the price they might achieve in that scenario.

iv) Mr Miller accepted that premises that were already converted and in use as dentists premises might attract "locational and historical goodwill" over and above their value as residential premises, based on (a) not having to incur the cost of converting a house to dentists surgery, which cost he thought might be £30-50,000 and (b) the chance of previous patients returning to a new practice at the address. Mr Oughton suggested I should add £50,000 to the figure of £245,000 for this element. But this is no substitute for a valuation of the premises in their actual condition and for commercial use. The evidence, such as it is, of value as residential premises does not show that even if one starts from the assumption they have been put in a condition to be used as a house they would be worth £245,000. Even if it were assumed it would then cost £30-50,000 to convert the hypothetical house into dentists premises, there is no evidence that the increase in their value on sale for that purpose would recoup the whole cost. Further, the suggested recognition of the possibility of patients

returning amounts to double counting of goodwill which has been valued separately. Mr Miller's evidence lends no support to any goodwill value of the premises separate and additional to his figure based on turnover.

v) I should value the premises on the basis of the capitalised value of the stream of rent receivable under the lease the claimant granted to Mr Aulak in 2010, which he put at £400,000 approximately. He submitted that the claimant had conceded that credit must be given for this value, but that is not so. It is conceded that credit for the rent should be given against the claim for consequential loss by reason of the obligations incurred under the bank loan the claimant took to finance the purchase, which I will deal with later. There is no such concession in relation to the primary loss, and it would be contrary to the principle that that loss is assessed at the date of purchase to take into account the value of one of the assets at a later date.

132. In the circumstances therefore the best evidence of what the premises were worth is what the parties agreed to sell them at, ie £245,000. I am not persuaded by any of the arguments that I should attribute any higher figure.

133. Mr Oughton submitted I should find the equipment and stock was worth £130,000, on the basis that was said to be Mr Blatter's valuation and the figure originally agreed between the parties. The price reduction of £50,000 had been wrongly taken from this element when it was more connected with goodwill or land value. Mr Vowles had seen the figure of £130,000 and did not dissent from it since he agreed the total value of £675,000 and did not comment on the apportionment.

134. There was no evidence Mr Blatter had conducted a valuation exercise in relation to the equipment. It is true that he apportioned that amount in his memorandum of sale, but there is no evidence how he arrived at it other than that he said he started from a figure for goodwill of £300,000 as 75% of the reported turnover. He did not say how he came to divide the remainder as he did, and the fact that he (or someone on the defendants' side) took the negotiated reduction from the figure for equipment may suggest that they thought that was the least justifiable amount. Mr Miller's report states that £80,000 is at the upper end of expectations, which I take to mean is the highest figure he could envisage on the basis of favourable assumptions as to the age and condition of the equipment. Having regard to that, I decline to find that the equipment was worth any more than the £80,000 paid for it.

135. I find therefore that the primary loss recoverable under the misrepresentation claim is £140,000, being the excess paid for goodwill (£300,000) over its true value at the sale date (£160,000).

136. The claimant also seeks to recover losses consequential on the decision to purchase. It is accepted that in a case where fraud is established she is entitled to recover all losses flowing from the fraud, even if not foreseeable at the time of the misrepresentation, subject to other principles of remoteness. The same would apply if the claim proceeded under s 2(1) Misrepresentation Act; see *Royscot Trust Ltd v Rogerson* [1991] 2QB 297.

137. Under this heading she makes four claims:

i) The costs and disbursements incurred in connection with the purchase, in the pleaded amount of £18,002.09.

ii) Costs and disbursements incurred on the sale to Mr Aulak in the sum of £4,700.

iii) Trading losses incurred between the purchase and resale, in the sum of £71,941.69 as shown by her accounts for the relevant periods. That amount includes interest repayments on the bank loan she took to finance the purchase, but not her repayments of capital.

iv) Loan interest payments falling due after the sale to Mr Aulak. In closing, Mr Whitaker put this claim at £27,823.78, supported by a calculation attached to his application to serve particulars of this head of loss, which I allowed at the start of the trial.

138. The first two amounts are not disputed, in principle or as to amount. That is plainly right; if a person is induced to buy an asset by misrepresentation when he would otherwise not have done so, he suffers a loss at the date of purchase not only of the shortfall in value of what he has acquired but also of his wasted expenditure in acquiring it. Further, he may reasonably seek to restore his position by selling the asset again. The costs of doing so may be recognised either as reducing the value of the asset at the time of purchase (because what is relevant is the net realisable value) or as losses flowing from the steps taken to restore his position.

139. The latter analysis also applies, in principle, in my judgment to trading losses incurred pending sale. It will no doubt normally be the case that a business cannot in practice be resold immediately, and in a case such as this where the claimant tried for a relatively short period to make the acquisition work and then took reasonable steps (which are not criticised) to resell it when she could not do so, any losses she reasonably incurred in the interim can in my judgment be properly said to have flowed from the purchase and the misrepresentation that led to it. The position might no doubt be different if for example the delay were much longer so that the chain of causation back to the purchase might be regarded as broken, but no such argument is raised here.

140. The defendant's case however is that these losses were not caused by the purchase but because the claimant chose to staff the practice by paid assistants and associates rather than working in it herself. Had she done the latter, it is said, the costs would have been reduced by the salary saved and the accounts would have shown a profit in all periods. This is said to be a failure to mitigate and/or an unreasonable decision on her part, pointing to her own evidence that Mr Blatter had told her that the practice had been run down but if she worked in it herself she could build it back up. She was accused of spending too much time on sport and not enough on working in dentistry.

141. I reject all these arguments. The practice was sold as one run by paid staff and not by its owners, and the claimant cannot be said to have unreasonably failed to mitigate loss by carrying it on in the same way. Further, if she had switched her own time from her Walsall practice to that at Wednesbury, she would presumably have had to incur extra staff costs at Walsall to replace her own time, which may reasonably be assumed to be comparable to the saving at Wednesbury. She was not acting unreasonably to the extent (if any) that she did not give up her sporting activities to make good the difficulties the defendants' fraud had put her in.

142. The amount of the trading losses is not disputed in any other way and I accordingly award the sum claimed.

143. The position in relation to the loan payments continuing after the sale to Mr Aulak is more complicated. It is not disputed that the claimant took the loan as a consequence of the purchase, or that she was not able to pay it off in full from the proceeds of sale to Mr Aulak, so that losses she could show she suffered by having the balance outstanding are in principle recoverable. The basis of calculation of those losses was however heavily disputed.

144. The claimant's calculation is complicated and I am not sure that I follow its rationale fully, but in summary I understand it to be as follows:

    a) Interest element of fixed monthly loan repayments in the period September 2010 (the date of sale to Mr Aulak) to January 2013 (when an interest fixture expired and the loan reverted to floating rate)- £91,998.

    b) Plus interest charged at the floating rate between January 2013 and June 2017 - £32,004

    c) Plus the amount of interest payable after June 2017 until the end of the loan term in 2027, on the assumption the present rate of repayment is maintained (calculated at £11,563 and capitalised at a present day value of £6,928 using a discount rate of 5%) . I am surprised that this figure can be as low as it is, given that the annual rate of interest charges between 2013-7 exceeds £6000, but that is not a matter explored before me.

    d) The total of these amounts, £131,230, is then multiplied by a percentage to reflect the fact that the interest is charged on the full loan of £675,000, but (i) only £625,000 of it was originally used for the purchase (ii) the claimant could have applied the £200,000 Mr Aulak paid to reduce the loan but evidently did not, and (iii) it is assumed the capital balance is to be notionally further reduced by the capital value of the lease granted to Mr Aulak, which is said to be £245,000 as that was the original consideration paid by the claimant. Thus the capital balance outstanding in September 2010 (£628,190) is taken as reduced by £495,000 so that only the balance (£133,190 or 21.2%) is taken as the amount remaining attributable to the purchase.

    e) The claim is thus for 21.2% of the total interest (£131,230) ie £27,823.

145. Mr Oughton's objections can I think be summarised as:

    i) The pleaded case states that "The claimant will give credit for rental payments received" but the calculation provided does not do so. Given that the claimant has received rent from the asset acquired in the transaction, she should offset that gain against the remaining costs flowing from the same transaction and so is shown to have suffered no net loss: *British Westinghouse v Underground Electric Railways Co of London* [1912] AC 673.

    ii) The discount rate used to capitalise the future rent payments is too high and should be 2.5%

iii) The lease should be valued on the basis of the yield from the rent received. He puts that value at £400,000.

iv) He further submitted that the amount of rent received and/or the capitalised value of future rent should be deducted from the trading losses claimed or the primary loss claim or both.

146. Though all these points appear convoluted, in the end in my view their resolution is straightforward. First, it is plainly right that only a proportion of the interest cost after the sale to Mr Aulak can be regarded as remaining attributable to the finance of the assets acquired. That proportion is obtained by deducting from the actual capital balance (£627,000 in round terms) the £50,000 that was not spent on the acquisition of the assets and the £200,000 that had been realised on sale of those assets. The balance (£377,000) is about 60% and represents the finance outstanding from the purchase.

147. The cost of funding that financing is thus 60% of the total, and runs at just under £24,000 pa during the fixed rate period of the loan (£92,000 over 28 months x 60%) and no more than £4,800 thereafter (60% of the highest annual charge of about £8,000) using figures from the claimant's calculation.

148. Second, in my judgment the rent received from leasing the property is a gain derived from the steps the claimant took to restore her position. It is to be taken into account in ascertaining whether she continued to suffer any loss flowing from the defendants' act, under the *British Westinghouse* principle, which Viscount Haldane expressed as follows (p689)

> "when in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act".

149. Though that case was one in contract, the principle is in my judgment equally applicable to a tortious measure because it concerns whether losses flow from a past cause or not, which is common to both bases of assessment. I do not accept Mr Whittaker's submission that the deal with Mr Aulak should be regarded as res inter alios acta, and so irrelevant to the loss arising from the purchase, because it could not have been foreseen that a special purchaser such as Mr Aulak would come along. The principle stated in *British Westinghouse* does not depend on the mitigation step being foreseeable at the date of breach, but only on it having actually been taken once identified.

150. The initial rent payable under the lease was £24,000 pa, so from the start it covered the remaining financing cost. After the interest fixture expired the interest charge reduced dramatically and from that point the claimant has been substantially in profit. She accepted there is no reason to think the lease will end before its 20 year term expires, which outlasts the remaining term of the loan. It follows that from the date of the lease she has suffered no continuing loss flowing from entering into the loan agreement.

151. It does not follow however that the rent received or receivable in future must be credited against losses incurred before the lease was granted, such as the trading losses incurred prior to sale. In *British Westinghouse* the savings made from the new

turbines the plaintiff installed to replace the defective ones supplied by the defendant were regarded as putting an end to losses suffered up to that point and showing that the cost of their installation was not recoverable since it was paid for by those savings. There was no suggestion that the savings should be carried back and set against losses already incurred during the period of operation of the machines supplied by the defendants.

152. Nor does it follow that the capital value of the reversion on the lease, however calculated, is to be set against either the primary loss or the consequential losses. Assessment of the claimant's capital loss arising from her acquisition of an asset worth less than what she paid is made on a once and for all basis as at the date of acquisition. In principle, if she subsequently sells the asset for more or less than its true value at the date she acquired it, the gain or loss arising is for her account. A fortiori, if by her own actions she makes the asset more or less valuable but does not dispose of it, the later value is not to be related back to the date of acquisition.

153. The result is that I disallow the fourth head of consequential loss and award a total of £94,643.78 in respect of the first three.

Damages under the warranty claim

154. Neither counsel made any case that damages assessed for the breach of warranty claim would be different in amount from those for misrepresentation. The principle of assessment of primary loss differs in that the object is to place the claimant in the position she would be in if there had been no breach of contract, ie if the warranty were true. The measure of loss is the difference between the value the business would have had if the warranty were true on the one hand and its value given the actual circumstances on the other. However, as in so many cases, it is not contended that the business would have been worth more than the price actually paid, so the result is the same as the under tortious measure.

155. Mr Oughton did not submit that any consequential losses I found recoverable in tort for the misrepresentation would not also be recoverable in contract for breach of the warranty.

Claim for stocks etc removed

156. There remains the claim for cost of replacing items said to have been removed between contract and completion. This claim is pleaded as follows:

    i) Para 53 (3) of the Particulars of Claim seeks "damages for breach of contract: value of consumable stores and fixtures and fittings sold to the claimant but removed by the defendants prior to completion (estimated) -£5000

    ii) Para 33 pleads that on the completion date the claimant found that "All the consumable stores had been taken. Some of the fittings (as defined in the contract) had been taken, including the telephones".

157. There are no other particulars given of what is alleged to have been taken or how the estimate of £5000 is arrived at. In her witness statement the claimant said (para 43) that she found that all the consumables had been taken and she had to replace that over one or two months at an estimated cost of £8,000. She did not say how that estimate was made up or why it was greater than the figure in the Particulars of Claim

(which appears to have included unspecified fixtures and fittings). She said separately that some fittings had been taken, others were on HP so not effectively sold to her and others were defective. She estimated the cost of replacement, seemingly under all these three categories, at £7,000 but gave no particulars of the items involved save that she could only recall that a chair had not been working.

158. The defendants submit that:

i) If any stocks had been removed before completion, what they had agreed to sell by the contract was "the stock in trade of the business at the Completion date", so it was wrong to say that those items had been sold to the claimant. This unattractive submission ignores the fact that clause 6.2 of the contract contains an obligation on them to carry on the business in its normal manner between contract and completion. An abnormal removal of stocks (and I accept the claimant's evidence that that was what happened) would be a breach of that obligation, which I find is sufficiently pleaded as a breach of contract by para 53 (3) quoted above.

ii) There is no pleaded case of breach in respect of disrepair or lack of title to any items on the list of fixtures and fittings sold.

iii) The only item identified as removed is the telephones, but the contract provided only for sale of the items listed in the inventory attached, which did not refer to telephones.

159. The claimant has no answer to the last two points. Having found a breach in relation to removal of stocks, I am in difficulty in assessing quantum however. The claimant's estimate of £5,000 is not broken down in any way and appears to include unspecified items of fixtures as well as stocks. Confidence in it is further undermined by the unexplained increase to £8,000, said to be stocks alone. I have not been referred to any accounts, before or after the sale, with a balance sheet that might indicate the normal level of stocks held. The only reference I can find that may assist is in a questionnaire the claimant completed when looking to sell the practice in 2009 (inserted in the bundle at the beginning of the trial) when she instructed the sale agents that the approximate current stock value was £1,000. Doing the best I can, I find that that is the best indication of the level of stock likely to have been held in the ordinary course in 2007 and so that is the sum I award.

160. Finally, there is a claim for interest. This may not be straightforward, since the claim for consequential losses itself included interest actually incurred, so I will leave that for further submissions with any other matters arising, if the parties are unable to agree it.

161. I will list a short hearing for this judgment to be handed down formally. There need be no attendance unless (a) there are matters arising and (b) they can be dealt with in 30 minutes. If longer is required the parties should agree a time estimate and provide available dates for a later hearing.