Case No: B30LS199

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

LEEDS DISTRICT REGISTRY


BEFORE HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT AT LEEDS ON 10 MAY 2017

BETWEEN

C21 LONDON ESTATES LIMITED

Claimant

-and-

MAURICE MACNEILL IONA LIMITED

Defendant

-and-

MR YASEEN NOORKHAN

Third Party

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## ORDER ON TRIAL OF LIABILITY

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**UPON** the trial of the liability element of the Claimant's Claim ("the Claim") and the Defendant's additional claim ("the Part 20 Claim") in this action -:

**IT IS ORDERED THAT -:**

1. There be judgment for the Claimant for damages to be assessed.

2. The Part 20 Claim is dismissed.

3. There be forthwith paid out of court to the Claimant's solicitors, including all interest thereon, the monies standing in Court to the credit of the Claim being the sums of

(1) £28,000 paid into court pursuant to the order of the court dated 22 August 2016;

(2) £39,082.50 paid into court in four traches pursuant to the order of the court dated 1 February 2017;

by way of security for costs of the Claim.

4. The Defendant do pay the Third Party's costs of the Part 20 Claim to be subject to detailed assessment, if not agreed.

5. The determination of all other consequential matters arising from the Judgment, including determination of any application, under CPR rule 52.3(2)(a), for permission to appeal, the costs of the Claim, and the amount of costs to be paid on account of the Costs Order made at paragraph 4 above, is adjourned to a date to be fixed for a hearing (**not by telephone**) before His Honour Judge Klein with a time estimate of 2½ hours.

6. The time for filing any appellant's notice at the appeal court is extended to 21 days after the date of the hearing referred to at paragraph 5 above and the court exercises its power under CPR rule 52.12(2)(a) accordingly.

7. The assessment of damages element of the Claim is listed for a costs and case management hearing at the same time as the hearing referred to at paragraph 5 above.

8. This order shall be served by the Claimant on the Defendant and the Third Party.

**Service of order**

The court has provided a sealed copy of this order to the serving party: Metis Law LLP, 84 Albion Street, Leeds, LS1 6AD (ref: RKS/C211376.001).


Neutral Citation Number: [2017] EWHC 998 (Ch)

Claim No: B30LS199

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**LEEDS DISTRICT REGISTRY**

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 10/05/2017

**Before:**

**HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

| | |
|---|---|
| **C21 LONDON ESTATES LIMITED** | Claimant |
| **- and -** | |
| **MAURICE MACNEILL IONA LIMITED** | Defendant |
| **- and -** | |
| **YASEEN NOORKHAN** | Third Party |

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**Sam Neaman and Andrew Feld** (instructed by **Metis Law LLP**) for the **Claimant** and **the Third Party**
**Matthew Weaver** (instructed by **Smith Partnership**) for the **Defendant**

Hearing dates: 4 – 6 April 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.

.....

HIS HONOUR JUDGE KLEIN

**His Honour Judge Klein:**

1. The Century 21 brand is an estate agency brand which is particularly well known in America. The brand, which operates by way of franchises, has been present in the United Kingdom estate agency market since 2005. The Defendant ("MMI") has, at all relevant times, held what I understand to be the master franchise for the brand in the United Kingdom and the Channel Islands.

2. In February 2006, MMI, under a franchise agreement,[1] granted to C21 Estate Ltd., as franchisee, the right to operate the Century 21 brand in Ilford. The franchise agreement was renewed in May 2012.[2] In due course, in circumstances which are not relevant to the claim, the franchisee of the Ilford territory became Essex Real Estate Ltd. ("EREL"). The Third Party ("Mr Noorkhan") is EREL's sole shareholder. Mr Noorkhan was also a shareholder of C21 Estate Ltd. In practice, Mr Noorkhan operated the Century 21 brand in Ilford, mainly through corporate vehicles, from 2006 until January 2017.

3. On 20 December 2013 MMI, under a franchise agreement ("the Chelsea Agreement"), granted to the Claimant, then called The Real Estate & Property Management Co. Ltd., as franchisee, the right to operate the Century 21 brand in Chelsea. Mr Noorkhan is a shareholder in the Claimant and was understood, by the parties to this dispute, to be the Claimant's controlling mind, at least for the purpose of the issues which I have to resolve.

4. The written standard terms of the Ilford Agreement and the Chelsea Agreement are identical:

   i) By clause 3.1.4, "Business" was defined as "the operation of an estate agency business in accordance with the terms and provisions of [the] agreement";

   ii) By clause 3.1.8, "Gross Revenue" was defined as "all monies...received or receivable...by you...directly or indirectly in connection with the Business including, but not limited to, transactions and provision of...property services, (including...conveyancing services [and] property management services...)...";

   iii) By clause 7.1.1, the franchisee agreed to pay MMI a Royalty Fee equal to 6% of the franchisee's Gross Revenue during the term of the agreement;

   iv) By clauses 7.1.2 to 7.1.4, Royalty Fees were due and payable on the settlement of each transaction monthly in arrears and the franchisee was required to regularly provide sufficient information to MMI in order that MMI could assess the franchisee's Gross Revenue;

   v) The franchisee was also required to pay MMI a Monthly Continuing Fee, and an NAF (National Advertising Fund) Contribution principally equal to 2% of the franchisee's Gross Revenue, payable monthly in arrears. Broadly, the NAF

[1] It may be more accurate to describe the agreements between MMI and the various companies in which Mr Noorkhan has an interest as sub-franchise agreements and, accordingly, to describe those companies as sub-franchisees. Nothing turns on these descriptions, however.
[2] In this judgment, I call the renewed agreement "the Ilford Agreement".

Contribution was intended to represent a contribution to a fund for advertising and marketing campaigns by MMI;

vi) By clause 11.2, the franchisee was required to pay promptly to MMI all fees and contributions due under the agreement;

vii) By clause 12.2, MMI was entitled to audit the franchisee's books and records;

viii) Clause 15.2 set out the contractual termination provisions by which the agreement could be terminated. So far as is relevant that clause provided as follows:

> "15.2.3 **Termination by us for Good Cause**. By us for good cause which will mean any material breach by you of your obligations under this Agreement as determined by us in our sole discretion exercised in good faith. Good cause includes both curable and non-curable defaults, including those listed at sections 15.2.4 and 15.2.5 below...
>
> "15.2.4 **Curable Defaults; Notice**. After giving you 30 days' prior written notice of the proposed termination and the opportunity to remedy the breach during the entire notice period or such longer or shorter notice as is required or permitted by law, if the breach is:
>
> > "15.2.4.1 The failure to pay when due any financial obligation to us...or to the NAF....
> >
> > "15.2.4.3 An audit by us of your records which discloses a deficiency of at least 5% in amounts due under this Agreement within any three month period or your refusal to permit us to audit your operations and records, or your failure to reasonably cooperate with our audit of your operations and records....
> >
> > "15.2.4.15 Any other material breach of this Agreement not listed below as a noncurable default.
>
> "Upon receipt of notice to terminate with right to remedy, you must immediately commence diligently to remedy that breach. If you remedy that breach during such period, our right to terminate this Agreement will cease, subject to termination for repeating the same default as described below.
>
> "15.2.5 **Noncurable Defaults; No Notice Required**. We reserve the right to terminate this Agreement immediately without prior notice and without your right to remedy for any of the following causes:...

> "15.2.5.5 Any material misrepresentation or omission by you to us in the franchise application or otherwise with respect to acquiring the Franchise...";

ix) Clause 15.7.2 provided as follows:

> "In the event of an "early termination" of this Agreement (which for purposes of this paragraph shall mean any termination of the Agreement by us "for cause"...[)], you shall immediately become obligated to pay us "lost future profits". For purposes of this Agreement "lost future profits" shall consist of all amounts which you would have been obligated to pay as Royalty Fees, NAF contributions, and any other fees due under this Agreement, from the date of early termination to the Expiration Date, had there been no early termination. The parties acknowledge and agree that it would be impracticable or extremely difficult to calculate the actual amount of lost future profits payable by you, and that the following method of calculation represents a fair and reasonable estimate of foreseeable lost future profits and will therefore be regarded as liquidated damages: Lost future profits shall be equal to the combined monthly average of Royalty Fees, NAF contributions and any other fees under this Agreement (without regard to any fee waivers or fee reductions) payable from the Effective Date of this Agreement through to the date of early termination, multiplied by the number of months (or partial months) remaining in the term of this Agreement. The present value of the total of these amounts calculated at a discount rate of 8% assuming payment is made at the end of each month, shall constitute our lost future profits [("Lost Future Profits")]";

x) By clause 17.1, it was provided that "any modification, change or amendment to this Agreement must be in writing and signed by a Director or authorised officer of us and by you".

5. On the same day as the Chelsea Agreement was entered into, Mr Noorkhan entered into a personal guarantee with MMI by which he guaranteed the Claimant's obligations under the Chelsea Agreement ("the Personal Guarantee").

6. There is no dispute that, before the Chelsea Agreement was entered into, EREL was not complying with the payment obligations in the Ilford Agreement and/or it had not complied with the payment obligations in the earlier (2006) franchise agreement relating to the Ilford territory in two respects:

i) It was not paying Royalty Fees and an NAF Contribution on any of the income it received in relation to property management services (together "PM Fees");[3]

ii) It was not paying (or had not paid) on time Royalty Fees on income it received in relation to other services.

7. Nor is it disputed that, after the making of the Chelsea Agreement, EREL did not pay PM Fees.

8. The circumstances in which EREL did not pay PM Fees were the subject of significant cross-examination during the trial.

9. At the time of the making of the Ilford Agreement, MMI knew that EREL was not paying PM Fees.

10. It was contended on behalf of the Claimant and Mr Noorkhan that, by or at about the time of the making of the Ilford Agreement, there was an agreement between Mr Noorkhan, on EREL's behalf, and Stuart White, on MMI's behalf, that EREL would not have to pay PM Fees. I have concluded, for the following reasons, that, whilst MMI did not make any agreement as contended, it did, when the company was under Mr White's control, effectively turn a blind eye to EREL's non-payment of PM Fees. Mr Noorkhan said in cross-examination that Mr White turned a blind eye to the non-payment. In cross-examination, Mr Noorkhan also contended that he deduced, from Mr White's body language at a meeting when the Ilford Agreement was signed, that Mr White went further and agreed that PM Fees did not need to be paid. However, the clear impression with which I was left, from observing Mr Noorkhan's cross-examination, is that there was no such agreement. Mr Noorkhan made a contemporaneous note of the meeting when the Ilford Agreement was signed. The language of that note is not obviously consistent with MMI and EREL having agreed that PM Fees need not be paid. The language of that note is much more consistent with a scenario in which MMI knew about EREL's non-payment but in which it was not intending to actively press for payment. Further, in an email dated 5 November 2013, Mr Noorkhan wrote of the previous arrangement (effectively between him and Mr White) as being ambiguous. In my view, Mr Noorkhan is unlikely to have used such language if, in fact, there had ever been an agreement between EREL and MMI that PM Fees would not be paid. Also, one of the witnesses called on the Claimant's behalf, Darren Hicks, made clear, in his cross-examination, that whilst Mr White knew about the non-payment of PM Fees, Mr White said to Mr Hicks, on several occasions, that he was unhappy about that but that he and Mr Noorkhan were in a "stalemate situation". Indeed, it is to be borne in mind that, whilst MMI knew about the non-payment PM Fees, when the company was under Mr White's control no active steps were apparently taken in respect of this.

11. In 2013, precisely when is not clear, but certainly by about the summer, there was a change of leadership at MMI; in particular, Robert Clifford was in control of MMI by then.

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[3] I formed the clear impression that, although properly NAF Contributions in relation to property management income were a liability additional to Royalty Fees on the same income, throughout, the parties treated the NAF Contributions as part and parcel of "royalties" due from EREL under the Ilford Agreement and did not distinguish between the two categories of liability.

12. Mr Clifford, and apparently most of the new MMI leadership team, had not been involved in the company before 2013. It is clear that, by the autumn of 2013, they were very concerned about EREL's non-payment of PM Fees.

13. Mr Noorkhan was interested in acquiring the right to operate the Century 21 brand in Chelsea. In October 2013 he sent MMI a business plan to encourage the company to grant him the franchise of its Chelsea territory. The business plan appears to show that Mr Noorkhan expected a franchise of the Chelsea territory to generate a profit, after the payment of Royalty Fees and tax, of about £675,000 p.a. Mr Noorkhan's interest in the Chelsea territory is, therefore, entirely understandable and perhaps gives some context to the discussions which took place, in the autumn of 2013, in relation to that territory. Indeed, Mr Noorkhan told me in cross-examination that "Ilford was a stepping stone to Chelsea/central London. This was always the case".

14. It was principally in those discussions that the concerns of the new leadership team at MMI about EREL's non-payment of PM Fees most clearly manifested themselves.

15. Mr Clifford, in cross-examination, explained that he was not happy about what he described as "the historic status quo" in which EREL was not paying PM Fees. He explained that he did not want that state of affairs to continue and that it was important that all of MMI's franchisees complied with the terms of the franchise agreements into which they had entered. Mr Clifford said that he had discussed with Mr Noorkhan, in September 2013, the need for EREL to pay all Royalty Fees due under the Ilford Agreement.

16. Mr Noorkhan explained, in cross-examination, that it was a "condition", for the acquisition of the franchise of the Chelsea territory, that all Royalty Fees, due under the Ilford Agreement, were paid in the future. He said that Mr Clifford had made it clear to him that, if this "condition" was not agreed, there was no prospect of Mr Noorkhan acquiring the Chelsea franchise. Mr Noorkhan said that it was made clear to him that there would be no Chelsea Agreement if EREL did not pay all Royalty Fees when they fell due. Mr Noorkhan also said that, as part and parcel of being offered the franchise of the Chelsea territory, he assured MMI that all income due under the Ilford Agreement would be declared and that EREL would pay all Royalty Fees. He later said that, at the time the acquisition of a franchise of the Chelsea territory was being discussed, he made a commitment to MMI that all Royalty Fees, due under the Ilford Agreement, would be paid. He explained that, by 10 December 2013, he was prepared to do whatever MMI wanted in order to obtain a franchise of the Chelsea territory. He also accepted, in cross-examination, that, at that time, he appreciated that, if the Royalty Fees due under the Ilford Agreement were not paid, the Chelsea Agreement could be terminated.[4]

[4] Mr Weaver, who appeared for MMI, put to Mr Noorkhan, in cross-examination, several times that he appreciated that, if all Royalty Fees due under the Ilford Agreement were not paid, the Chelsea Agreement was liable to be terminated. Save for the last time when Mr Weaver put this point to Mr Noorkhan, Mr Noorkhan agreed with Mr Weaver. That last time, Mr Noorkhan resiled from his previous position. Nevertheless, I am satisfied that Mr Noorkhan did appreciate that, if Royalty Fees due under the Ilford Agreement were not paid, the Chelsea Agreement was liable to be terminated. Mr Noorkhan struck me as an astute and successful businessman. Bearing in mind too the other evidence which he gave, from which it is apparent that he appreciated the significance, to MMI, of the payment of PM Fees, I believe that his former repeated answer to Mr Weaver's question is the truth.

17. Mr Noorkhan's evidence is consistent with that given on behalf of MMI. For example, Mr Clifford said, in cross-examination, that Mr Noorkhan and he discussed a commitment to pay all Royalty Fees due under the Ilford Agreement and that Mr Noorkhan confirmed that he would comply with the terms of the Ilford Agreement including as to payments. Mr Clifford said of Mr Noorkhan: "He agreed to bring the business into line and to comply with the franchise agreement".

18. There was an exchange of emails between Mr Clifford and Mr Noorkhan on 11 and 13 December 2013, when the discussions about the acquisition of the franchise of the Chelsea territory were advanced. The content of those emails reflects MMI's concerns about EREL's non-payment of PM Fees, Mr Noorkhan's recognition of this and his desire to acquire a franchise of the Chelsea territory.[5] The emails were entitled "re: Century 21 Chelsea Business Plan formed by existing Century 21 Ilford office", and read:

> "Your business plan was professional and appreciated. We believe you can make a real success of the territory in question, given the plans you outlined to me. My colleagues also appreciated your views about the historic relationship with Century 21 UK in terms of the income which has, and has not, been attracting the relevant royalty payment. They also understood your position in terms of the lettings management business you have built over some years and your desire to have us waive the mandatory use of Direct Lettings for the new, proposed franchise in Chelsea.
>
> "As is understandable and fair, the company wants to ensure that the future relationship - across both the existing and proposed additional franchise - is in excellent shape, so very much appreciated your commitment to bringing Ilford into line in terms of Century 21 UK royalty income being paid on all Ilford's income: including lettings management income which appears not to be generating royalty payments to us at present. We would need to agree (and which may have been your suggestion) appropriate access to Winman for Century 21 Head Office to provide transparency of income and royalties thereon.
>
> *"This is fine and we will do whatever is required, so that by conclusion, Head Office is both satisfied and reassured that a procedure will be enforced to allow a member of staff from Ilford to forward the sales report generated by cfp together with the C21 monthly billing report. Necessary meetings can be setup at our end (or remotely if necessary) to allow Head Office to feel comfortable with the procedure to eliminate any possibility of ambiguity going forward. I can also arrange for Head Office to communicate with cfp so that an understanding of the security of these reports is also obtained. I understand,*

[5] Mr Noorkhan's 13 December 2013 reply ("Mr Noorkhan's December email"), to Mr Clifford's 11 December email ("Mr Clifford's December email"), was embedded in Mr Clifford's December email. For ease of reference, Mr Noorkhan's reply is shown, italicised, in the quoted text.

> *that any further verifications will be cleared up when and at audit stages.*
>
> "This arrangement for Ilford duly paying all royalties due on all of its income would be a contractual component of any new deal to grant the Chelsea franchise - naturally the new franchise will also make royalty payments on 100% of its income irrespective of source or the historic status quo.
>
> *"This is fine with no problem at all and all to take effect upon signing of the new Chelsea agreement..."*

19. As I have noted, clause 17.1 of the Chelsea Agreement limited the way in which amendments could be made to its written terms. Further, as Mr Clifford's December email made clear, that EREL would pay all Royalty Fees due under the Ilford Agreement on time (and otherwise in accordance with the Ilford Agreement), was to be a term of the Chelsea Agreement. Against this background, on 20 December 2013, at the same meeting at which the Chelsea Agreement was signed, what the parties have called a side letter ("the side letter") was entered into. The side letter was marked "Strictly Private & Confidential" and was addressed to Mr Noorkhan personally at the Claimant's Chelsea premises. The side letter began: "this letter is an agreement for Century 21 UK and the parties above and is an acceptance and authorised addition to the Estate Agency Franchise Agreement that has been entered into and executed by the parties. Please find detailed below the points raised and your subsequent agreement;". The side letter then set out a large part of the December 2013 emails to which I have already referred and, in particular, contained the following text:

> "This arrangement for Ilford duly paying all royalties due on all of its income would be a contractual component of any new deal to grant the Chelsea franchise - naturally the new franchise will also make royalty payments on 100% of its income irrespective of source or the historic status quo.
>
> "This is fine with no problem at all and all to take effect upon signing of the new Chelsea agreement."

After the text copied from the December 2013 emails, the signature of Louise Jefferies, MMI's Franchise Development Director, appears. The following page of the side letter contained the following:

i) the witnessed signature of Mr Clifford under the text: "Signed on behalf and with the authority of CENTURY 21 UK";

ii) the witnessed signature of Mr Noorkhan under the text: "acknowledged and agreed by both parties".

20. In cross-examination Mr Noorkhan told me that the purpose of the side letter was to insert into the Chelsea Agreement an additional "condition" dealing with the payment of Royalty Fees due under the Ilford Agreement. Mr Noorkhan also told me that he signed the side letter on the Claimant's behalf.

21. As I have said, it is not disputed that, after the making of the Chelsea Agreement, EREL defaulted in paying PM Fees. The amount in question has not been agreed. On MMI's case the amount in question, for the period after the making of the Chelsea Agreement, must be about £2,620 (exc. VAT). The Claimant and Mr Noorkhan accept this figure as the approximate amount of PM Fees outstanding in 2014. On the available evidence I am also satisfied that, by the time of the service of the default notices to which I now refer, EREL was also in default in the payment of Royalty Fees on other income after December 2013, which default amounted to about £940 (exc. VAT).

22. It is broadly MMI's case, as articulated by Mr Clifford in cross-examination, that EREL's non-payment of PM Fees, after the Chelsea Agreement was made, was not inadvertent but was a deliberate decision.

23. It is broadly the case of the Claimant and of Mr Noorkhan that EREL's non-payment of PM Fees was a non-deliberate error. Miss Rooprai is EREL's compliance and accounts manager. She explained that she had the day to day responsibility for submitting, to MMI, monthly billing reports which formed the basis for the calculation of the amount of Royalty Fees, including PM Fees, payable from time to time by EREL. She explained that, in practice, the monthly billing reports were compiled and submitted by Disha Luhar; a former employee of EREL. Miss Rooprai said that, on the day the Chelsea Agreement was made, Mr Noorkhan informed her that EREL would, henceforth, need to show, on the monthly billing reports, income derived from property management (so causing, in practice, the payment of PM Fees). She said that the day the Chelsea Agreement was made (20 December 2013) was the last Friday and last working day before the Christmas 2013 break. She said that her conversation with Mr Noorkhan took place late in the day (after 4 p.m.) at a time when she was distracted and that, in any event, she was much more interested in the fact that the Chelsea Agreement had been made. She said that (i) she did not tell Disha Luhar about the requirement for property management income to be shown on the monthly billing reports, so that Disha Luhar could not have implemented that change, (ii) the only person who would have completed the monthly billing reports in 2014 other than Disha Luhar was her and (iii) she could not recall having completed any monthly billing report in 2014. It is said that it was because the monthly billing reports did not show property management income (as a result of the failure of communication to which I have referred which, it is also said, was a non-deliberate error), so that PM Fees were not calculated, that PM Fees were (non-deliberately) not paid in 2014.

24. On 22 October 2014, MMI served two default notices:

i) One, described as a "Curable Default Notice", under clause 15.2.4.1 of the Ilford Agreement, on EREL (but addressed to Mr Noorkhan personally, although nothing turns on this), requiring it to settle in full an invoice from MMI including for the sums I have identified in paragraph 21 above (for unpaid PM Fees and other Royalty Fees after the making of the Chelsea Agreement) and providing that, in default, the Ilford Agreement would be terminated immediately;

ii) A second, described as a "Non Curable Default Notice". This notice ("the Default Notice"):

a) Was expressed to relate to the Chelsea Agreement;

b) Was addressed to Mr Noorkhan personally at the office at which EREL operated the Ilford franchise (although no point is taken about this);

c) Contained the following significant text:

> "We hereby exercise our right to terminate this agreement immediately without prior notice and without your right to remedy under the following clause:
>
> - 15.2.5.5 Any material misrepresentation or omission by you to us in the franchise application or otherwise with respect to acquiring the Franchise.
>
> "Failure to operate and implement the conditions of the side letter signed and dated in conjunction with the aforementioned agreement..."

d) Also sought payment of £34,000, said to be made up of £10,500 for "Minimum NAF contribution for remaining period of contract" and £24,000 for "Continuation fees for remaining period of contract".

25. Thereafter Mr Noorkhan took steps to, in his own words, "salvage" the Chelsea Agreement and so he visited MMI's office on 27 October 2014 "to persuade [MMI] not to terminate the Chelsea Agreement" and, thereafter, he and MMI's leadership team exchanged emails. Mr Noorkhan's efforts were to no avail and, after some months, the Claimant debranded its Chelsea premises.

26. The Claimant contends that the service of the Default Notice and the termination or purported termination thereby of the Chelsea Agreement by MMI was a repudiatory breach of the Chelsea Agreement by MMI. It contends that, on 2 March 2015, it accepted or purported to accept that repudiatory breach. It therefore began this claim, for damages, for loss of profits (alternatively for wasted expenditure), for repudiatory breach.

27. MMI defends the claim and brings an additional claim against Mr Noorkhan.

28. MMI does not contend that, prior to 2 March 2015, the Claimant had, in the face of any repudiatory breach of the Chelsea Agreement by MMI, affirmed the agreement or otherwise waived any such repudiatory breach.

29. MMI contends, in defence of the claim, that it was entitled to serve the Default Notice and thereby to terminate the Chelsea Agreement, and so it cannot have been in repudiatory breach, because:

i) On its proper construction, Mr Noorkhan's December email contained an implied representation that EREL intended to pay PM Fees ("the Representation"), which representation was repeated when the side letter was signed, but that representation was false, and so a misrepresentation, because

at the time it was made (and/or, presumably, at some time thereafter before the Chelsea Agreement was signed) EREL did not intend to pay PM Fees. If this is correct, it is not disputed that MMI was entitled to serve the Default Notice and thereby the Chelsea Agreement was terminated;

ii) That EREL would pay PM Fees was a term of the Chelsea Agreement and the failure, by EREL, to pay PM Fees was a repudiatory breach of the Chelsea Agreement which MMI accepted by the service of Default Notice. (Although it is not clear from the Defence, at trial MMI contended that that EREL would pay PM Fees was (i) a condition of the Chelsea Agreement, so that any failure to pay PM Fees gave rise to a terminable breach, or (ii) an intermediate term of the Chelsea Agreement and the actual failure, by EREL, to pay PM Fees was a repudiatory, and so terminable, breach. MMI further contended that, in either case, by the service of the Default Notice it accepted the terminable breach of the Chelsea Agreement).

30. By the additional claim, MMI contends that, because it lawfully terminated the Chelsea Agreement by service of the Default Notice, under the personal guarantee Mr Noorkhan is liable to pay Lost Future Profits. By his Defence to the additional claim, Mr Noorkhan contended that the obligation to pay Lost Future Profits amounted to an unenforceable penalty so that, on any basis, he could not be liable for Lost Future Profits under the personal guarantee. At trial, he abandoned that defence. He also contended that, because MMI was in repudiatory breach of the Chelsea Agreement, which repudiatory breach was accepted by the Claimant, any liability under the personal guarantee fell away. It is not disputed that, if MMI was in repudiatory breach of the Chelsea Agreement, in the circumstances of this case any liability of Mr Noorkhan under the personal guarantee did fall away. In short, therefore, the outcome of the additional claim will be determined by the outcome of the main claim.

31. On 9 August 2016, the District Judge ordered a trial on liability only. This is the judgment following that trial.

Contractual Term

32. In the context of this case it is helpful to consider first whether, by the side letter, the Claimant promised, as a term of the Chelsea Agreement, that EREL would pay PM Fees ("the Guarantee").

33. The language of the side letter which I have already quoted (see paragraph 19 above) makes clear, to my mind, and I conclude that the parties to the Chelsea Agreement intended that it would contain a promise by the Claimant that EREL would pay PM Fees.

34. The Claimant contends that this is not the proper construction of the side letter because such a term would be in the nature of a guarantee and that such a construction of the side letter would amount to an un-businesslike or unreasonable construction of its words. In the particular circumstances of this case, I disagree. On the one side, MMI's leadership team was very concerned, by December 2013, to ensure that EREL paid PM Fees, as Mr Noorkhan was aware. On the other side, Mr Noorkhan was extremely keen to obtain the franchise of the Chelsea territory and, in his own words, he was prepared to do whatever MMI wanted in order to obtain that franchise. By his

own account, during the negotiations for the Chelsea Agreement Mr Noorkhan made a commitment that PM Fees would be paid. As I have noted, in cross examination, Mr Noorkhan accepted that, if PM Fees were not paid, the Chelsea Agreement could be terminated. That the Guarantee would be a term of the Chelsea Agreement was, in the circumstances, entirely to be expected.

35. The Claimant contends that the Guarantee was not a term of the Chelsea Agreement because the side letter was not entered into by Mr Noorkhan on behalf of the Claimant.

36. I am satisfied that the side letter was effective to incorporate the Guarantee into the Chelsea Agreement because the side letter was made, contrary to the Claimant's contention, by Mr Noorkhan on behalf of the Claimant, because (even putting aside Mr Noorkhan's own evidence to that effect):

i) The side letter was drafted for signature at the same meeting when the Chelsea Agreement was signed;

ii) Although addressed to Mr Noorkhan personally, the Claimant's postal address was given on the face of the side letter;

iii) The opening section of the side letter made clear that it was intended to be an "authorised addition" to the Chelsea Agreement;

iv) The side letter expressly contemplated that the Guarantee would be a term of the Chelsea Agreement. (To be clear, that is, in my view (taking into account, amongst other matters, the other matters I identify in this paragraph, the acknowledged importance to MMI of EREL paying PM Fees and Mr Noorkhan's recognition that a default in payment might terminate the Chelsea Agreement), the only or most reasonable and businesslike construction of the words; "This arrangement...would be a contractual component of any new deal to grant the Chelsea franchise"). Only the parties to the Chelsea Agreement could, by clause 17.1 of the Chelsea Agreement, agree the addition of a term to it;

v) I am satisfied that the formality of the side letter signatures by Mr Clifford and Mr Noorkhan was intended to meet the requirements of clause 17.1 of the Chelsea Agreement;

vi) Those formalities included an acknowledgement, by Mr Noorkhan, that the side letter was agreed by the "parties". In the context of the side letter, this reference to "parties" was, most likely, intended to refer to the same "parties" who were previously referred to in the side letter, including the Claimant;

vii) It would serve no purpose for the side letter to have been made by Mr Noorkhan on behalf of EREL. EREL was already committed to paying PM Fees, in circumstances where I have found that there was no agreement with MMI that it would not do so;

viii) It would serve no purpose for the side letter to have been made by Mr Noorkhan personally. As in the case of the Chelsea Agreement, Mr Noorkhan had already given a personal guarantee in relation to the Ilford Agreement;

ix) It may also be relevant to note that, in relation to MMI's contention that it was entitled to terminate the Chelsea Agreement for a material misrepresentation, the Claimant does not contend that any misrepresentation made in Mr Noorkhan's December email was not made on the Claimant's behalf.

Mr Neaman and Mr Feld, who appeared for the Claimant and for Mr Noorkhan, pointed to other features of the side letter which, they contended, supported a different conclusion. It must be borne in mind, in my view, that the side letter was not drafted with the exactitude one would expect from lawyers, as is evident from the language of the whole of the side letter. Despite the features on which counsel rely, I am satisfied that the matters I have already identified outweigh those features and justify the conclusion I have reached. In any event, as I have noted the conclusion I have reached is reinforced by Mr Noorkhan's own evidence; in particular, that he signed the side letter on the Claimant's behalf.

37. In this context there is a further construction dispute between the parties; as to whether the Guarantee covered only future PM Fees or whether it extended also to arrears of past PM Fees. In my view the language of the side letter does not obviously extend to arrears. Indeed, that language suggests, in my view, that the Guarantee was to cover only future PM Fees because it was expressed "to take effect upon signing of the new Chelsea agreement". I am also satisfied that the focus of the discussions in the autumn of 2013 was on bringing about a situation in which, for the future, EREL would be paying PM Fees. This was particularly important to MMI's new leadership team because, for the future, they would be responsible, in practice, for accounting for income to the master franchisor in relation to the UK territory. It is reasonable to suppose that they were therefore less concerned about arrears of past PM Fees but were concerned that, in the future, PM Fees were paid. Further, in cross-examination, Mr Clifford eventually accepted that the Guarantee was only to cover future PM Fees. Taking all these matters into account, I am satisfied that, on its proper construction, the Guarantee covered only future PM Fees.

Misrepresentation

38. I turn now to consider MMI's contention that Mr Noorkhan's December email contained a misrepresentation. MMI goes further and contends the side letter contained a misrepresentation. If Mr Noorkhan's December email did not contain a misrepresentation then the side letter could not have done so. I will therefore consider this issue by reference to Mr Noorkhan's December email.

39. The first issue I need to consider is whether, by Mr Noorkhan's December email, he made the Representation. Such a representation would be an implied representation because the express words of Mr Noorkhan's December email speak only of, as I have found, a proposed term of the Chelsea Agreement.

40. It is not disputed that whether or not a representor makes an implied representation (and what the content of any such representation is) depends at least on what a reasonable person would have inferred from the representor's words and conduct in

their context (see per Toulson J in *IFE Fund SA v. Goldman Sachs International* [2007] 1 Lloyd's Rep 264 at [50]).

41. I am satisfied, on the facts of this case, that, by Mr Noorkhan's December email, the Representation was made, because:

i) As I have found, historically there was no agreement that EREL was not required to pay PM Fees;

ii) As I have explained, MMI was keen to ensure that, for the future, EREL paid PM Fees;

iii) Indeed, the grant of a franchise of the Chelsea territory to the Claimant was dependent on MMI being satisfied that EREL would pay PM Fees;

iv) Mr Noorkhan fully appreciated this;

v) Notably, Mr Noorkhan accepted, in cross-examination, that he did assure MMI that PM Fees would be paid.

In these circumstances, I am satisfied that a reasonable representee would have concluded that, by his assurance, referable to the payment of PM Fees, that "this is fine with no problem at all" (emphasis added), Mr Noorkhan was representing that EREL intended to pay PM Fees.

42. Mr Neaman and Mr Feld contended that a representation will only be implied if also the reasonable representee would have concluded that the implication of such a representation was the necessary inference from the words actually used. There is no authority to support such a proposition but, in any event, I do not see how this contention can be right. If, on the balance of probabilities, a court determines that a reasonable representee would have concluded that the representor had made a representation by the words actually used in the context in which they were spoken or written, then, inevitably, the court will have determined that the implication of a representation is the only correct result. If the court determines, on balance, that the implication of a representation is the only correct result, it would be odd if, nevertheless, the court might conclude that an implied representation was not made.

43. The Claimant contends that, even if Mr Noorkhan made the Representation, it was not false.

44. A representation as to intention is only false if, at the time the representation is made and/or continues to have effect, there is no intention to do that which is represented or, to the knowledge of the representor, there is no ability to do that which is represented (see Chitty on Contracts (32nd ed); paragraph 7-012). Indeed, Mr Weaver accepted that MMI could only succeed in establishing that the Representation was false, and so could amount to a misrepresentation, if EREL never genuinely intended to pay PM Fees at the time the Representation was made (or, presumably, at a time after it was made but before the Chelsea Agreement was made). In short, MMI accepted that, for the Representation to have been false, in this case it must have been fraudulently made.

45. When considering whether the Representation was fraudulently made, it is important to bear in mind what Lord Millett said in *Three Rivers DC v. Bank of England (No.3)* [2003] 2 AC 1:

> "183 ...The rules which govern both pleading and proving a case of fraud are very strict. In *Jonesco v. Beard* [1930] AC 298 Lord Buckmaster, with whom the other members of the House concurred, said, at p.300:
>
> > "It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires".
>
> "184 It is well established that fraud or dishonesty...must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake, 7th ed (1952), p 644; Davy v Garrett (1878) 7 Ch D 473, 489; *Bullivant v. Attorney General for Victoria* [1901] AC 196; *Armitage v. Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not mERELy negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> "185 It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal...
>
> "186 The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts

> the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.
>
> "187 In *Davy v. Garrett* 7 Ch D 473, 489 Thesiger LJ in a well known and frequently cited passage stated: "In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent." This is a clear statement of the second of the two principles to which I have referred.
>
> "188 In *Armitage v. Nurse* [1998] Ch 241 the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted "in reckless and wilful breach of trust". This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence.
>
> "189 It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v. Midland Bank Trust Co. Ltd.* (unreported) 21 July 1999, are to the contrary, I am unable to accept them."

46. It is also important to bear in mind that it is inherently less probable that a representation is fraudulently rather than negligently or innocently made. As Hamblen J reiterated in *Cassa di Risparmio della Repubblica di San Marino SpA v. Barclays Bank Ltd.* [2011] 1 CLC 701 at [229]:

> "Where a serious allegation (such as deceit) is in issue, this does not mean the standard of proof is higher. However, the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The

> more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established – *The Kriti Palm*, paragraph259, quoting Lord Nicholls in *Re H (Minors)* [1996] AC 563, 586."

47. In its Defence, MMI contends that it is proper to infer that the Representation was false and that EREL, at a material time, did not intend to pay PM Fees because:

    i) Of the history of non-payment, by EREL, of PM Fees;

    ii) After the making of the Chelsea Agreement, EREL did not pay PM Fees;

    iii) After the service of the Default Notice, EREL showed, on the monthly billing reports for October 2014 and November 2014, significantly greater income;

    iv) Before and after the making of the Chelsea Agreement, EREL significantly failed to properly show income on the monthly billing reports.

48. The matters pleaded in the Defence are all consistent with a scenario in which there was an intention, at the material times, to pay PM Fees but either there was a change of intention thereafter or, as the Claimant and Mr Noorkhan contend, a non-deliberate failure to pay PM Fees after the Chelsea Agreement was made. In such circumstances, MMI's contention that the Representation was false must fail.

49. I go further. In my view, that EREL did not pay PM Fees before the making of the Chelsea Agreement is not probative of the falsity or otherwise of the Representation. As I have found, for a significant part of the period, MMI effectively turned a blind eye to the non-payment of PM Fees. To my mind those circumstances are not probative of EREL's intention against the changed background which existed at the time the Chelsea Agreement was being actively contemplated.

50. That, in fact, EREL did not pay PM Fees (or, indeed, other Royalty Fees) after the Chelsea Agreement was made is not sufficient, in my view, to establish that the Representation was false. As the authors of Spencer Bower & Handley on Actionable Misrepresentation (5th ed) explain, at paragraph 2.08:

> "The fact that the intention was not fulfilled is in itself no proof that it did not exist when the representation was made, though it may, with other circumstances, support that inference..."

In this case the only circumstances which MMI prays in aid of its case, other than the non-payment of PM Fees after the making of the Chelsea Agreement, are (i) the non-payment of those fees before the Chelsea Agreement was made, but, as I have shown, the circumstances in which PM Fees were not paid before the Chelsea Agreement was made were very different circumstances and (ii) the declaration of property management income only on the monthly billing reports for October 2014 and November 2014. This second matter is only a different way, in my view, of articulating the contention that the Representation must have been false because PM Fees were not paid after the Chelsea Agreement was made, and so is of no assistance to MMI.

51. This is enough to dispose of MMI's case that the Representation was false. Nevertheless, because further matters going to the falsity or otherwise of the Representation were the subject of cross-examination, I do consider them now.

52. It was contended, by Mr Weaver on MMI's behalf, that the conversation between Mr Noorkhan and Miss Rooprai on 20 December 2013 ("the Conversation") did not take place. He contended that, if I found that the Conversation did not take place, such a finding would support MMI's case that the Representation was false.

53. I am not satisfied that the Conversation did not take place.

54. If the Conversation did not take place, I would have to conclude, as Mr Weaver accepted, that, either (i) Mr Noorkhan and Miss Rooprai individually resolved to lie on affirmation or (ii) they conspired together to lie on affirmation, when they each asserted that the Conversation did take place.

55. I am of the view that it is even more inherently improbable than a single person making a representation fraudulently, that two people might separately make or together resolve to make the same untruthful assertion in evidence given under affirmation.

56. In support of his contention that the Conversation did not take place (and, perhaps, as freestanding grounds for supporting MMI's case that the Representation was false), Mr Weaver relied on the following matters:

    i) Mr Noorkhan was not telling the truth when he contended that he had reached an agreement with Mr White that EREL was not required to pay PM Fees;

    ii) Miss Rooprai was not telling the truth, Mr Weaver argued, when she said, in an email dated 12 November 2014 to MMI's Mr Anderton and to Mr Noorkhan:

> "...As far as we were aware our billing report was being entered correctly by our accountants and through investigation subsequent to the audit, has allowed us to now identify where the breakdown in communication was..."

    iii) The Claimant has adduced no evidence that Mr Noorkhan mentioned to any other member of its staff that, after the making of the Chelsea Agreement, income from property management would have to be declared in the monthly billing reports.

57. I turn to consider these matters.

58. I have found that it is not true that there was an agreement, between Mr Noorkhan and Mr White, that EREL was not required to pay PM Fees, contrary to Mr Noorkhan's contention.

59. I am also satisfied that Mr Noorkhan, as a witness, could not be relied on as a dispassionate historian. I give two examples. First, after some cross-examination on the subject, I am satisfied, from the tenor of his evidence taken together with his email dated 5 November 2013, that Mr Noorkhan appreciated that, in truth, there was no

agreement with Mr White as to the non-payment of PM Fees. Secondly, as Mr Noorkhan accepted, one of the grounds he gave to MMI, in October 2014, to explain why property management income was not shown, by EREL, in its monthly billing reports was because there had been a breakdown in communications with EREL's accountants. It is inconceivable, in my view, that Mr Noorkhan would not have appreciated, at that stage, that in 2014 the monthly billing reports had been completed by Miss Rooprai or her assistant, and not by EREL's accountant.

60. I am clear that, by her 12 November 2014 email, Miss Rooprai intended to lay the blame for the failure, by EREL, to declare property management income in the monthly billing reports on EREL's accountants. To my mind, that is the only reasonable construction to place on the text of the email which I have quoted above. I am also satisfied that Miss Rooprai, who was admittedly responsible in 2014 for the completion of the monthly billing reports, knew that there was no basis for blaming the accountants. In cross-examination and in questions from me, Miss Rooprai gave no coherent, let alone convincing, explanation for why she sought to blame the accountants. I bear in mind that, by November 2014, Mr Noorkhan had already blamed the accountants for EREL's failure to show property management income in the monthly billing reports. Further, by his own admission Mr Noorkhan was desperate to keep the Chelsea franchise. I think the most likely explanation for the content of Miss Rooprai's 12 November 2014 email is that she and Mr Noorkhan agreed, beforehand, that she was going to blame the accountants. Whilst this does not reflect well on either of them, that they were prepared to act in this way at a time when Mr Noorkhan was desperate to keep the Chelsea franchise has no bearing, in my view, on whether, almost 12 months before, EREL intended to pay PM Fees. Indeed, it may be said that, that they were prepared to say something which was not true in October/November 2014, shows how important the Chelsea franchise was and so, it may be said, how unlikely it was that Mr Noorkhan made the Representation fraudulently.

61. It is not disputed that Mr Noorkhan did not tell any member of staff other than Miss Rooprai that it was necessary for EREL to show property management income in the monthly billing reports, but that is entirely unsurprising. The completion of the monthly billing reports was Miss Rooprai's responsibility.

62. In my view, these matters are insufficient to overcome the inherent improbability that the Conversation, attested to by Mr Noorkhan and Miss Rooprai on affirmation, did not take place. Put shortly, I am not satisfied that MMI has established, to a sufficient degree or at all, that the Conversation did not take place.

63. Nor has MMI satisfied me that these matters (that is, those I have identified in paragraphs 56(i)-(iii) above), which do not go directly to the issue of whether or not the Representation was false, establish (or significantly help to establish) that the Representation was false.

64. It follows, therefore, that MMI has not established that there was a material misrepresentation in the application for the franchise of the Chelsea territory or otherwise with respect to the acquisition of that franchise and so MMI could not lawfully terminate the Chelsea Agreement on that ground.

Condition

65. I have already found that the Guarantee was a term of the Chelsea Agreement. I must now consider MMI's case that (i) EREL's failure to pay PM Fees led to a terminable breach, by the Claimant, of the Chelsea Agreement and (ii) by the service of the Default Notice, it accepted that terminable breach, and the consequent (purported) termination of the Chelsea Agreement by it was not a repudiatory breach of that agreement.

66. In this context the first issue I must consider is whether the Guarantee was a condition of the Chelsea Agreement.

67. In cross-examination, Mr Noorkhan accepted that it was fundamental, to the acquisition of the franchise of the Chelsea territory, that EREL duly paid PM Fees. Indeed, Mr Noorkhan described this requirement as a "condition" for the acquisition of that franchise. He also accepted that he appreciated, at the time the Chelsea Agreement was made, that, if PM Fees were not paid, the Chelsea Agreement could be terminated.

68. As Tettenborn et al helpfully explain in Contractual Duties: Performance, Breach, Termination and Remedies (2nd ed), at paragraph 10-036, a contractual term is a condition in the following circumstances:

> "A term is a condition (rather than an intermediate or innominate term, or a warranty), in any of the following five situations: (1) statute explicitly classifies the term in this way; (2) there is a binding judicial decision supporting this classification of a particular term as a "condition"; (3) a term is described in the contract as a "condition" and upon construction it has that technical meaning; (4) the parties have explicitly agreed that breach of that term, no matter what the factual consequences, will entitle the innocent party to terminate the contract for breach; or (5) as a matter of general construction of the contract, the clause must be understood as intended to operate as a condition. This classification was declared as "neat" by Waller LJ in *The Seaflower* who adopted the statement by Chitty on Contracts—although it should be noted that Chitty does not separate items (3) and (4) in this list."

69. In this case, only the fifth situation might apply. Although Mr Noorkhan appreciated that a failure, by EREL, to pay PM Fees could lead to a termination of the Chelsea Agreement, I am not satisfied that the Claimant and MMI explicitly agreed that any default in payment, by EREL, of PM Fees could bring about the termination of the Chelsea Agreement. Indeed, that there was no such explicit agreement seems to follow from Mr Clifford's evidence in paragraph 55 of his witness statement, where he says:

> "...In my view Mr Noorkhan could have been under no illusion of the importance that we placed on the maintenance of the Ilford royalties in relation to the Chelsea Agreement. He would have understood that failure to pay the Ilford royalties would put the Chelsea Agreement in jeopardy."

Mr Clifford does not assert that there was an explicit agreement. As I read this evidence, it tends to suggest that there was no explicit agreement.

70. I turn then to consider the fifth situation.

71. In *Compagnie Commerciale Sucres et Denrees v. C. Czarnikow Ltd. (The Naxos)* [1990] 1 WLR 1337, Lord Ackner said, at pages 1346-1347:

> "I start by reminding myself of the statements of principle made in this House in *Bunge Corporation v. Tradax Export S.A.* [1981] 1 WLR 711 and in particular the observations by Lord Wilberforce in his speech, at p.716A. Having stated that the courts should not be too ready to interpret contractual clauses as conditions he said:
>
> > "But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts."
>
> "...On the day before embarking upon the hearing of the present appeal, the Court of Appeal, identically constituted, gave judgment in *State Trading Corporation of India Ltd. v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277. The leading judgment was given by Kerr LJ and was concurred in by Lloyd and Butler-Sloss LJJ. One of the questions to be decided in that case was whether a particular obligation of the sellers was a condition of the contract. Kerr LJ quoted from the classic judgment of Bowen LJ in *Bentsen v. Taylor, Sons & Co. (No.2)* [1893] 2 QB 274, 281:
>
> > "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability."
>
> "Having referred to, amongst other authorities, the *Bunge Corporation* case, Kerr LJ observed [1989] 2 Lloyd's Rep. 277, 283:
>
> > "At the end of the day, if there is no other more specific guide to the correct solution to a particular dispute, the court may have no alternative but to follow the general statement of Bowen LJ in *Bentsen v. Taylor, Sons & Co. (No.2)* which I have already quoted, by making what is in effect a value judgment about the commercial significance of the term in question.""

72. In Carter's Breach of Contract, at paragraph5-04, it is suggested that, in determining whether a contractual term is a condition, consideration ought to be given to the following non-exhaustive factors:

> "(a) the form and structure of the term; whether entry into the contract was motivated by an understanding on the part of [the innocent party] that the term would be strictly complied with;
>
> "(b) the relationship between the term in issue and the other terms of the contract;
>
> "(c) the likely effects of any breach of the term;
>
> "(d) the extent to which the [innocent party] will be adequately compensated by an award of damages for breach of the term;
>
> "(e) whether construing the term as a condition will achieve a reasonable result;
>
> "(f) the nature of the contract in which the term appears;
>
> "(g) the nature of the subject matter of the contract;
>
> "(h) the nature of the term and the obligation which it creates."

I believe that all these factors are factors in the process which Lord Ackner approved in *The Naxos*.

73. In determining whether the Guarantee was a condition of the Chelsea Agreement, I do not place any weight on the use, by Mr Noorkhan in cross-examination, of the word "condition". I have no reason to believe that he, as a lay person, would understand the distinction between contractual conditions and intermediate terms.

74. To my mind, that it was or might be a "condition", for the acquisition of the franchise of the Chelsea territory, that EREL paid PM Fees, in other words that it was a pre-condition for the making of the Chelsea Agreement that EREL so acted, of itself does not make the Guarantee a condition of the Chelsea Agreement; although I accept that the importance the Claimant and MMI placed on EREL's obligation and the Guarantee is an important factor that is to be taken into account in determining whether the Guarantee was a condition of the Chelsea Agreement.

75. What weight should the court place on the fact that both the Claimant and MMI appreciated that a failure, by EREL, to pay PM Fees could cause the termination of the Chelsea Agreement?

76. It is to be remembered that, by clause 15.2.4.15 of the Chelsea Agreement, MMI was able to terminate the Chelsea Agreement for any material breach of it (which was not specified, in the Chelsea Agreement, as a noncurable default).

77. Tettenborn et al explain, at paragraphs 9-038-9-039:

> "Material" breach is a concept used by draftsmen in the practice of commercial agreements but this language does not form part of the terminology adopted by the Common Law system of principles governing breach. In short, the courts do not use the concept of "material breach", but contractual draftsmen frequently use this phrase.
>
> "A breach will be "material" if it is "substantial" or "a serious matter"...The case law shows that a "material" breach is not trivial, but it must be "substantial", although it need not be so serious as to justify termination applying the Common Law criterion for justified termination following breach."

78. In *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.* [2013] EWCA Civ 200 at [126], Jackson LJ said in relation to the clause under consideration in that case:

> "...I must consider what "material breach" means... In my view this phrase connotes a breach of contract which is more than trivial, but need not be repudiatory...I think that "material breach" means a breach which is substantial. The breach must be a serious matter, rather than a matter of little consequence."

79. I have concluded that MMI could have taken steps to terminate the Chelsea Agreement under clause 15.2.4.15, by the service of a curable default notice, following at least certain failures, by EREL, to pay PM Fees. It follows that it would not only be by designating the Guarantee a condition of the Chelsea Agreement that MMI could have terminated the Chelsea Agreement after EREL had failed to pay PM Fees – so that the weight the fact that both the Claimant and MMI appreciated that a failure, by EREL, to pay PM Fees could cause the termination of the Chelsea Agreement is not as great as MMI contends.

80. On the one hand, I have borne in mind (i) the importance, in particular, to MMI of the Guarantee and that it would not have entered into the Chelsea Agreement had it not been satisfied that EREL would pay PM Fees and (ii) the appreciation of the Claimant and MMI that, if EREL did not pay PM Fees, the Chelsea Agreement could be terminated.

81. On the other hand, I have borne in mind:

i) That MMI was able to rely on a contractual termination provision (clause 15.2.4.15) to terminate the Chelsea Agreement even for non-repudiatory breaches of the Guarantee;

ii) It is not clear to me, on the evidence, that the parties had consciously turned their minds to what might happen if there was a trivial failure, by EREL, to pay PM Fees (say an underpayment of a few pounds or a single payment received a few hours late);

iii) The main purpose of the Chelsea Agreement was to grant the franchise of the Chelsea territory to the Claimant and for MMI to receive Royalty Fees on

income to which the Claimant was entitled as a result of business it conducted in the Chelsea territory;

iv) A single trivial breach of the Guarantee (or a single trivial failure, by EREL, to pay PM Fees), if it entitled MMI to terminate the Chelsea Agreement, would be likely to have caused significant damage to the Claimant; in particular, in relation to its investment in the franchise of the Chelsea territory. On the other hand, such a breach would have had little impact on MMI;

v) A breach of the Guarantee was clearly compensatable in money.

82. Taking all these matters into account I have concluded that the Guarantee was not a condition of the Chelsea Agreement. When set against the main purpose of the Chelsea Agreement, I do not regard the Guarantee as commercially significant. More than that, when MMI was in a position to exercise a contractual termination clause in relation to at least certain breaches of the Guarantee, it would, to my mind (for the reasons I have already given), be unreasonable to designate the Guarantee a condition so that even a trivial breach of it would entitle MMI to bring the Chelsea Agreement to an end.

83. It may be that this conclusion is consistent with the view MMI held before the trial because:

i) By the express language of the Default Notice, MMI did not contend that the Guarantee was a condition of the Chelsea Agreement;

ii) By its Defence, MMI does not, in express terms, contend that the Guarantee was a condition of the Chelsea Agreement.

84. In these circumstances, in order for MMI to have lawfully terminated the Chelsea Agreement, the failure by EREL to pay PM Fees would have had to have led to a repudiatory breach of the Chelsea Agreement. It is that issue which I now consider.

Repudiatory Breach

85. Tettenborn et al explain, at paragraph 8-01:

> "Repudiation involves an actual breach of contract by conduct (or sometimes by omission) which is grave enough so as to go to the root of the contract. The hallowed expression "goes to the root of the contract" (or "goes to the whole root", or "strike at the root or essence") means that the breach is really serious. For example, the "going to the root" test was used in *Poussard v. Spiers* to justify an impresario's decision to find a non-temporary replacement, in order to keep a new opera from becoming an immediate commercial disaster. But there are various similar expressions of the test of sufficiently serious default. Thus, Lord Wright in *Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.* approached the question by asking whether the guilty party had conducted himself in a way which was "substantially inconsistent with his contractual obligations". A

variation, adopting the innocent party's perspective, is Atkinson J's approach in *Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester)*, where he posed the question whether the breach's impact had been so serious that it had become "commercially wholly unreasonable [for the innocent party] to carry on". Commenting on this array of similar tests, Arden LJ said in *Valilas v. Januzaj*:

> "The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ("the victim") can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression "going to the root of the contract" conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

86. The test postulated for example by Arden LJ in *Valilas* may be too onerous a test of what amounts to a repudiatory breach of contract. In *Telford Homes (Creekside) Ltd. v. Ampurius Nu Homes Holdings Ltd.* [2013] 4 All ER 377, Lewison LJ had said, at [48]-[52]:

> "[After reviewing earlier authorities] [t]hese authorities adopt as the relevant test whether the breach has deprived the injured party of "substantially the whole benefit" of the contract; which is the same test as that applicable to frustration. This sets the bar high. Other cases adopt a view that is more favourable to the injured party. Thus in *Décro-Wall International SA v. Practitioners in Marketing Ltd.* [1971] 1 WLR 361 the defendant distributors of the plaintiff's goods were slow in meeting bills of exchange. But their ability to meet the bills eventually, albeit late, was not in doubt. This court held that they had not repudiated the contract. Salmon LJ said that if the contract did not spell out the consequences of breach "the courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract." Sachs LJ said that "to constitute repudiation a breach of contract must go to the root of that contract." Buckley LJ said:
>
> > "To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a

> fundamental term of the contract, or that it must go to the root of the contract."
>
> "On the face of it therefore there is a tension between the test of deprivation of "substantially the whole benefit" (Diplock LJ) and "a substantial part of the benefit" (Buckley LJ). In *Federal Commerce & Navigation Co Ltd v. Molena Alpha Inc (The Nanfri)* [1979] AC 757 Lord Wilberforce quoted a number of different formulations of the test (including those of Diplock LJ and Buckley LJ) and said:
>
> > "The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."
>
> "The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Ltd* [2007] HCA 61 (2007) 82 AJLR 345 at [54] to describe a breach as "going to the root of the contract" is:
>
> > "...a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party."
>
> "Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract...
>
> "The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

87. It is to be remembered that, in this case, MMI complains that, after the making of the Chelsea Agreement, EREL repeatedly did not pay PM Fees and, so, it must contend that there have been repeated breaches of the Guarantee. In deciding whether the Claimant was in repudiatory breach of the Chelsea Agreement, it is appropriate for me to consider repeated breaches of the Guarantee as a whole. In *Force India Formula*

*One Team Ltd. v Etihad Airways PJSC and Aldar Properties PJSC* [2011] ETMR 10. as the headnote explains:

> "The defendants were the sponsors of a Formula One motor racing team, Force India ("the Team"), which the claimants acquired from a Dutch company, Spyker. The first defendant owned and operated Etihad, the national airline of Abu Dhabi, and the second defendant was a property development company.
>
> "In 2007 the defendant sponsors agreed to sponsor the Team for three seasons. The agreement provided that the sponsors' names would be integrated into the Team name; the Team would not enter into any arrangement that might conflict with the sponsors' activities; Etihad would be the airline exclusively associated with the Team; the sponsors were obliged to pay the Team a performance-related bonus; the Team could choose to source another sponsor but, if it did so, the defendant sponsors were entitled to exercise a range of options which included the option to terminate the sponsorship agreement. The agreement could also be terminated upon written notice by the sponsors under cl.21, if the team owner had committed a material breach which, though capable of remedy, had not been remedied within 10 business days. Force India subsequently acquired the Formula One team. At this point one of the new owners, who had an interest in Kingfisher - a company which owned and operated an airline - changed the livery on the cars for winter testing to include Kingfisher's logo; it was disputed whether Etihad had consented to that change.
>
> "Some three months after the acquisition, Force India emailed the sponsors, proposing to amend the sponsorship fees. The sponsors wrote back that they took the email to be notice of Force India's intention to exercise its right to source an alternative sponsor and that they were accordingly terminating the agreement. According to the sponsors (i) since Force India was in breach of the agreement by using the Kingfisher logo, changing the team name and using new livery, its notice therefore constituted an acceptance of the antecedent repudiation of the agreement by Force India; (ii) Force India could not claim for the loss of a chance of obtaining bonus payments for the points scored in the second and third years of the agreement since, at the apparent date of Force India's acceptance of the repudiation, the possibility of such bonuses accruing to it was speculative.
>
> "The Team denied that the defendants were entitled to terminate the sponsorship agreement and said that the letter from the sponsors amounted to a repudiation of the agreement, which it accepted. The Team then brought proceedings for breach of the sponsorship contract, claiming the payment of

> sums owed under the agreement as well as damages for its breach. The defendants contested the Team's right to recover damages since the Team had received sponsorship monies from third parties, and denied that the Team was entitled to the payment of bonuses.
>
> "The High Court upheld the claim and dismissed the counterclaim."

88. Nevertheless, as the headnote continues:

> "The defendant sponsors appealed against this decision, submitting that the Team had repudiated the sponsorship agreement and that the defendants had been entitled to terminate the contract.
>
> "Held, by the Court of Appeal, that the appeal would be allowed.
>
> "The change of team name, livery and adoption of the Kingfisher logo together amounted to a series of repeated, or continuing, breaches which were ultimately repudiatory. The change of team name was a clear and continuing breach of contract, in particular because of the omission of the names of the appellant sponsors. The deliberate change of the Team's livery without consulting with the sponsors was a material breach of contract. The promotion of the Team in association with India and the new owner's business interests, including Kingfisher Airlines, was in plain conflict with the sponsors' interests which were concentrated in Abu Dhabi and, in the case of Etihad, in the airline industry..."

89. Rix LJ (with whom Patten LJ and Sir Mark Waller agreed) said succinctly, at [87]:

> "In my judgment, the facts stated above [that is, the change of team name, livery and adoption of the Kingfisher logo] reveal a series of repeated, or continuing, breaches which were sooner or later but ultimately repudiatory."

90. In this case, as I have already indicated, the main purpose of the Chelsea Agreement was to grant the franchise of the Chelsea territory to the Claimant and for MMI to receive Royalty Fees on income to which the Claimant was entitled as a result of business it conducted in the Chelsea territory. In other words, it may be said that the principal adventure which was governed by the Chelsea Agreement was the development of the Chelsea territory for the benefit of both the Claimant and MMI (in the latter's case, principally by its receipt of Royalty Fees derived from the Chelsea territory). It cannot be said that EREL's failure to pay PM Fees after the making of the Chelsea Agreement had any effect on that principal adventure or the payments arising from that principal adventure, which, under the Chelsea Agreement, MMI was to enjoy. Nor can it be said, therefore, that non-payment of PM Fees fundamentally

changed the value of the future performance of the Claimant's outstanding obligations under the Chelsea Agreement.

91. The financial losses caused to MMI and attributable to EREL's failure to pay PM Fees of about £2,600 will have been very small both in absolute terms and in comparison to what MMI is likely to have obtained, by way of Royalty Fees, under the Chelsea Agreement had it run its course. Further, as the breaches complained of by MMI ultimately related to the non-payment of money, I am satisfied that MMI could have been adequately compensated in money for those breaches.

92. I have already indicated that MMI has not established, to my satisfaction, that the Conversation did not take place. It follows from this, when taken together with the absence of other contrary evidence, that MMI has not established that EREL's failure to pay PM Fees was deliberate or that any consequential breach of the Guarantee was deliberate, at least until an audit by Mr Dan McManus on MMI's behalf in July 2014. What about the position after the audit?

93. By shortly after the audit, the dispute, principally between Mr Noorkhan, on the one hand, and MMI's leadership team, on the other hand, was as to the non-payment, by EREL, of PM Fees between the whole of June 2013 and May 2014. I have already concluded that the Guarantee only extended to the payment of PM Fees after the Chelsea Agreement was made, so only for about 5½ months of that twelve month period. Further, even though, by August 2014, the focus was on the non-payment, by EREL, of PM Fees between June 2013 and May 2014, Miss Sharkey (of MMI) told me that Mr Noorkhan was not told, before September 2014, of the amount that MMI contended was outstanding for that period and Mr Anderton told me that he could not recall the amount being discussed with Mr Noorkhan before September 2014. It appears that it was only in an email, dated 8 September 2014, that Mr Anderton notified Mr Noorkhan that the amount said to be outstanding was about £6,132. On the same day, Miss Rooprai asked for a full breakdown showing how that sum was calculated. Mr Anderton told me that that request was not unreasonable. Miss Rooprai was provided, by MMI, with a spreadsheet on 11 September 2014. It is not obvious, from the format and content of the spreadsheet, that it related to PM Fees. On 17 September 2014, Mr Anderton asked Mr Noorkhan whether the amount of unpaid PM Fees could be agreed. On 18 September 2014, Mr Noorkhan replied that he and Miss Rooprai were meeting the following day, presumably to discuss the spreadsheet, and that a response would be provided as soon as an answer was available. It appears, from an email from Mr Anderton to, in particular, MMI's leadership team, that he asked for a response from Mr Noorkhan and/or Miss Rooprai by the end of September 2014. It was only 3 weeks after the end of September 2014 that the Default Notice was served.

94. In these circumstances, I have concluded that MMI has not established that, by the time the Default Notice was served, the Claimant had resolved to breach the Guarantee in the future or that EREL had resolved to continue not to pay PM Fees.

95. For these reasons, in my view the failure, by EREL, to pay PM Fees, from December 2013 until October 2014 and any consequent breaches of the Guarantee, did not deprive MMI of substantially the whole of the benefit of the Chelsea Agreement or, if it is something different, a substantial part of the benefit of that agreement. It follows

therefore that I have concluded that the Claimant was not in repudiatory breach of the Chelsea Agreement in connection with the non-payment, by EREL, of PM Fees.

96. Although not expressly addressed by MMI in its submissions, I ought to consider whether, even though not in repudiatory breach of the Chelsea Agreement, the Claimant nevertheless renounced it. As Popplewell J said in *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd.* [2015] 2 Lloyd's LR 407 at [209]:

> "... conduct comprising a breach or breaches of obligations which have fallen due may be insufficient to be a repudiation but nevertheless be conduct which is a renunciation because it would lead the reasonable observer to conclude that there was an intention not to perform in the future, and the past and threatened future breaches taken together would be repudiatory. Such conduct is not infrequently referred to in the cases simply as a repudiation, but is more accurately described as a renunciation in the nomenclature I have adopted. The reason why a defaulting party commits an actual breach is generally irrelevant to whether it constitutes a breach, or whether the breach is a repudiation. But the reason may be highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance, and therefore to the issue of renunciation. Often the question whether conduct is a renunciation falls to be judged by reference to the defaulting party's intention which is objectively evinced both by past breaches and by other words and conduct."

97. I can deal with this matter briefly. I have already found that MMI has not established that, by the time the Default Notice was served, the Claimant had resolved to breach the Guarantee in the future. It follows therefore that I am not satisfied that the Claimant intended, at the time the Default Notice was served, not to perform the Chelsea Agreement in the future and so no renunciation of the Chelsea Agreement by the Claimant is made out.

98. Although not pleaded by MMI, I have considered whether EREL's additional failure to pay other Royalty Fees due under the Ilford Agreement, after the making of the Chelsea Agreement, might have led to a terminable breach of the Chelsea Agreement. The non-payment of these other Royalty Fees was a matter more peripheral to the Chelsea Agreement than the non-payment of PM Fees (about which there had been particular express discussion before the making of the Chelsea Agreement). The total amount of these other Royalty Fees was very small indeed. Taking into account these factors and, also, for the same reasons that I have concluded that any breach of the Chelsea Agreement in relation to the non-payment of PM Fees was non-repudiatory, I have concluded that the non-payment of these other Royalty Fees is not capable of, in effect, turning any otherwise non-repudiatory breaches of the Chelsea Agreement by the Claimant into a repudiatory breach of the Chelsea Agreement by it.

99. As the Claimant was not in terminable breach of the Chelsea Agreement in the ways contended for by MMI, when it served the Default Notice MMI was not lawfully entitled to terminate the Chelsea Agreement. It follows, therefore, having regard to

the way the parties have put their respective cases, that MMI was in repudiatory breach of the Chelsea Agreement, which repudiatory breach was accepted by the Claimant.

100. In the light of the conclusions I have reached, it seems to me (i) that there must be judgment for the Claimant for damages to be assessed and (ii) that the additional claim against Mr Noorkhan must be dismissed, but I will hear further from counsel as to (i) what are the consequences of my conclusions, (ii) the proper form of order in the light of my conclusions and (iii) further directions for the assessment of damages.