CONTRACT – Purchase of commercial investment property – Fraudulent misrepresentation – Inducement - Breach of contract – Rectification – Penalties - Damages

EVIDENCE – Effect of failure to call relevant witnesses – Adverse inferences – Proper approach to evidence

Neutral Citation Number: [2021] EWHC 2382 (Ch)

Case No: BL-2019-001003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building,
Fetter Lane,
London,
EC4A 1NL

Date: Thursday, 26 August 2021

Before :

His Honour Judge Hodge QC
Sitting as a Judge of the High Court

- -

Between :

Ahuja Investments Limited

Claimant

- and –

(1) Victorygame Limited
(2) Surjit Singh Pandher

Defendants

- -
- -

Mr David Holland QC and **Mr Edward Rowntree** (instructed by **Cardium Law Limited**) for the **Claimant**
Mr Ian Clarke QC and **Mr Nicholas Trompeter QC** (instructed by **SBP Law**) for the **Defendants**

Hearing dates: 1 – 2, 5 – 9, 13 – 14 July 2021

- -

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 HODGE QC

Covid-19 Protocol: This judgment was handed down remotely by email to counsel and by release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Thursday 26 August 2021.

The following cases are referred to in the judgment:

Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd [2019] EWHC 476 (Comm)
Cavendish Square Holdings BV v Makdessi [2015] UKSC 67, [2016] AC 1172
Ceylon (Government of) v Chandris [1965] 3 All ER 48
ECO3 Capital Ltd v Ludsin Overseas Ltd [2013] EWCA Civ 413
Efobi v Royal Mail Group Ltd [2021] UKSC 33, [2021] 1 WLR 3863
FoodCo UK LLP v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)
FSHC Group Holdings Ltd v GLAS Trust Corp Ltd [2019] EWCA Civ 1361, [2020] Ch 365
Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)
Hayward v Zurich Insurance Company Plc [2016] UKSC 48, [2017] AC 142
Holyoake v Candy [2017] EWHC 3397 (Ch)
Lewis v Yeeles [2010] EWCA Civ 326
Magdeev v Tsvetkov [2020] EWHC 887 (Comm)
Monsolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961
The 'Panaghia Tinnou' [1986] 2 Lloyd's Rep 586
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511
Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [2019] 4 WLR 112
Strover v Harrington [1988] Ch 390
Victorygame Ltd v Ahuja Investments Ltd [2021] EWCA Civ 993
Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch), [2017] L & TR 23
Williams v. Natural Life Health Foods Limited [1998] 1 WLR 830
Wisniewski v Central Manchester Health Authority [1998] PIQR 324

Judge Hodge QC:

I: Introduction and background

1. In his farewell speech from the Delhi High Court, Justice J.R. Midha is reputed to have said that: "In the Court of Justice, both the parties know the truth; it is the judge who is on trial." Never has that perceptive observation resonated more fully with me than in the present case, where both parties have signally failed to assist the court by calling evidence from three highly relevant potential witnesses, in breach of their duty under CPR 1.3 to help the court to further the overriding objective to deal with the case justly and at proportionate cost. As a result, this is not so much a case of "Hamlet without the Prince" as one of Hamlet without any of Polonius, Gertrude or Laertes (or Rosencrantz and Guildenstern without Hamlet, Claudius or the Player).

2. This is my judgement on the trial of a claim, issued on 23 May 2019, for damages for two sets of fraudulent, or alternatively negligent, misrepresentations allegedly made to the claimant by the defendants during the course of the sale by the first defendant to the claimant of a commercial investment property in West London. There is also a parallel claim for damages for breach of contract. The value of the primary claim is said to be in excess of £8.776 million (less the sum of £800,000 advanced under a loan agreement which the claimant entered into with the first defendant on completion of the sale together with £24,000 for interest which had fallen due under the loan agreement before its purported rescission and which remains outstanding). The defendants deny any and all liability to the claimant. The first defendant counterclaims for: (1) a declaration as to the true interpretation, alternatively rectification, of the sale contract; (2) the recovery of monies due under both the sale contract and the loan agreement and/or two dishonoured cheques; and (3) an injunction requiring the claimant to provide, or to procure the provision of, certain security for moneys due under the loan agreement.

3. The trial took place over nine court days between 2 and 14 July 2021. The claimant is represented by **Mr David Holland QC** leading **Mr Edward Rowntree** (of counsel). The defendants are represented by **Mr Ian Clarke QC** leading **Mr Nicholas Trompeter QC**.

4. For structural reasons, this judgment is divided into a number of sections as follows: **I:** Introduction and background **II:** Evidence and trial **III:** The witnesses **IV:** The rental schedule and the lease term representation **V:** The contractual claims **VI:** The statutory declaration **VII:** The loan agreement **VIII:** The expert evidence **IX:** The counterclaim **X:** Conclusions. However, each section of this judgment has informed the other sections.

5. During the course of this trial, a great many matters have been raised and developed during the course of counsels' extensive written and oral submissions which, as the evidence and the case have developed, and in the light of my findings, I find it unnecessary to record or address in this judgment. The fact that they do not feature expressly in this judgment does not mean that they have been overlooked.

6. This case arises out of the sale and purchase of a freehold investment property known as The Himalaya Shopping Centre and situated at Nos 65 and 67 The Broadway, Southall, Middlesex, UB1 1JR **('the property')**. The claimant, Ahuja Investments

Limited **('Ahuja')**, was the buyer. It was incorporated with the specific purpose of acquiring the property on 12 February 2016. Its sole director was and is Mr Joginder Singh **('Mr Singh')**; and he (and members of his extended family) are the ultimate beneficial owners. The first defendant, Victorygame Limited **('Victorygame')**, was the seller. The second defendant, Mr Surjit Singh Pandher **('Mr Pandher')**, is and was the controlling director of Victorygame, which is a company owned by members of his family. The native language of both Mr Singh and Mr Pandher is Punjabi and it was in that language that they communicated with each other and with their professional advisers, although all written communications were in English.

7. Ahuja and Victorygame exchanged contracts for the sale and purchase of the property on 1 March 2016. The transaction completed over two years later, on 22 August 2018. Ahuja did not have all the funds it required to complete the purchase so on the day fixed for completion, Ahuja and Victorygame entered into a loan agreement under which the latter advanced the sum of £800,000 to the former to assist with the purchase.

8. Ahuja claims that it was induced to enter into the sale contract, and the later loan agreement, by fraudulent (alternatively negligent) misrepresentations about the duration of the leases of the retail units on the ground floor of No 65 and the rental income from the tenants. It is common ground that a schedule was provided to Ahuja's solicitors, and became incorporated into the sale contract, which stated, in capitalised, red text, that "ALL TENANTS HAVE SIGNED A 15 YEARS LEASE FROM THE 20/2/15" when, in fact, the substantial majority of the leases were for 6 years 9 months and not all of them ran from that date. This is referred to as "the lease term representation".

9. The defendants accept that there was a misrepresentation, which they say was due to an innocent mistake; but they deny that there was any operative inducement. They contend that Ahuja knew the true terms of the leases prior to the exchange of contracts for a number of reasons, one of which is that the original leases were in the possession of Ahuja or its solicitors for around two months between February and April 2016 (which spanned the exchange of contracts). It is common ground that the leases had been provided to Mr Jagjit Sohal (of Monarch Commercial Property Consultants), Victorygame's selling agent, and that he then delivered them to Ahuja's solicitor, Mr Randeep Jandu (of Stradbrooks). The defendants contend that it should be inferred that, before they were scanned and returned to Victorygame's then solicitors (Chhokar & Co, acting by Mr Olabode Fagbemi), Mr Jandu had inspected the leases and had discussed them with his client. Further or alternatively, the defendants invite the court to infer that Mr Jandu had told his client that he had not inspected the leases, and did not know about the lease terms, and that Mr Singh instructed him to proceed to exchange of contracts on the purchase in any event because he was not concerned about the terms of the various leases.

10. Sadly, there was no evidence before the court from any of Mr Sohal, Mr Jandu, or Mr Fagbemi. On 8 June 2021, Mr Robin Vos (sitting as a Deputy Judge of the High Court) delivered a judgment upholding a claim to legal professional privilege made by Ahuja over correspondence passing between its current solicitors, Cardium Law, and its former solicitors, Stradbrooks, reversing a decision of the Master, on 29 April 2021, to order disclosure of two documents comprising: (1) a letter of claim from Cardium Law to Stradbrooks dated 10 February 2020, and (2) a letter of response

dated 19 December 2020 from Stradbrooks' professional indemnity insurers. Permission for a second appeal was granted, on limited grounds, on 14 June 2021 by Henderson LJ, who directed that the appeal should be listed for hearing on 22 June. After the conclusion of legal argument on that day, the Court of Appeal (Baker and Andrews LJJ and Sir Stephen Irwin) informed the parties that the appeal would be dismissed for reasons to be given in their reserved judgments. It was while Mr Singh was in the witness box, on Monday 5 July (Day 3 of the trial), that the Court of Appeal handed down a reserved judgment (delivered by Andrews LJ) giving their reasons for having dismissed the defendants' appeal: see [2021] EWCA Civ 993.

II: Evidence and trial

11. The trial commenced on Thursday 2 July 2021 in court 3 of the Rolls Building. I had already undertaken two days' pre-reading, assisted by the provision of detailed written skeleton arguments, chronologies, and dramatis personae. By the end of the trial, the principal documents bundle extended to some 7,160 pages arranged in 27 lever-arch files (labelled D1-26A). There was also an interparty correspondence bundle of over 300 pages, and some 1,343 pages of exhibits to the tenants' witness statements. Apparently the two core bundles had arrived too late to be of any use to counsel in their preparations and these were never referred to.

12. Generally the court aimed to sit at 10.00 am each day although, on a couple of occasions, the court sat a little later than that due to technical and other issues; and each day's hearing concluded at between about 4.30 and 5.00 pm. Although the trial was listed as an attended trial, due to restrictions on the numbers allowed into court during the Coronavirus pandemic, on average about 20 people attended remotely each day using the Microsoft Teams video platform. This included the transcriber, who was taking a live note of each day's hearing until the evidence concluded at the end of Day 7. This hybrid arrangement caused frequent problems due to the inaudibility of witnesses, counsel, and the judge, as a result of the variable quality, and the positioning, of the microphones. On the morning of Day 7, the transcriber (and a number of others) were unable to access the Teams hearing for about the first fifteen minutes (although this part of the evidence was recorded on the court's DARTS system); and at other times there were temporary interruptions to the Teams connection. I did not find this hybrid mode of hearing to be at all satisfactory: the problems of inaudibility were a constant distraction, and the quality of the transcript suffered as a result to such an extent that it is not always an entirely accurate record of the evidence, with relevant passages sometimes being missed or inaccurately recorded (a matter to which at times I drew the court's attention). Had it not been for the presence of an interpreter during the evidence of the claimant's witnesses, with the benefit of hindsight a fully remote hearing might have been preferable.

13. On the morning of **Day 1** of the trial I ruled on two preliminary issues: I gave the defendants permission to rely at trial on certain lately disclosed documents; and I directed that the evidence of two 'pro-forma' tenant witnesses, Mr Pardeep Singh Madhan and Mr Harinder Singh Gurwara, should be taken in the court room (as with all the other witnesses) rather than remotely. In the event, this direction caused no apparent difficulties; and it was probably more effective than taking their evidence remotely since both men gave their evidence through a Punjabi interpreter.

14. On the afternoon of **Day 1** of the trial, Mr Joginder Singh entered the witness box. He was there throughout **Days 2 and 3** of the trial, concluding his evidence at about 10.50 am on **Day 4**. Mr Singh is the sole director of Ahuja and he was its principal witness. He gave evidence (for a total of some 13 hours) through a Punjabi interpreter although it was clear that he had an adequate command of the English language, both written and spoken. Although both Ahuja's conveyancing solicitor, Mr Jandu, and Victorygame's selling agent, Mr Sohal were able to speak Punjabi, Mr Singh had chosen to communicate with them by text and by email in English, rather than in his native tongue. Even in cross-examination, Mr Singh sometimes answered questions directly, rather than through the interpreter; and in re-examination, and in response to questions from the Bench, this was his invariable mode of response. It was while Mr Singh was in the witness box, on Monday 5 July (Day 3 of the trial), that the Court of Appeal handed down their reserved judgment giving their reasons for having upheld Ahuja's claim to legal professional privilege over the letter of claim sent by Cardium Law to Stradbrooks and the letter of response from the solicitors acting for that firm's professional indemnity insurers.

15. The remainder of the morning of **Day 4** was spent hearing (with the assistance of a Punjabi interpreter) the evidence of two of the 24 tenants of units within the property who had given 'pro-forma' witness statements, one selected by Ahuja and the other by the defendants; and then the evidence of Mr Jagmit Singh Ahudja, Mr Singh's son and an employee of Ahuja. Mr Harinder Singh Gurwara, the tenant of Unit 7, and Mr Pardeep Singh Madhan, the tenant of Unit 8 and a former tenant of Unit 9A, both gave evidence for about 30 minutes. Mr Ahudja gave evidence for about a little under an hour. That concluded the claimant's factual evidence.

16. Mr Pandher, the second defendant, went into the witness box after the luncheon adjournment on **Day 4**. His evidence (which was given without an interpreter) continued on **Day 5** and concluded, having lasted a little more than 8 hours in total, shortly before noon on **Day 6**. During the course of Mr Pandher's evidence, after the luncheon adjournment on **Day 5**, another defence witness, Mr Arun Monga, was interposed to give evidence (also without an interpreter) for about 30 minutes to rebut Ahuja's suggestion that his offer to purchase No 67 The Broadway, with an option to purchase No 65, was not genuine.

17. Mrs Valveer Kaur Pandher, the wife of the second defendant and a director of Victorygame, gave evidence (in good conversational English), either side of the luncheon adjournment, for a little under 2 hours on **Day 6**. The defendants' factual evidence concluded with the unchallenged witness statement, dated 25 March 2021, of Mrs Monia Pandher, the wife of Mr Jaswinder Pandher (and thus the daughter-in-law of the second defendant). She is a part-qualified accountant by training who assists the defendants with their business affairs.

18. For the remainder of the afternoon of **Day 6** and the morning of **Day 7** I heard from Ahuja's expert valuer, Mr Paul Wolfenden FRICS, the principal of his own boutique real estate advisory business, for about 4 ¾ hours in total. On the afternoon of **Day 7** I heard, for about 3 hours, from the defendants' expert valuer, Miss Hazel Morris MRICS, a specialist valuation partner in, and a member of, Knight Frank LLP.

19. Over the weekend of 10-11 July and on Monday 12 July counsel prepared their detailed written closing submissions. Ahuja's written closing extends to some 74

pages and 178 paragraphs. The defendants' written closing extends to some 140 pages and 527 paragraphs. Mr Holland addressed me in closing for a little over 4 ½ hours on **Day 8**. Mr Clarke responded for about 4 ½ hours on **Day 9**; and Mr Holland replied for about 1 ½ hours. The trial concluded, and the court reserved judgment, at about 5.00 pm on **Day 9**.

III: The witnesses

20. Both leading counsel accept that this is a case in which, unfortunately, one side or the other is telling lies. They recognise that, having heard all the witnesses give their evidence, the court will have to make up its own mind about who is telling the truth.

21. Inevitably, both counsel referred me to the frequently-cited observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) about the fallibility of human memory and the weight to be placed upon documentary evidence, leading to the conclusion (at [22]) that "the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts". I was also referred to observations of Males LJ (with the agreement of McCombe and Peter Jackson LJJ) in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 at [48]-[49] about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned, culminating in the statement that "… in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations". I have borne those observations firmly in mind when evaluating the evidence in this case.

22. The court has not heard from any of three witnesses who played a central role in the dealings that have given rise to this litigation: **Mr Jandu** (of Stradbrooks), who acted as Ahuja's solicitor on the purchase of the property; **Mr Sohal** (of Monarch Commercial Property Consultants), who acted as the selling agents for the property; and **Mr Fagbemi** (of Chhokar & Co), who acted as the first defendant's solicitor on the sale of the property. As I observed in my introduction, this is not so much a case of "Hamlet without the Prince" as one of Hamlet without any of Polonius, Gertrude or Laertes (or Rosencrantz and Guildenstern without Hamlet, Claudius or the Player).

23. It is well-known that, in certain circumstances, the court may be justified in drawing adverse inferences from the absence of a witness who might have been called, and who might be expected to have material evidence to give; but the burden is on the party who invites the court to draw an adverse inference from the failure to call such a witness clearly to identify the nature of the evidence which the court is invited to infer, and to explain why the absence of evidence on the point from that witness is material to that issue. Mr Clarke referred me to the case of *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) where, founding themselves upon observations of Brooke LJ (with the agreement of Roch and Aldous LJJ) in what Cockerill J describes as "the increasingly relied upon authority" of *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, each party had suggested that the court should draw adverse inferences against the other because certain witnesses had not been called.

Having reviewed the authorities, Brooke LJ derived the following principles from them in the context of the case that was before his court:

(1) In certain circumstances, a court may be entitled to draw adverse inferences from the absence, or the silence, of a witness who might be expected to have material evidence to give on an issue in that action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party, or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his or her absence or silence may be reduced or nullified.

24. At [150] of *Magdeev*, Cockerill J observed that "the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller." Cockerill J proceeded to deal with the point relatively briefly at [154] thus:

(1) This evidential 'rule' is a fairly narrow one. The drawing of such inferences is not something to be lightly undertaken.

(2) Where a party relies on it, it is necessary for it to set out clearly (a) the point on which the inference is sought, (b) the reason why it is said that the 'missing' witness would have material evidence to give on that issue, and (c) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

(3) The court then has a discretion, and will exercise it not just in the light of those principles, but also in the light of: (i) the overriding objective, and (ii) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case – during the trial.

25. In my judgment, before the discretion to draw an adverse inference or inferences can arise at all, the party inviting the court to exercise that discretion must first:

(1) establish (a) that the counter-party might have called a particular person as a witness and (b) that that person had material evidence to give on that issue;

(2) identify the particular inference which the court is invited to draw; and

(3) explain why such inference is justified on the basis of other evidence that is before the court.

Where those pre-conditions are satisfied, a party who has failed to call a witness whom it might reasonably have called, and who clearly has material evidence to give, may have no good reason to complain if the court decides to exercise its discretion to draw appropriate adverse inferences from such failure. A good illustration of this, in the context of the present case, may be afforded by what passed between Mr Singh and Mr Jandu over the phone in the few minutes before exchange of contracts for the sale of the property at 15.11 (GMT) on 1 March 2016.

26. Mr Singh signed the contract (in India) on Saturday 27 February 2016, intending to send it back to Stradbrooks' offices the following day. I find that at the time he signed the contract, and later returned it to Stradbrooks' offices, the contract did not include the rent schedule containing the lease term representation. I also find (for reasons that will appear later in this judgment, and contrary to Mr Singh's evidence) that at the time Mr Singh had not even seen the lease term representation. I find that the first occasion on which Mr Singh was provided with a copy of the lease term representation was as a PDF attachment (described as 'Leases and Rental schedule') to Mr Jandu's email of 29 February, which also attached his report on title. At paragraph 71 of his March 2021 witness statement, Mr Singh says that he does not recall reading the report on title on that day although he does remember opening and reading the rental schedule as he "was mostly concerned about the rental income and lease terms for the property". However, it is clear from Mr Singh's email to Mr Jandu (timed at 04.30 GMT) that he had indeed opened and read the report on title and at least some of the other attachments (such as the replies to standard commercial property enquiries); although, as Mr Clarke points out, there is nothing to suggest that Mr Singh had read the rental schedule at that time or that he had thought that it had originated from the defendants, rather than from Stradbrooks. In cross-examination (at pages 18-19 of the transcript of Day 3) Mr Singh described the schedule as "a legal document" and he said that he had "looked at it and, according to this document, I bought the Property".

27. At 13.35 (GMT) on 1 March 2016, Mr Fagbemi sent Mr Jandu an email including an attachment described as "Leases and Rent Schedule". This was the first time since 17 February, when (in Mr Clarke's words, and as I find) the lease term representation had "dropped out of the picture", that the rental schedule in which it appeared had featured as part of the sale contract. At 14.08 Mr Jandu forwarded this email on to Mr Singh in India (and to Mr Sohal) with the comments: "Gents They want to add these documents to the Contract. Rent Schedule is slightly amended." Mr Jandu sent a chasing email, possibly at 14.29 (although the recorded time of 20.29 where Mr Singh was staying in India may indicate a time in the UK of 14.59 since the emails at D8/2018 and 2096-9 suggest that Mr Singh was 5 ½ hours ahead of the UK), which asked Mr Singh to "please confirm if you are happy with the rent schedule and that the seller has not disclosed all leases to us for the property, therefore we do not know all the lease terms". In response, Mr Singh sent two short emails to Mr Jandu from his iPhone (at 15.02 (GMT): "Kindly conform [sic] what is the total rent?" and at 15.06: "I think that is fine proceed for exchange") before contracts were exchanged at 15.11 (GMT) on 1 March 2016.

28. In his evidence, Mr Singh could not recall the content of this telephone conversation. At paragraph 79 of his March 2021 witness statement, he simply says this:

> "I had a number of phone calls with Mr Jandu on the day of exchange (which was over 5 years ago). I cannot exactly recall having a phone call with Mr Jandu in between these two emails, but it is apparent that I was provided with the necessary comfort to proceed somehow (likely from Stradbrooks' statement that the First Schedule confirmed the 'Leases & Licences to which the Property is subject to'). In any event, now that the (fourth version of the) First Schedule had been provided for incorporation in the Contract of Sale, it was a matter of common sense that it formed part of the Contract of Sale and provided me with the contractual protection that I required (as I could no longer trust Mr Pandher's word)."

29. Mr Singh had no better recollection of this conversation when he was asked about it (at pages 21 to 27 of the transcript) on Day 3 of the trial. Because Mr Jandu was not called, I have no evidence from him about this important, final conversation which led to Mr Singh's instruction to proceed to exchange of contracts on the purchase of the property. Mr Clarke invites me to find that in the time available for the call, the only topic of conversation was the rent. I consider that it is appropriate to draw this inference in the light of: (1) the absence of any evidence on this point, whether satisfactory or at all, from either of the parties to the relevant conversation; (2) the terms of Mr Singh's query, which was directed solely to "the total rent"; and (3) the timescale of four minutes between the two emails during which the call must have taken place.

30. I also accept Mr Clarke's invitation to find that Mr Singh: (1) had not bothered to open, or to look at, the rental schedule attached to the email that Mr Jandu had forwarded to him, and (2) was totally unconcerned about the "lease terms". That is consistent with the facts that: (a) the emails were only available to Mr Singh on his i-Phone, and (b) his only query concerned "the total rent", and, specifically, the omission of any query about what information was missing concerning "the lease terms"

31. Since first preparing this part of my reserved judgment, the Supreme Court has handed down its judgment in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863 concerning the burden of proof in an employment case where discrimination is alleged. Speaking with the agreement of Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblen, Lord Leggatt said this (at [41]):

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was

> bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

Since these observations merely serve to reinforce the conclusions at which I have arrived independently of them, it was not necessary for me to call for further submissions in relation to this authority.

32. The omission to call a material witness or witnesses without reasonable explanation may have a significance that goes beyond the drawing of appropriate adverse inferences. Three particular aspects are of particular relevance to the present case. First, in a case where there are contemporary documents which appear on their face to provide cogent evidence on an issue which is contrary to the evidence of one of the parties to the litigation, the court may decide to take the documents at their face value, and decline to accept that party's evidence to the contrary, where this is unsupported by the evidence of a non-party witness who clearly could have given evidence material to that issue and who might have, but has not, been called by that party as a witness. The same may apply where the evidence of one of the parties to the litigation is contrary to the known or probable facts.

33. Second, the failure to call a witness who might have been able to give evidence on a material issue may mean that the court is left with no direct evidence at all on that issue. In that situation, the party who might be expected to have called that witness cannot complain if the court rejects that party's case on that issue and either makes a finding based on the inherent probabilities presented by the limited evidence that is before the court, or simply concludes that it is unable to make any finding of fact at all on that issue. This is an alternative way of analysing my conclusion as to what was said during the telephone conversation between Mr Jandu and Mr Singh between 15.02 and 15.06 GMT on 1 March 2016 (if Ahuja can be taken to have been advancing a positive case on that issue notwithstanding the paucity of Mr Singh's evidence on the point).

34. The third aspect comes into play in a case, such as the present, where there is a claim (or, as here, a counterclaim) for rectification, whether the correction of an alleged mistake in the relevant document is sought to be achieved through a process of construction or by way of recourse to the court's equitable jurisdiction. In the former case, it must be clear, from the rest of the document, construed in the light of its admissible background and context, both that something has gone wrong with the language of the document and precisely what correction needs to be made in order to cure that mistake. In a case where the equitable jurisdiction is invoked, the court requires the relevant mistake to be proved to a high degree of conviction because rectification is a discretionary remedy which must be cautiously watched and jealously exercised. Although the standard of proof is the ordinary civil standard of the balance of probabilities, a party seeking rectification may find itself unable to discharge the evidential burden of proof in a case where its evidence lacks the support of a non-party witness who clearly could have given evidence material to that issue and who might have, but has not, been called by that party.

35. Against this background, I turn to the witnesses in the present case.

36. For the defendants, Mr Clarke submits that Ahuja's main witness, **Mr Singh**, was an unsatisfactory witness for five principal reasons. First, there can be no doubt that Mr Singh has a relatively good command of written and spoken English, yet he chose to give his evidence in cross-examination (but not in re-examination) through a Punjabi interpreter. In reality, the court should view this as no more than a device to: (1) allow Mr Singh more time to formulate his answers to questions; and/or (2) insulate himself from giving evidence in his own clear words. Secondly, over the course of his cross-examination, Mr Singh refused to give straight answers to simple questions, preferring instead to dissemble and to give long speeches. Thirdly, Mr Singh had a consistent and convenient loss of memory whenever it came to matters which he perceived as potentially damaging to his case, but an unswerving firmness in his recollection of events which he perceived as potentially helpful. Fourthly, Mr Singh proved himself willing to tender evidence that was obviously false, contrary to, and in the face of, contemporaneous documentation, an obvious illustration being Mr Singh's recent suggestion (for the first time in cross-examination) that an agreement had been concluded whereby the forfeited Palace Shopping Centre deposit would be taken off the purchase price for the property on completion when it is clear from other reliable evidence that this could not be right. Fifthly, Mr Singh was liberal in making unsubstantiated allegations of, or innuendos suggesting, wide-spread dishonesty and impropriety going far beyond Mr Pandher and, by the end of his evidence, implicating all of Mr Monga, Mr Sohal, Mr Jandu and even Habib Bank in the alleged fraud against him.

37. Mr Holland acknowledges that Mr Singh was not perhaps the easiest of witnesses; but he submits that he was adamant that he felt genuinely aggrieved by what he perceived as Mr Pandher's dishonourable behaviour in changing the basis of their deal and by the lies that has told. Mr Holland also acknowledged that in re-examination Mr Singh had answered questions in English without the assistance of the interpreter; but he suggested that this was because Mr Singh had clearly felt more comfortable when he was not being challenged, and he denied the suggestion that Mr Singh had been hiding behind the interpreter. Mr Holland submitted that Mr Singh's evidence on vital matters should be regarded as truthful.

38. Notwithstanding Mr Holland's submissions, I accept all of Mr Clarke's criticisms of Mr Singh as a witness. In addition, I found Mr Singh to be immensely evasive as a witness and to be someone who was reluctant to engage with, or to respond to, questions in cross-examination. One example was Mr Singh's failure to engage with Mr Clarke's questions about Mr Sohal's email of 2 February 2016 at pages 53-54 of the transcript of Day 2. Another was Mr Singh's failure to respond to Mr Clarke's questions about the need for the loan agreement at pages 56 to 62 of the transcript of Day 3. I also identified a tendency for Mr Singh to develop and embellish his evidence with the passage of time. An example is Mr Singh's assertion (at paragraph 17.3 of his second witness statement in March 2021) that at their meeting on 9 February 2016 Mr Pandher had told him that "all of the Units in No 65 were subject to 15-year lease terms" whereas (at paragraph 18.3 of his first witness statement in March 2020) he had recorded merely being told that "all of the Units in No 65 were occupied under leases", with no reference to being told about 15-year lease terms.

39. I also note that Mr Singh's unchallenged evidence - which on this point I accept - was that he had flown out to India on 20 February 2016 and that he had stayed there until

about the end of March. During that time, he had been communicating with Mr Jandu, and with Mr Sohal, on his i-Phone rather than by using a computer. This has to be borne in mind when considering Mr Singh's response to the emails he received when he was in India in the period leading up to the exchange of contracts.

40. Mr Clarke began his written closing with two over-arching submissions. First, he submitted that, disgruntled by the sums he had to pay to complete Ahuja's purchase of the property, Mr Singh has searched for reasons to justify the non-repayment of the £800,000 loan; and this has led him to "reverse-engineer" a claim in fraud based upon the lease term representation which, if it were anything at all (which Mr Clarke says it is not), could only ever be a claim for breach of contract. One remarkable feature of this litigation is said to make good this submission: the fact that, in his witness statements, Mr Singh said absolutely nothing to explain the circumstances in which he had first discovered the falsity of the lease term representation. His evidence in cross-examination did not elucidate that matter any more completely either. In his oral evidence, Mr Singh maintained that he had found out the true position "only after completion" although, when pressed, he could not remember the exact date. His oral evidence was that the true position was first disclosed to him by one of the ground floor tenants, although Mr Singh could not remember which tenant it was; and Mr Ahudja could not remember either. Mr Clarke suggests that it is bizarre to suppose that Mr Singh would have initiated a discussion with this unidentified tenant by telling him the length of his lease. In any event, it is most likely that this supposed conversation (if it happened at all) had taken place at some point early in September 2018, in advance of the date for payment of that quarter's rent. Assuming (as, on Ahuja's case, one must) that the existence of 15-year lease terms was key to Mr Singh's decision to buy the property in the first place, Mr Clarke points out that the discovery that this was not the case must have been shocking for Mr Singh; yet, viewed in that context, Mr Singh's subsequent activity, or rather inactivity, is nothing short of extraordinary.

41. Thus: (1) Mr Singh could not recall: (a) checking the lengths of any of the other ground floor leases, or asking his son to check the position, (b) asking any other tenant about the length of their lease, or even (c) telling Mr Jandu about the fact that one of the ground floor leases was less than 15 years. (2) Mr Singh made no complaint about the lease term representation in his email to Mr Jandu sent on 6 September 2018, saying only: "Seller rent statements are not correct …". (3) Mr Singh said nothing about the lease term representation in his text message to Mr Pandher on 12 September 2018, in advance of the meeting between them, referring only to issues concerning rental figures. (4) Notably (and consistently with the email and text message previously cited), the first letter from Stradbrooks to Chhokar & Co after completion on 29 November 2018 merely complained about alleged "discrepancies in the information provided by your client at completion and the actual tenants in occupation, the actual rents paid to your client and the rent arrears position". As it was put to Mr Singh in cross-examination, had he complained about the falsity of the lease term representation before that date, it is inconceivable to suppose that Mr Jandu would not have mentioned it in his letter. Nor was the position corrected in Stradbrooks' follow-up letter of 3 December 2018.

42. Chronologically, the first time Ahuja ever raised the falsity of the lease term representation was after Ahuja had changed solicitors, in Cardium Law's letter of 17

January 2019. In terms, Cardium Law prepared this letter having had "the opportunity of taking their client's instructions and reviewing the supporting documentation". Mr Clarke submits that this letter is notable in that, so far as relevant to the lease term representation, it complains only about a purported breach of contract, the salient part of the letter being headed 'Breach of Contract Claim'. There is no allegation of misrepresentation, still less of any dishonest misrepresentation. On the contrary, it is said only that Ahuja relied on the information contained in the contract of sale as being true, correct, and accurate. Mr Clarke says that this can only be because, before then, Mr Singh had not said anything about what Mr Pandher had allegedly said or done at the meeting on 9 February 2016. Ultimately, says Mr Clarke, this letter really makes it clear that this is not a misrepresentation case at all. Mr Singh is said to have made that point himself when (at page 56 of the transcript of Day 1) he said that, after completion, "… we discovered that the leases were not proper leases". When pressed to explain what was improper about the leases, he said (at page 57): "When the contract was exchanged, it was written properly that the leases are for 15 years, and it starts from 20/2/2015 and it was written in highlight". In other words, Mr Clarke submits, Mr Singh's complaint is not about a misrepresentation which had induced him to enter into the sale contract. Rather, his complaint is that the ground floor leases do not conform to the written words in the sale contract.

43. Mr Clarke submits that the irresistible inference is that Mr Singh either knew full well (or if he did not know, he did not care) about the true position regarding the length of the ground floor leases prior to exchange of contracts. It was only after the £800,000 loan had already fallen due for repayment, and after Ahuja had transferred its instructions from Stradbrooks to Cardium Law, that Mr Singh first raised any suggestion that he had been deceived by the lease term representation. Mr Clarke characterises this misrepresentation claim as "a cynical and adventitious one, which ought never to have been brought in the first place".

44. For reasons that will become apparent, I consider that the inference that Mr Singh (and thus Ahuja) placed no reliance on the lease term representation is fully made out on the evidence. I also find that the absence from Cardium Law's letter of any reference to any misrepresentation as to the term of the leases having been made at the meeting of 9 February 2016 reinforces the evidence that is already afforded by the relevant underlying meta-data that the first document to contain the lease term representation only came into existence on the morning of 12 February 2016 (and thus after the 9 February meeting). This significantly undermines Mr Singh's evidence as to what transpired at that meeting. I do not accept Mr Holland's oral submission that it was the loan agreement that was the pressing matter, and the focus of attention, at the time of the 17 January 2019 letter, particularly in view of the way that letter is structured, with the breach of contract claim and the loan agreement being addressed separately, and any fraudulent or negligent representation being raised only in relation to the latter, and then only in the context of the later statutory declaration. In my assessment and judgment, all of this operates significantly to undermine both Mr Singh's reliability, and also his credibility, as a witness.

45. Mr Clarke also submitted that the alleged fraud was inherently improbable for three reasons. First, the lease term representation was incorporated into the sale contract. On Ahuja's analysis, the defendants 'hard-wired' their liability for deceit into the very contract which Ahuja claims was to be brought about by that deceit in the first place.

That is a fair point; but, as Mr Holland pointed out, an incompetent fraud is still a fraud. Second, Mr Clarke suggests that Ahuja has made no attempt to establish a financial motive for the fraud. However, it is clear from the contemporaneous emails that the defendants were seeking to put pressure on Ahuja to effect an immediate, or at least early, exchange of contracts, and that in itself would have provided sufficient motivation for any fraudulent misrepresentation: see, in particular, the email sent in the name of Mr Pandher to Mr Chhokar (and copied to Mr Sohal) at 11.55 on 12 February 2016 attaching the rental schedule at D5/1092. I therefore attach no real weight to this consideration. Third, the defendants could never have thought that they could get away with any fraudulent misrepresentation as to the length of the leases: since it is common ground that the original leases were provided to Ahuja and its solicitors at an early stage in the transaction (according to Mr Singh, on 18 February although Mr Pandher put this even earlier, either on the day of the 9 February meeting or the following day) and that they had remained with Stradbrooks until they were scanned on to their electronic filing system, and then returned to Chhokar & Co, on 13 April 2016, the defendants would have expected Stradbrooks to have inspected the leases and discovered the falsity of the lease term representation. This is a valid consideration which I will have to factor in to my evaluation of the evidence as a whole.

46. Moving on from Mr Singh, Mr Clarke invited me to treat the evidence of **Mr Ahudja** with some caution. This I do; but since Mr Clarke also acknowledged that Mr Ahudja had limited evidence of materiality to give, I find that nothing really turns on his evidence.

47. Mr Clarke also submitted that no real weight could be placed on the evidence of **the 'pro-forma' tenant witnesses**, contending that, fundamentally, the court could not be satisfied that their witness statements were prepared in the witnesses' own words or that they had even understood the words printed on the page. The reality was that their evidence was "a collective effort". I consider these criticisms to be well-founded; and I will factor them in to my findings on the issue of whether Mr Pandher agreed with the tenants of No 65 that the contractual rent increases due in February 2018 would not be enforced.

48. Turning to the defendants' witnesses of fact, Mr Clarke acknowledged that there were aspects of the evidence of **Mr Pandher** which were unsatisfactory, in the sense that he did not provide clear answers to all of the questions which were put to him. However, Mr Clarke submitted that it was clear enough that he was doing his best to assist the court; that he was not a dishonest witness; and that, on the whole, his evidence was reliable. Mr Clarke emphasised that: (1) Although Punjabi is his first language, Mr Pandher (unlike Mr Singh) chose to give evidence in English without the assistance of an interpreter. In this way, he was doing his best to assist the court by giving his evidence in his own words as he meant them to be heard. Although it plays no part in my assessment of his evidence, the impression that I formed was that by giving evidence in English, Mr Pandher was seeking to create a favourable impression on the court, by way of contrast with Mr Singh. (2) Mr Pandher willingly volunteered evidence contrary (or perceived as contrary) to his own interests, most notably when accepting (at page 67 of the transcript of Day 4) that whoever had inserted the 'ALL TENANTS' text had "intended it to be read". However, I record and note the limited, and inevitable, nature of such concessions. (3) Where those parts

of Mr Pandher's evidence were open to corroboration by an independent witness, that corroboration was forthcoming. Mr Clarke instanced the support that Mr Pandher's evidence received from the evidence of Mr Monga. However, Mr Monga's evidence is really only relevant to a peripheral issue raised by Mr Singh, and it does not go the heart of this litigation. What I find to be of far more significance is the absence of any independent corroboration of Mr Pandher's evidence from either Mr Sohal or Mr Fagbemi.

49. Mr Clarke submits that **Mrs Valveer Kaur Pandher** came across as an honest witness who, on two occasions, became visibly upset by the questions that were being put to her. He submits that her emotion was genuine and real, accepting her responsibility for the offending 'ALL TENANTS' text as well as having great remorse for it. As she memorably said (at page 67 of the transcript of Day 6): "I cannot tell you how haunting that is for me over the years", not because she had lied but because "I have put my family – for that one line, I have put my family through hell and back. Who would do that?" Mr Clarke says that this was clearly not self-pity.

50. Mr Holland submits that it is Mr and Mrs Pandher who have been consistently lying. He says that they lied at the time of the negotiations for the contract in February and March 2016; that they lied at the date of, and in the period leading up to, completion of the purchase of the property in June to August 2018; that they have lied to this court; and that they have fabricated documents to cover up their lies. He points out that they start 'on the back foot' because they have to accept that the lease term representation was obviously untrue. They must also accept that the schedule annexed to the statutory declaration, and every draft apportionment schedule which followed it (including the actual completion schedule), were inaccurate because they did not set out the level of arrears which Mr Pandher now says had arisen from his 'commercial decision' not to collect the minimum 10% rental increase which the tenants of No 65 were not in fact paying. The defendants also have to accept that the figures in the last column for units 2, 4, 7, 9, 11, 12, 18, 21 were incorrect, as was the total rental figure of £257,479.36.

51. Mr Holland submits that significant parts of the evidence of Mr and Mrs Pandher were, and are, literally incredible, being directly contrary to the documents, to the inherent probabilities and to common sense. He points to the defendants' quite extraordinary delay in providing any explanation as to how the (admittedly untrue) lease term representation came to be made. Their present explanation was signally absent from both the detailed letter in response to Ahuja's letter before action of 1 April 2019 and the second defendant's witness statement on the summary judgment application, appearing for the first time only in the re-amended defence and counterclaim at the end of July 2020. Mr Holland submits that this is quite extraordinary. Faced with Ahuja's serious allegations of fraud and misrepresentation, if there had honestly been any innocent explanation for the lease term representation it would have been put forward at the earliest possible opportunity. Mr and Mrs Pandher's explanation that they had simply forgotten, until they were reminded some years later by the discovery of the corrective fax, is not credible in the circumstances; nor is Mrs Pandher's assertion that she was not shown, and did not discuss, the letter before action by and with Mr Pandher. Mr Holland submits that the true explanation for this late revelation is that, when faced with the imminent prospect of having to explain what the disclosed documents and the underlying metadata would show, Mr

and Mrs Pandher simply concocted their present story, including the alleged corrective fax; and that the account that they have now put forward is a series of palpable and ridiculous lies.

52. Mrs Pandher had arranged for a series of 'Instructions for New Lease' letters to be sent to Chhokar & Co, instructing them to draw up a new lease for each of the units at No 65 for a term of "15 YEARS FROM 20th FEBRUARY 2015 (divided into 6 yrs 9 months then automatically extended to another 6 yrs 9 months. Tenant liable for whole 15 yrs term)". Mr Holland submits that the defendants' assertion that those solicitors both: (1) missed the fact that two periods of 6 years 9 months do not add up to 15 years, and (2) effectively disobeyed their instructions to make the lease terms renewable is simply incredible.

53. Mr Holland submits that the defendants' belated account of how the lease term representation came to be made innocently is itself incredible. Not only would the court have to accept the reason why it took one and a half years to come up with the story, but it would also have to accept that: (1) Neither Mr nor Mrs Pandher appreciated that two terms of 6 years 9 months did not add up to a total of 15 years. (2) Neither of them had noticed that most of the 6 years 9 months terms were not, in any event, renewable. (3) Mrs Pandher had either misread or ignored her own "traffic light" colour-coded schedule, a brief perusal of which would have told even the most uninformed reader that the lease term representation was not literally correct. Her account is that she did not refer back to this schedule, but she could not explain why she had not done so. (4) Despite the fact that she claimed never to have read the leases, Mrs Pandher was confident enough to put the lease term representation at the head of a document which was being prepared for the defendants' solicitors in bold type, in red, and in capitals. (5) Despite her professed lack of facility at the computer, Mrs Pandher prepared the schedule using not one but two separate computers and then, at her husband's dictation, sent it to Chhokar & Co by email. (6) Mr Pandher did not read the attachment to the email which was dictated by him and sent out in his name to Chhokar & Co by his wife. (7) A document said only to have been intended for the eyes of Chhokar & Co was sent to the agent, Mr Sohal, and to Stradbrooks, as well as becoming part of the sale contract.

54. Mr Holland submits that account of the so-called "corrective fax" is also unbelievable. Neither Mr nor Mrs Pandher were able to explain, either coherently or at all: (1) Why the correction was sent by fax and not by email. Mrs Pandher's explanation that it would have taken her an hour is incredible when, as she accepted, she had her own email address and a computer at home. (2) Why the correction was not made by correcting the printed text on the existing schedule. (3) Why there was no trace of this fax on Chhokar & Co's files. (4) Why, if the corrective fax had been sent, Chhokar & Co: (a) failed to correct the lease term representation at any time in the days leading up to exchange; (b) included it in the contract; and (c) took so long to answer the query as to its accuracy raised by the solicitor acting for Habib Bank (forwarded by Stradbrooks on 16 March 2018 and only eventually answered by Chhokar & Co, after having taken instructions from Mr Pandher, on 29 June 2018). (5) Why the second page of the so-called faxed schedule had entries relating to the Kabul Restaurant deliberately blanked out when: (a) that information had already been sent to Chhokar & Co in the original schedule and (b) it could have been amended by hand (as was the lease term representation). (6) Why there was no fax

cover sheet or even annotation to indicate what it was or who it was from. (7) Why there were four sheets, all with the same metadata showing them being scanned in July 2019?

55. Even if the court were to accept that Chhokar & Co had somehow made a mistake both in incorporating the schedule containing the lease term representation into the draft contract, and also in sending a separate copy of the rental schedule (making two in all) as attachments to their email to Mr Jandu dated 17 February (timed at 14:29), Mr Holland submits that Mr Pandher had no coherent explanation as to why, having checked the schedule to the draft contract, noticed the error on the second page of the rental schedule, and instructed Chhokar & Co to amend it in manuscript (by reducing the rent outstanding for the Kabul Restaurant from £49,132 to £18,000), he had failed at the same time to identify, and to instruct Chhokar & Co to correct, the false lease term representation in their later, corrective email of 17 February to Mr Jandu (timed at 16:27). Mr Holland also submits that Mr Pandher's evidence (at pages 28 and 29 of the transcript of Day 5) that his instruction was not to send the rental schedule to the other side or to incorporate it into the sale contract is contradicted not only by probabilities – "why should Mr Fagbemi have disobeyed his instructions?" - but also by the email of 17 February 2016 (timed at 16:29), which states: "With regard to the rental schedule, our client has instructed that the arrears of rent owed by Kabul Restaurant is £18,000.00 and same is currently being repaid in monthly instalment of £1,000.00. We have amended (in manuscript) the rental schedule accordingly." Mr Holland notes that this email was forwarded to Mr Pandher only two minutes after it was sent to Stradbrooks (at 16.29: see D24/6257); yet Mr Pandher never complained about the corrected rental schedule (still bearing the false lease term representation) having been sent to Mr Jandu.

56. It is now clear (and, eventually, it was accepted by the defendants) that if their case is correct, the schedule attached to the statutory declaration, and all the subsequent draft apportionment statements, as well as the actual completion statement, were inaccurate in that, whilst the 10% rental increase (reflected in the "March Quarter Rent" and the "Rent per Quarter" columns) was payable, Mr Pandher had taken "the commercial decision not to pursue any of the tenants for the difference" but he had omitted to include those arrears in the "Arrears" column of any of these schedules. Mr Pandher's case on this was first put forward in paragraphs 151-2 of his March 2021 witness statement. Not only is this contrary to the evidence of Mr Singh and the 24 individual tenants, but Mr Holland submits that Mr Pandher's excuse (at paragraph 167.4) that the failure to show the resulting arrears of rent was "sheer oversight" is simply unbelievable, not only because Mr Pandher is not a man to allow anyone to build up arrears of rent without chasing them, but also because his account is contrary both to his own document (at D25/6566) and the letters he was writing to the tenants in August 2018 returning their rent cheques on the basis that Victorygame was no longer their landlord: had there been arrears of rent, these cheques would not have been returned but they would have been cashed and cheques written for any resulting balance due to the tenants.

57. Mr Holland submits that Mr Pandher's account (at paragraphs 181-188 of his March 2021 witness statement) as to how the 'Option A' and 'Option B' apportionment calculations came into existence is incoherent. If he had genuinely told Mr Singh and Mr Jandu that the tenants were not paying the 10% rental increase (as he says he did

in a conference call on 20 August 2018) then neither of the Option A or Option B schedules was accurate. An accurate schedule would have shown the rents due including the 10% rent increase (as in Option A) but also showing (as Option A did not) the level of arrears indicating that the tenants had not paid the 10% rent increase for the March and June quarters. If Mr Pandher had told Mr Singh and Mr Jandu that the tenants were not paying the 10% rental increase, there is no coherent reason why these arrears were not reflected in the completion statement schedules (which were prepared after the date of the alleged conference call). It was in the defendants' own commercial interests to state the arrears accurately because under clause 13.3 of the sale contract: "Where any sum or sums are in Arrears before the Completion Date, the Buyer shall be obliged to pay to the Seller any Arrears in respect of the period before the Completion Date." Mr Holland submits that the Option A and B calculations were drawn up because Mr Pandher was engaged in calculating which of them would result in the larger payment to Victorygame on completion. In the event, this proved to be Option A. But the absence of any arrears of rent attributable to the 10% rental increase supports Ahuja's case that the defendants had agreed not to enforce that increase.

58. In conclusion on the issue of credibility, Mr Holland submits that whilst Mr and Mrs Pandher tried to portray themselves as unskilled in the use of computers, the evidence disproves their assertions as to their electronic inexperience, having run a successful business from the property (as well as a carpet business) since 2000. Specifically, Mr Holland referred to evidence that: (1) Mr Pandher said that her husband had two icons on his computer for the ground and the first floors of the property and was able to prepare the quarterly rental schedules in excel. (2) Mrs Pandher had her own email address and a computer at home. (3) She was able to prepare the rental schedule on 12 February 2016 using two computers and then email the result as an attachment to Chhokar & Co. (4) The unchallenged metadata show that the two original pages of the rental schedule were first created at 10.31 and 10.39 and saved by the initial author ("HIMALAYA") at 10.44 and 10.50 respectively. That does not indicate that the initial author took a great deal of time in creating them. (5) Mrs Pandher is no mere cipher for her husband, citing an email from Mr Sohal dated 28 July 2018 stating that Mr Pandher's "… wife is now in charge she will not entertain any compromise. She says this transaction has caused a lot of trouble in their family."

59. Notwithstanding Mr Clarke's valiant defence of Mr and Mrs Pandher as witnesses, I consider that Mr Holland's criticisms of their evidence are well-founded. In the light of the reliable contemporary documents, the known or probable facts, and the absence of any independent, corroborative evidence, I cannot regard either of them as a reliable, or as a credible, witness. I find that Mr Pandher was a signally unimpressive witness, who did not provide clear, or satisfactory, answers to questions that were put to him, and who was unable to provide adequate explanations for questions clearly raised by the documents. I find that Mrs Pandher is a highly intelligent lady who speaks good conversational English, a language of which she has a far better command than her husband. She was an engaging witness who was firm in her evidence to the court. At the end of her evidence (at pages 86-87 of the transcript on Day 6), I asked Mrs Pandher what was half of 15. Her immediate answer was 7.5. She was simply unable to answer my follow-up question of how she had come to make the mistake about six years nine months plus six years nine months equalling fifteen, commenting that: "If I could, I would not be here today". I am not without some

sympathy for the unfortunate position in which Mrs Pandher has found herself. It is with regret that I must record that I have formed the clear view that she has deliberately lied in her evidence to the court. I am sure that she is not the sort of person who regularly tells deliberate lies, least of all when under oath; but I am satisfied that she has done so in this case out of family loyalty to her husband and in order to support his false case. I find that I cannot accept the evidence of either Mr or Mrs Pandher, save where it is consistent with either or both the reliable contemporary documents and the known or probable facts.

60. Mr Clarke submits that **Mr Monga** was a credible witness whose account of events was not the subject of any serious challenge and that his evidence should be accepted in its entirety. I accept that submission; but, as previously stated, Mr Monga's evidence is really only relevant to a peripheral issue raised by Mr Singh and does not go the heart of this litigation. In any event, I am satisfied that Mr Pandher used Mr Monga's genuine interest in the property as a lever to get Mr Singh to increase the price Ahuja was prepared to pay for the property. I found Mr Pandher's evidence on this point to be particularly unconvincing.

61. At the conclusion of the defendants' factual evidence, the court was told that it could take the evidence of **Mrs Monia Pandher** as read. However, the reason her evidence went unchallenged was because she had limited material evidence to give.

62. The court has not heard from three witnesses who played a central role in the dealings that have given rise to this litigation. The first is **Mr Jandu** (of Stradbrooks), who acted as Ahuja's solicitor on the purchase of the property. At the end of Mr Singh's evidence, I asked him whether he wished to explain to the court why it was not going to hear any evidence from Mr Jandu. Mr Holland intervened, reminding me of the Court of Appeal's recent decision on litigation privilege. My response was that it was always open to the claimant to waive that privilege. After the court had allowed him a short adjournment to reflect on the matter, Mr Holland indicated that had Mr Singh been able to seek Mr Holland's advice, Mr Holland would have advised him not to answer that question. In the light of that advice, Mr Singh elected not to answer my question. I am therefore left in the position of having no evidence from Ahuja as to why the court has not heard from the solicitor who had acted for it on this transaction.

63. On the defendants' application for the disclosure of the letters that had passed between Ahuja's present solicitors and the solicitors acting for Stradbrooks' professional indemnity insurers, the defendants contended that any advice which Mr Jandu had given to Ahuja regarding the length of the terms of the leases was of critical importance to the fair resolution of these proceedings. In his evidence in opposition to that application, Ahuja's solicitor stated that: (1) "the dominant purpose of sending the letter before action was to obtain information relevant to these proceedings, which was not apparent from the conveyancing file"; and (2) the letter in response that was received from the solicitors instructed by Stradbrooks' professional indemnity insurers had "contained the information sought". Having received this unspecified information, Ahuja elected not to call Mr Jandu as a witness.

64. The day before the Court of Appeal hearing of the defendants' appeal from Mr Vos's decision upholding Ahuja's claim to litigation privilege in respect of the exchange of letters, the defendants issued, and then purported to serve, a summons requiring Mr Jandu to attend trial to give evidence. This was then withdrawn in the face of

objections from both the claimant and the solicitors acting for Mr Jandu's professional indemnity insurers. According to the defendants, their witness summons was withdrawn in order to avoid the disruption to the trial timetable that would have resulted from a contested application regarding Mr Jandu's status as a witness. Mr Holland pointed out that Ahuja had waived the privilege in Stradbrooks' file. However, on the evidence of Ahuja's own solicitor, it is in possession of information that is not apparent from that conveyancing file. Mr Holland criticised the lateness of the defendants' attempt to secure the attendance of Mr Jandu as a witness, having known since March 2021 that he was not to be called as a witness by Ahuja. He also criticised the defendants' failure to serve any witness statement or summary from Mr Jandu. However, I can understand why the defendants should have elected to defer issuing any witness summons until after 8 June 2021, when Mr Vos allowed the appeal from Master Pester's decision (of 29 April) which had ordered disclosure of the letters. Even if the defendants' attempt to secure Mr Jandu's attendance was somewhat half-hearted, I can understand their reluctance to call him, and their difficulties in serving any witness statement or summary for him, when: (1) he had been acting as Ahuja's solicitor in the relevant transaction; (2) the defendants could have had no idea what he was going to say, and so would have experienced difficulties in drafting any witness statement or summary for him; and (3) they might well have experienced difficulties in challenging any evidence he might have given to the court.

65. The inescapable inference that I find it proper to draw from the evidence from Ahuja's present solicitor (cited above) is that Mr Jandu has provided Ahuja with information material to these proceedings which: (1) is not apparent from the conveyancing file, and (2) Ahuja does not wish to disclose to the defendants or make available to the court. I have no evidence from Ahuja as to why the court has not heard from Mr Jandu. I am satisfied that the defendants have established both: (a) that Ahuja could have called Mr Jandu as a witness, and (b) that he has material evidence to give to this court. I am also satisfied that the defendants: (c) have identified the particular inferences which they would invite the court to draw from Mr Jandu's absence, and (d) have explained why such inferences are justified on the basis of other evidence that is properly before the court. Mr Clarke submits that the manifest desire on the part of Ahuja to keep Mr Jandu from giving evidence permits the court to infer that his evidence would be unhelpful from Ahuja's perspective. In particular, he invites the court to infer that Mr Jandu would have given evidence to the effect that: (1) Prior to exchange of contracts he had either read the ground floor leases and told Mr Singh about them or he had told Mr Singh that he did not know about the ground floor lease terms and that Mr Singh had told him to proceed to exchange in any event. (2) At some point over the course of 29 June to 1 July 2018, Mr Jandu informed Mr Singh about the contents of Chhokar & Co's letter dated 29 June 2018 confirming that "the inscription on the Tenancy Schedule was an error". (3) During the conference call on 20 August 2018, Mr Pandher had told Mr Jandu and Mr Singh that the tenants were not paying the 10% rental increase that had been due in February 2018. In his oral closing, Mr Clarke emphasised: (a) that he was not inviting the court to draw any adverse inference from Ahuja's assertion of litigation privilege but rather from its failure to call its former solicitor as a witness when it is implicit in Ahuja's case that that solicitor was equally misled by the lease term representation, and (b) that Mr Jandu's evidence would have gone to the heart of an issue advanced by Ahuja yet,

having received undisclosed information not apparent from the conveyancing file, Ahuja has elected not to call him as a witness.

66. Whilst I have borne the observations of Cockerill J in *Magdeev v Tsvetkov* firmly in mind, I am satisfied that this is one of those perhaps rare cases where it is appropriate to draw inferences adverse to Ahuja from its failure to call Mr Jandu as a witness. Indeed, I can conceive of few cases where it would be more appropriate to do so. However, I do not consider that it is appropriate for the court to go so far in the drawing of adverse inferences as Mr Clarke would invite me to go. I do not consider that it would be appropriate for me to infer that Mr Jandu had actually read any of the ground floor leases or that he had told Mr Singh about them. That would be difficult to reconcile with Mr Jandu's acceptance of the lease term representation in the schedule to the contract when (on this hypothesis) he would have known that it was incorrect. But I do consider that it is appropriate to draw the inference that Mr Singh had instructed Mr Jandu not to trouble to consider the terms of the leases (or to charge Ahuja for doing so) because Mr Singh was concerned only with the rental income from the leases and not with their length. That attitude on the part of Mr Singh is consistent with: (1) other documents in the case, such as Mr Sohal's emails to Mr Singh of 2 and 25 February 2016 (which do not mention the length of the ground floor leases) and Mr Sohal's omission to copy Mr Singh in to his email to Mr Jandu, timed at 15.12 on 12 February, (which attached the rental schedule containing the lease term representation), all of which suggest that Mr Sohal appreciated that the length of the ground floor leases was no interest to Mr Singh; (2) the commercial realities of the case, notably the common perception (shared by Mr and Mrs Pandher, Mr Sohal and Mr Singh, and spoken to by Miss Morris) that, irrespective of the length of their tenancies, the individuals who were the tenants of the retail units at the property would remain in occupation for as long as they were continuing to trade profitably whilst, if they ceased to do so, it would not be worthwhile seeking to pursue them, or difficult to find alternative tenants; and (3) the fact that Stradbrooks did not see fit to scan the leases until they returned them to Chhokar & Co on 13 April 2016. Mr Holland submits that this inference would be inconsistent with Stradbrooks' report on title, but I do not discern any necessary inconsistency. Whilst I might have expected to have seen some written record of any instruction from Mr Singh to his solicitors not to consider the terms of the leases (and, if he had been called as a witness, Mr Jandu would have been asked about this, by the court if not by counsel) in my judgment the omission of any such written record is insufficient to outweigh the fact that there is demonstrably evidence that, had he been called, Mr Jandu would have given that it is clear that Ahuja does not want this court to know about. In my judgment, the most likely, and the minimal, inference as to the nature, and the content, of that evidence is that which I have indicated that it is appropriate for me to draw.

67. Consistently with this inference, and as I have already made clear, I also consider that I should accede to Mr Clarke's invitation to find that the only matter discussed between Mr Singh and Mr Jandu during the short telephone conversation that took place between the emails timed at 15.02 and 15.06 on 1 March 2016, immediately prior to exchange of contracts at 15.11, was the rent for the property, and not the terms of the leases to which it was subject.

68. I do not consider that it would be appropriate to infer that Mr Jandu informed Mr Singh of the contents of Chhokar & Co's letter of 19 June 2018 because the natural way of doing so would have been to forward the email to Mr Singh and there is no evidence of this. Nor do I consider that it would be appropriate to draw any inference as to what may have been said about the February 2018 rental increase during any conference call on 20 August 2018 because: (1) there is only Mr Pandher's evidence that this was discussed, and I find him to be an unreliable witness, and (2) had Ahuja been alerted to the fact that this rent increase was not being paid, I would have expected there to have been some reference to it in the contemporary documents.

69. The second of the triad of missing witness is **Mr Sohal**. At the end of Mr Singh's evidence I asked him why the claimant had not sought to adduce any evidence from Mr Sohal. Mr Singh indicated that he had asked Mr Sohal to come to court and give evidence but that he had indicated that he would not do so because both parties to the litigation had been his clients (although Mr Singh said that he had never paid Mr Sohal any money). Mr Singh also said that he would have been content for Mr Sohal to give evidence in this case. Both in cross-examination, and in answer to questions from the bench at the end of his oral evidence, Mr Pandher said that he had attempted many times to persuade Mr Sohal to attend court to give evidence but that he had declined to do so. Mr Clarke invited me to find that whilst it was understandable, in the light of Mr Sohal's email to Mr Singh of 25 February 2016 (at D7/1829), why the defendants had not considered it appropriate to call Mr Sohal to give evidence on their behalf, there was no credible explanation for Ahuja's failure to summon Mr Sohal to testify on its behalf and to corroborate Mr Singh's version of events of the meeting on 9 February 2016. Mr Clarke therefore invited me to infer that Mr Sohal's evidence regarding the events of that meeting would be contrary to Ahuja's pleaded case, and to Mr Singh's description of what had occurred. I am satisfied that both parties to this litigation have good grounds to view Mr Sohal as a "loose cannon", whose evidence could not safely be relied upon; and that I should draw no adverse inference from either party's failure to call him as a witness, no matter how interesting, and of how much potential assistance to the court, his evidence might have been after it had been robustly tested in cross-examination.

70. The third of the triad of missing witnesses is **Mr Fagbemi** (or, indeed, any other solicitor from Chhokar & Co, such as its principal, Mr Santokh Chhokar). Mr Clarke points out that neither party sought to call Mr Fagbemi as a witness, although (in contradistinction to the position with Mr Jandu) the defendants did not seek to prevent Ahuja from so doing. Mr Clarke submits that it was open to Ahuja to summon Mr Fagbemi as a witness, but since it chose not to do so, the court cannot fairly draw any adverse inference from his absence as a witness. At the end of his evidence, I asked Mr Pandher why the defendants had not chosen to call the defendants' former solicitor, Mr Fagbemi. Following the same course as Mr Holland had taken with Mr Singh, Mr Clarke advised Mr Pandher not to answer that question; and, in the light of that advice, Mr Pandher indicated that he did not wish to answer the court's question. I am therefore left in the position of having no evidence from the defendants as to why the court has not heard from the solicitor who had acted for them on this transaction.

71. Mr Holland points out that Mr Fagbemi could have been called to give evidence on several matters, including: (1) The renewal of the existing tenants' leases, including

his understanding of the instruction to grant terms of 15 years from 20 February 2015 (divided into 6 years 9 months then automatically extended for another 6 years 9 months, with the tenant liable for the whole of the 15 years' term) and why (contrary to the defendants' letters of instruction) the automatic renewal was not included. (2) Whether Chhokar & Co ever received the corrective fax and, if so, why it was not acted upon. (3) The reasons for the incorporation into the sale contract of the rental schedule (with the incorrect lease term representation). (4) Mr Fagbemi's alleged advice to Mr Pandher to adopt and provide the Option A apportionment calculation for the purposes of completion. The court is left in the position that it has no direct evidence from the defendants' solicitor on any of these matters when Mr Fagbemi could have been called to address them.

72. I reject Mr Clarke's implicit suggestion that Ahuja might have called Mr Fagbemi (or any other solicitor from Chhokar & Co) as a witness at this trial. I do so for essentially the same reasons that I gave when I indicated that I appreciated any reluctance on the part of the defendants to call Mr Jandu as a witness: (1) Mr Fagbemi had been acting as the defendants' solicitor in the relevant transaction. (2) Ahuja would have had no idea what he was going to say and so might have experienced difficulties in drafting any witness statement or summary for him. (3) Ahuja might well have experienced difficulties in challenging any evidence Mr Fagbemi might have given to the court. The natural party to this litigation to have called Mr Fagbemi was the defendants. For reasons to which the court is not privy, the defendants have elected not to place his evidence before the court. The defendants must bear the appropriate consequences of this when the court comes to evaluate such evidence as is before the court, and to weigh the conclusions to be drawn from such contemporary documents as the court finds to be reliable and from the other known or probable facts.

73. I agree with Mr Holland that it is simply not credible to conclude that Chhokar & Co either: (1) missed, or failed to query, the fact that two periods of 6 years 9 months do not add up to 15 years; or (2) simply overlooked, or disobeyed, their express instruction to make the new leases for the ground floor units at No 65 renewable for further terms of 6 years 9 months. The inherent probability (as I find) is that Chhokar & Co queried this with Mr Pandher prior to the grant of the renewed leases and, as a result of some further, corrective instruction from Mr Pandher, the new leases were each granted for terms of only 6 years and 9 months (without any right of renewal). This finding, in turn, makes it inherently less probable that Mr Pandher could have had any real or honest belief in the truth of the lease term representation.

74. When I come to evaluate the evidence of the three key witnesses who have given factual evidence in this case - Mr Singh, Mr Pandher, and Mrs Valveer Kaur Pandher - my short conclusion (in response to the usual submissions from each side's counsel that it was the other side's witnesses who were lacking in credibility) is that I find that the court can place no reliance upon the written or oral evidence of any of them, save to the extent that it is supported either by contemporary documentary evidence which it is common ground, or the court finds, is reliable, or by the known or probable facts, and by any inferences which are properly to be drawn therefrom. Sadly, I am satisfied that none of those three witnesses has come to this court to tell the truth, or to assist the court to find the true facts; rather they have done so with a view to persuading the court of the truth of their own version of the facts.

IV: The rental schedule and the lease term representation

75. Ahuja's principal claim is founded upon allegations of fraudulent, alternatively negligent, misrepresentation. There is an associated claim in negligence, but I agree with Mr Clarke that this adds nothing to the claim based upon negligent misrepresentation. Essentially this claim focuses upon the admitted misrepresentation in the rental schedule that all the tenants occupying units at No 65 had signed 15-years' leases from 20 February 2015. Ahuja also complained that the rental income was not as stated in the rental schedule but I am satisfied that this further (and secondary) complaint is not made out: although the figure in the total column of £257,479.36 was inaccurate, this was simply the product of an obvious (and explained) "casting error" which had no influence on Mr Singh's decision to purchase the property, which was based upon the totals in the rent and service charge columns which have not been shown to be materially inaccurate.

76. A convenient summary of the elements of the tort of deceit based upon a claim in fraudulent misrepresentation is to be found in the judgment of Jackson LJ (with whom McFarlane and Arden LJJ agreed) in *ECO3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 at [77]-[78], as follows:

> "... What the cases show is that the tort of deceit contains four ingredients, namely:
>
> (i) The defendant makes a false representation to the claimant.
>
> (ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
>
> (iii) The defendant intends that the claimant should act in reliance on it.
>
> (iv) The claimant does act in reliance on the representation and in consequence suffers loss.
>
> Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does.
>
> I do not accept that 'intention to deceive' is a separate or free standing element of the tort of deceit. The phrase 'intention to deceive' is merely another way of describing the mental element of the tort. It is a compendious description of ingredients (ii) and (iii) as set out in the preceding paragraph."

77. In his judgment in *Hayward v Zurich Insurance Company Plc* [2016] UKSC 48, [2017] AC 142 at [18] Lord Clarke JSC (with whom Lord Neuberger PSC, Lady Hale DPSC and Lord Reed JSC all agreed) said that:

> "Subject to one point, the ingredients of a claim for deceit based upon an alleged fraudulent misrepresentation are not in dispute. It must be shown that the defendant made a materially false representation which was intended to, and did, induce the representee to act to its detriment. To my mind it is not necessary, as a matter of law, to prove that the representee believed that the representation was true. … However, that is not to say that the representee's state of mind may not be relevant to the issue of inducement. Indeed, it may be very relevant. For example, if the representee does not believe that the representation is true, he may

> have serious difficulty in establishing that he was induced to enter into the contract or that he has suffered loss as a result."

Later in his judgment, Lord Clarke made it clear that:

(1) Questions of inducement and causation are questions of fact.

(2) Although the claimant must show that he was induced to act as he did by the misrepresentation, it need not have been the sole cause.

(3) It is sufficient for the misrepresentation to be an inducing cause and it is not necessary for it to be the sole cause. If it plays some part, even if only a minor part, in contributing to the course of action taken, a causal connection will exist.

(4) Materiality is evidence of inducement because what is material tends to induce.

(5) Once it is proved that a false statement was made which is 'material', in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement; and the inference is particularly strong where the misrepresentation was fraudulent. In such a case, it is very difficult to rebut the presumption of inducement.

(6) The representee has no duty to be careful, suspicious, or diligent in their research.

(7) Where the representee knows that the representation is false, he cannot succeed; but the representee's knowledge of the truth must normally be full and complete. Partial and fragmentary information, or mere suspicion, will not do.

78. On the balance of probabilities, I find that the only details or information which had been provided to Mr Singh in advance of his meeting with Mr Pandher on 9 February 2016 were the documents that were attached to Mr Sohal's email of 2 February, timed at 16.07 (at D4/991), including the rental schedules at D4/1003 and 1004 which roughly equate to the figure of £1,068,000 per annum given as "the current market net rental of 65" in the email: £ (220,468 x 4 =) c. 882,000 + (15,550 x 12 =) 186,600 = 1,068,600. I reject the defendants' case that its self-styled 2015 rent schedule (at A/323) was given to Mr Singh in advance of his meeting because I see no reason why this document (with the details of rents outstanding) should have been provided in addition to the document in fact supplied by Mr Sohal. On the balance of probabilities: (1) I find that Mr Singh brought these documents along with him to the meeting (although it seems to me that nothing turns on this). (2) I reject any suggestion that Mr Singh had been afforded an opportunity to inspect the leases of the units at the property before 9 February since, on the defendants' own evidence and case, this facility was afforded to Mr Singh at the meeting itself.

79. I reject Mr Singh's evidence that at the meeting on 9 February 2016 he was handed a copy of the rental schedule, or any document similar to it, containing the lease term representation. It is common ground - and I find - that this document was only first created on the morning of 12 February, three days after that meeting. Therefore no copy of it could have been handed to Mr Singh at the meeting on 9 February. Mr Holland submits that since other rental schedules clearly existed before the 9 February meeting, it is "not unlikely" that there was another schedule presented to Mr Singh at

the meeting bearing the lease term representation. However, I can think of no sensible reason why the defendants should have first created a fresh rental schedule document, and then added the lease term representation to it, all on 12 February (which both parties' forensic e-disclosure experts agree is what actually occurred) if such a document was already in existence, and a copy had been handed to Mr Singh, three days earlier; and Mr Holland was unable to suggest any such reason.

80. I reject Mr Singh's evidence that he was informed that the leases were all for terms of 15 years at the 9 February meeting In his March 2020 witness statement Mr Singh did not mention any verbal representation concerning the length of any of the leases at the 9 February meeting. This assertion first emerged only in November 2020. Had this already been communicated at the meeting, the defendants would have had no good reason to amend the rental schedule that was first created on 12 February to set out the duration of the tenants' leases. It is also inherently unlikely that Mr Pandher would have said anything, still less anything that was untrue, about the length of the leases at that meeting (which took place at Mr Pandher's office) when – as I accept – the actual leases were available for inspection, the parties were still negotiating about the purchase price, and Mr Pandher was shortly thereafter to provide the original leases for inspection by Ahuja (and its solicitors).

81. However, I also reject Mr Pandher's evidence that he told Mr Singh that most of the leases had contractual terms of 6 years 9 months and that he took one of the leases out of his files and showed Mr Singh a reference to the term of the lease. That is not consistent with the wording that – as I find – Mr Pander added to the rental schedule on 12 February about all of the tenants having signed a 15 years' lease; and it would have led to a further discussion – which Mr Pandher does not suggest in fact occurred – in which he would have been asked to explain why such an unusual lease term had been granted when the leases, originally for 15 years terms, had fallen due for renewal. On the balance of probabilities, I find that Mr Pandher simply explained to Mr Singh that most of the tenants had originally held 15 year leases, and that they had been happy to renew their tenancies when these had come to an end. Mr Singh may have inferred that the tenancies had been renewed for similar terms as before, but I do not find that this was discussed. Given that the leases were available for inspection at Mr Pandher's office, and were later offered for collection by Mr Singh, I find that Mr Pandher did offer to allow Mr Singh to inspect one or more of the leases; but I am not prepared to find that Mr Singh did so or, if he did, that he noticed that the lease had been granted for a 6 years 9 months' lease term because that would have provoked some discussion as to the reasons for this (which Mr Pandher does not suggest occurred). I reject Mr Singh's evidence that anything was said about the landlord making a profit from the service charge provisions because there is no reference to this in any of the contemporary emails (including Mr Sohal's extraordinary email of 25 February at 19.08 in which he advanced reasons for Mr Singh to proceed with the purchase of the property at £18.5 million despite Mr Pandher's conduct, describing it as "still a very good buy").

82. Turning to the events of the morning of 12 February 2016, contrary to the evidence of Mr and Mrs Pandher, and for the reasons advanced by Mr Holland, which are supported by the reliable contemporary documentary evidence and the known and probable facts, on the balance of probabilities I find as follows:

(1) It was Mrs Pandher who prepared the first version of the ground floor rental schedule on the computer known as 'Himalaya' between 10.31 and 10.44 (and the first floor rental schedule between 10.39 and 10.50) by cutting and pasting from an existing document (such as the rental schedule that Mr Sohal had sent to Mr Singh on 2 February 2016). Mrs Pandher then sent it to her husband's computer.

(2) It was Mr (and not Mrs) Pandher who proceeded to amend the ground floor rental schedule on the computer known as 'S Pandher' by adding the lease term representation, saving it at 11.32. He also amended the first floor rental schedule by adding the postscript, saving it at 11.20. Although it does not matter to the outcome of this litigation, it may well be the case that Mrs Pandher was not even aware, at the time, that her husband had added the lease term representation to the rental schedule.

(3) Mr (and, if she knew of its existence, Mrs) Pandher had no real or honest belief in the truth of the lease term representation. They both knew that none of the ground floor tenants had signed 15 year leases (as they both recognise by their account of composing and sending a 'corrective' fax). Neither of them honestly believed that all of the ground floor leases ran from 20 February 2015. No honest person, with the knowledge possessed by Mr (or Mrs) Pandher, could have put the lease term representation on the rental schedule. Nor could any honest person, with such knowledge, have allowed that document to be incorporated into the sale contract or referred to in Schedule 2, to assist in identifying the "Occupational Leases" with the benefit of which the property was being sold.

(4) Having added the lease term representation to the rental schedule, Mr Pandher then composed an email to Mr Santokh Chhokar (copying in Mr Sohal), attached the two-page rental schedule (bearing the lease term representation), and sent it to them at 11.55. In the email, "as time is of the essence" Mr Pandher required "confirmation from the buyer's solicitors, before 1 pm today … that the buyer will exchange before" 19 February. Mr Pandher was explicit that he would "not enter into any lengthy enquiries …"

(5) Mr Clarke makes much of the fact that Mr (and, if she knew of its existence, Mrs) Pandher could never have thought that the defendants could ever have got away with any fraudulent misrepresentation as to the length of the ground floor leases because this would inevitably have come to light as part of Stradbrooks' standard due diligence. However, by the time Mr Pandher came to make the false lease term representation, he had already agreed, subject to contract, both the sale, and also the sale price, with Mr Singh. I find, from the text of the accompanying email, and on the balance of probabilities, that the false lease term representation was made in order to encourage Ahuja (and Mr Singh) to proceed to an early exchange of contracts on a sale that they had already agreed, and to seek to deter Mr Singh from instituting any lengthy pre-contract enquiries. In that context, I doubt whether Mr Pandher gave all that much thought as to whether his deception might be found out; but if he did, I am sure that he thought that he could brazen it out, asserting that he had simply had in mind the 15 year terms of the original ground floor leases and that he had simply mistakenly, but honestly, assumed that they had all been renewed from the same original term date.

(6) No corrective fax was ever composed or sent to Chhokar & Co bearing a manuscript amendment to the lease term representation correcting the reference to the

length of the ground floor leases from 15 years to 6.9 years. For all of the reasons advanced by Mr Holland, Mr and Mrs Pandher's account of sending a corrective fax to Chhokar & Co is inherently implausible. At the end of his evidence (at page 38 of the transcript on Day 6) I asked Mr Pandher why, having sent the rental schedule out as an email attachment, he had not simply asked his wife to correct the mistaken text at the top by putting in "6 years 9 months' lease". Mr Pandher's explanation was that the hard copy was on his file when he had noticed the mistake and that he just took his pen out, crossed it out and asked his wife to fax it back to Mr Fagbemi. I pointed out that it would have been much easier just to have corrected it on the computer schedule and sent it as a corrected email attachment. Mr Pandher's response was: "I agree with you, my Lord, if it had occurred to me I would have done that … It did not register at that time in my mind to ask, send it by email, because I am more used to sort of faxing things." I find this evidence thoroughly unconvincing. I am satisfied that the account of a corrective fax is a deliberate lie which has been concocted by the defendants, not in order to bolster a genuine case, but rather to counter the effect of the false lease term representation. It is a later concoction by the defendants in a vain, and poorly executed, attempt to cover up Mr Pandher's earlier untruth. I find that the boxes on the first floor rental schedule to the right of the entry for the Kabul Restaurant and Banqueting Hall were deliberately blanked out with a post-it sticker in an ill-conceived, and amateurish, attempt to conceal the fact that the version of that page that is represented as the corresponding page of the faxed version had in fact contained the manuscript correction made by Chhokar & Co (at some time during the period of just under two hours between their faxes timed at 14.29 and 16.27 on 17 February 2016) reducing the rental arrears owed by the Kabul Restaurant from £49,132 to £18,000. There was no documentary, written, or oral evidence that Chhokar & Co ever received the "corrected" rental schedule; and the fact that they did not do so is supported by the fact that it was the uncorrected rental schedule that was sent (more than once) to Stradbrooks and that was later adopted for the purposes of the second schedule to the sale contract. It is because the fax is a fabricated document that there is no fax transmission sheet or covering letter, no fax transmission record or data, and no original or copy fax in Chhokar & Co's files. It is inherently improbable that Mr Pandher would have picked up, and caused Chhokar & Co to correct, the rental arrears for the Kabul Restaurant (as he clearly did) but not the false (and uncorrected) lease term representation.

83. I now turn to the issue of reliance on the false lease term representation and inducement. I have already set out the law on this issue. I recognise that any representation as to the length of the occupational leases to which a property is subject is inherently likely to operate on the mind of a typical potential purchaser of an investment property. I acknowledge that the defendants therefore bear the heavy burden of rebutting the presumption that that representation played some part, even if only a minor part, in contributing to Ahuja's decision to purchase the property. I also recognise that that burden is a particularly heavy one where, as in the present case, the misrepresentation was made fraudulently. However, I am satisfied that this case is one of those probably rare cases where the defendants have discharged that heavy burden.

84. In closing, Mr Clarke emphasised the way that Ahuja's case is pleaded. There is no pleaded allegation, and no evidence, that Mr Singh (who was Ahuja's directing mind) ever received, saw, or read either of the 17 February 2016 emails or their attachments, including (crucially) the lease schedule to the contract or the referenced rental

schedule containing the lease term representation. Thus, the pleaded claim in misrepresentation essentially rests upon: (1) what Ahuja claims was said, and produced, at the meeting on 9 February 2016; and (2) the (slightly amended) rental schedule that Mr Fagbemi sent to Mr Jandu as an email attachment at 13.35 on 1 March 2016 (after Mr Singh had already returned the signed contract to Stradbrooks, but prior to exchange) and which Mr Jandu forwarded on to Mr Singh in India at 14.08 (GMT). Mr Clarke emphasises what happened thereafter. Mr Jandu sent a chasing email, probably at either 14.29 or 14.59 GMT, asking Mr Singh to "please confirm if you are happy with the rent schedule and that the seller has not disclosed all leases to us for the property, therefore we do not know all the lease terms". In response, Mr Singh sent two short emails to Mr Jandu from his i-Phone (at 15.02: "Kindly conform [sic] what is the total rent?" and at 15.06: "I think that is fine proceed for exchange") before contracts were exchanged at 15.11 GMT on 1 March 2016. There was no query about the missing "lease terms".

85. I have already rejected Ahuja's evidence and case that Mr Singh was ever told about, or handed a copy of any document containing, the lease term representation at his meeting with Mr Pandher on 9 February. That, of itself, throws real doubt upon the entirety of Mr Singh's evidence as to the reliance he placed on the lease term representation. I find that Mr Singh was not privy to the communication of the lease term representation to Mr Sohal, or to Mr Jandu, on 12 February 2016. I find that the first time that the lease term representation was ever communicated to Mr Singh was when he received the rental schedule as one of the attachments to the email that Mr Jandu sent to Mr Singh in India early on the morning of Monday 29 February 2016 when he submitted his report on title. It was described as "5. List of Leases & Licences to which the Property is the subject to". The provenance of that list was not identified so it would not have been clear to Mr Singh whether it had been prepared by Mr Jandu or by the seller of the property. Since it is clear from Mr Singh's emailed response (at 04.30 GMT) that he had looked at some at least of the email attachments, I am prepared to find that he had looked at the rental schedule (although he did not see fit to refer to, or to comment upon it, in his email). However, for the reasons provided by Mr Clarke (and referred to above), which I find utterly compelling, I am entirely satisfied that the lease term representation contributed in no way to Mr Singh's decision to proceed with the property. That is because of the very late stage in the course of the property purchase at which the lease term representation was first communicated to Mr Singh, by which time he had already decided to proceed with the purchase, and the fact that he had no interest in, or concerns about, the length of the occupational leases to which it was subject. I find that he appreciated that the existing tenants would remain for as long as the ground floor lease units were making a profit, and that if any tenant ceased making a profit, the likelihood was that that tenant would no longer be good for the rent irrespective of the term of the tenant's lease; and Mr Singh anticipated, based upon No 65's past occupational history, that if any of the tenants did cease to be good for their rent, then he would readily be able to re-let elsewhere.

86. In my judgment, it is of crucial importance to bear in mind that by the time the lease term representation was first communicated to Mr Singh, he had already signed the purchase contract and sent it back to Mr Jandu. He had previously agreed to purchase the property for £17.25 million; and he had then been forced, most reluctantly, to increase his offer to £17.875 million. At no time – as I find - had the length of the

occupational leases ever featured in Mr Singh's discussions with any of Mr Pandher, Mr Sohal or Mr Jandu; and - as I also find – he had instructed his solicitors not to investigate the terms of the occupational leases. The length of the leases never featured in Mr Singh's deliberations concerning the purchase of the property. I find that the defendants have discharged the heavy burden of rebutting the presumption of reliance and inducement. In my judgment, although I have found that there was a fraudulent misrepresentation as to the length of the occupational leases, there was no actionable misrepresentation. The claim in fraudulent misrepresentation therefore fails. Had I rejected the claim in fraud, any claim in negligent misrepresentation, or for negligent misstatement, would similarly have failed for want of reliance on the part of Ahuja.

87. Had I found that there had been an actionable misrepresentation, I would not have found that it was any defence to a claim founded upon the lease term representation that Stradbrooks had been in possession of the original occupational leases, which would have demonstrated the falsity of that representation, because I am not satisfied that Stradbrooks had ever read any of those leases. As previously recorded, I find that the reason for this is that Mr Singh had instructed them not to go to the trouble of doing so. Mr Holland emphasises (and I accept) that it is no defence to a claim in misrepresentation by a seller of property that the purchaser had every opportunity to discover the truth of the misrepresentation yet, due to its own negligence, it failed to do so. That is because contributory negligence is no defence to a claim in misrepresentation. I accept Mr Holland's submission that any negligence, or want of care, on the part of the purchaser's solicitor is to the same effect as that of the purchaser personally.

88. In support of his submissions on reliance, Mr Holland invited the court to contrast the terms of the contract for the purchase of this property, insofar as they concerned the occupational leases to which it was subject, with those of clause 11.1 of the earlier (and abortive) contract entered into by another of Mr Singh's companies for the purchase of the Palace Shopping Centre and Liberty Cinema Site which had been sold "subject to and with the benefit of whatever licences and tenancies may be subsisting at the Property as at the Completion Date and the Buyer shall take subject to such and shall not raise any objections requisitions or requirements in respect of the same". Given that, according to Mr Singh, the lack of knowledge of the leases affecting that property had caused that earlier contract to be rescinded, Mr Holland submits that it is entirely understandable that Mr Singh should have wanted the defendants to list the tenants in schedule 2 to the contract for the purchase of this property. Apart from the fact that it was not until a year or so later (in March 2017) that the contract for the purchase of the Palace Shopping centre was rescinded, that consideration would seem to me to cut both ways since it would make it less likely that Stradbrooks should have failed to investigate the terms of the occupational leases affecting the subject property (unless, as I find, they were expressly instructed not to do so by Mr Singh). Nevertheless, even though Stradbrooks were provided with the original leases, I am satisfied that they never actually considered them; and I therefore find that the defendants could not successfully have relied upon the fact that Stradbrooks were in possession of the leases in support of the contention that Ahuja knew the lease term representation to be false.

89. Had there been an actionable misrepresentation, I do not consider that its correction, over two years later (on 29 June 2018), by the somewhat bland and uninformative statement that "the inscription on the Tenancy Schedule was an error", would have afforded any defence to a claim founded upon that misrepresentation. Mr Singh says that Stradbrooks never drew this correction to his attention (although he was copied in to the email of 2 July by which this email was forwarded to the solicitors acting for Habib Bank, who were funding Ahuja's purchase of the property); but in the light of my conclusion about Mr Singh's general lack of credibility, and in the absence of any evidence from Stradbrooks, I do not find myself able to make any express finding of fact on this point. If Mr Jandu did fail expressly to draw this error to his client's attention, the most likely explanation is because Mr Jandu understood either: (1) that Mr Singh was already aware of the error (of which there is no satisfactory evidence, beyond the fact that he was copied in to the email to the solicitors acting for Habib Bank), or (2) that (as I have already found) the lease term representation was a matter of no concern to him. In my judgment, however, it does not matter whether Stradbrooks did draw the error to Mr Singh's attention because he is to be treated as affected by his solicitors' knowledge of this communication since it was their duty to pass it on to him: compare *Strover v Harrington* [1988] Ch 390 at 409H – 410B per Sir Nicolas Browne-Wilkinson V-C, and followed by Lewison J in *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) when he observed at [217]: "a communication of the true position to the tenants' solicitors is to be treated as a communication to the tenants themselves". However, this was over two years after the exchange of contracts. By this time, Ahuja was under no obligation to rescind the contract or to refuse to complete the purchase. In my judgment, it was both reasonable, and lawful, for Ahuja to proceed to completion and thereafter to sue for damages for any resulting loss. After all, by the time of the 29 June 2018 letter, Ahuja had already paid a deposit of over £1 million, entered into the lease of No 67 and paid rent under it, and spent over £250,000 on refurbishing that property.

90. Had I found that the fraudulent misrepresentation was actionable, I would have found Mr Pandher to be personally liable in tort (but not in contract) as the author of the false lease term representation in addition to Victorygame. Fraudulent misrepresentation is a tort. As Mummery LJ observed in *Lewis v Yeeles* [2010] EWCA Civ 326 at [26]: "In general, an individual tortfeasor is personally liable for his own torts, even if he is a director of a limited liability company, which may also be liable for the tort. The fact that a director acts as agent for his company does not give him a defence to personal liability for torts committed by him." Maurice Kay and Hooper LJJ both agreed. Of course, the position may be different in the tort of negligent misstatement because this requires an assumption of personal responsibility, so as to create a special relationship between the director personally and the claimant: contrast *Williams v. Natural Life Health Foods Limited* [1998] 1 WLR 830 at 835-836 per Lord Steyn (a case on negligent mis-statement, cited by Mummery LJ at [25], in which the issue was whether, applying an objective test, a director of a one man company had made a personal assumption of responsibility upon which there was reliance).

V: The contractual claim

91. Mr Holland submits that the lease term representation was a term of the sale contract and, since it was false, Victorygame was in breach of contract. By virtue of clause

7.1.2 of the contract, and the definition of the "Occupational Leases", the property was sold to Ahuja with the benefit of the rights and obligations arising by virtue of the occupational leases listed in the second schedule. The definition of those leases included the express term that "ALL TENANTS HAVE SIGNED A 15 YEARS LEASE FROM THE 20/2/15". Thus it was an express term of the contract that Ahuja, as the purchaser, would have the benefit of 15 year leases. Further by clause 7.2, the "matters subject to which [the Property] is sold", and of which Ahuja, as purchaser, was deemed to have full knowledge, included the matters set out in clause 7.1, and thus the "Occupational Leases" (as defined). Therefore, the effect of clause 7.2 was to fix Ahuja, as the purchaser, with knowledge of the "Occupational Leases" and to prevent it from seeking to go behind the description of the leases set out in the second schedule. Thus, the lease term representation constituted a contractual warranty given by Victorygame as to the length of the ground floor leases of No 65. Even if the parties knew or suspected that the lease term representation was untrue, Victorygame's liability for breach of contract is not affected. Mr Holland relies upon observations of Moore-Bick LJ, delivering the leading judgment in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 at [56]:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel …"

Mr Holland also submits that liability for the falsity of the lease term representation is not excluded by clause 18.2 of the sale contract since it was both: (1) a "representation or warranty … expressly set out in this contract", and (2) a "fraudulent misrepresentation", both of which are expressly excepted from the operation of that sub-clause.

92. I accept all of these submissions.

93. Mr Clarke submits that on a proper construction of the contract, Ahuja's analysis is wrong. Under the contract, the property was sold "with the benefit of ... the rights and obligations by virtue of the Occupational Leases." These are the "leases ... listed in Schedule 2." The lease term representation does not form part of the "list" at all. It comprises text extraneous to the "list." It follows that the contract does not contain any contractual warranty of the sort alleged by Ahuja.

94. I agree with Mr Holland that this is a thoroughly bad point, which involves a complete mis-reading of the sale contract. Schedule 2, as originally drafted, was intended to list the occupational leases, with details of the date and parties to each lease, the term commencement date, and the length of the term amongst the particulars to be inserted. Instead, the draftsman merely inserted: "Refer to the list Attached Herewith". That list included the lease term representation as the only details of the term commencement date and the length of the term. Clearly that formed part of "the list". I therefore agree

with Mr Holland that the lease term representation was a term of the sale contract and, since it was false, that Victorygame was in breach of contract. I also agree with Mr Holland that liability for the falsity of the lease term representation is not excluded by clause 18.2 (or any other provision) of the sale contract. In my judgment, none of the terms of the sale contract exclude or modify the seller's liability for breach of contract; nor would they have excluded or modified the seller' liability for fraudulent misrepresentation had this been actionable.

95. That leaves the counterclaim for rectification, either by a process of construction, or by the application of the equitable jurisdiction to rectify a document on the grounds of common mistake. Mr Holland submits that neither of Mr Clarke's rather desperate pleas to remove the lease term representation from the contract by invoking one or other of these two different principles come anywhere near to getting off the ground. I agree. I will consider each of Mr Clarke's suggested escape routes in turn.

96. First, rectification by construction. As Mr Clarke submits it is trite law that in appropriate circumstances, a mistake in a contract may be corrected by a process of construction without obtaining a court order in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure that mistake. If those conditions are satisfied, then the correction is made as a matter of construction. In deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. Nor is there any limit to the correction which may be made provided it is clear to the reasonable person, having regard to all the relevant documents, and the admissible background, what the parties really meant.

97. Mr Clarke relies on the recent decision of the Court of Appeal in ***Monsolar IQ Ltd v Woden Park Ltd*** [2021] EWCA Civ 961. That case concerned a rent review provision in a lease. There was no dispute between the parties as to how the rent review operated, if read literally. On the contrary, it was common ground that the rent review provision was clear and unambiguous and not open to two different interpretations. However, the result of applying the rent review provision, if read literally, resulted in an irrational result. The Court of Appeal had no hesitation in correcting the lease as a matter of construction. In so doing, at [31], Nugee LJ (with whom Males and Baker LJJ agreed) drew a distinction between "a case which concerns a provision which seems merely imprudent and one which appears irrational." Reference was made to "… the fine dividing line between a case where the result appears 'commercially unattractive and even unreasonable' and a case which appears 'nonsensical or absurd'."

98. Mr Clarke submits that, in this case, generically the same approach can be adopted. Read literally, the lease term representation in schedule 2 to the sale contract is irrational and nonsensical or absurd and is clearly a mistake. It cannot have been intended that its inclusion in the sale contract should give rise to an immediate claim for breach of warranty on the part of the seller of the property. On an objective assessment, based upon the relevant contextual scene, the parties to the sale contract cannot have intended the property to be contracted to be sold subject to ground floor leases with 15-year contractual terms for the simple reason that those leases were not for such terms, and (what is more) that was known to the parties prior to contracting. When Mr Singh and Mr Pandher signed their respective parts of the contract, the

second schedule was not attached to it; and they did not realise that a mistaken document would be attached to the contract. Thus, there is a clear mistake in the sale contract. In order to cure that mistake, all that needs to be done is to delete the false lease term representation (or otherwise to re-word it so as to harmonise the text with the contractual terms of the ground floor leases).

99. I have no hesitation in rejecting this submission. As Mr Holland points out, if Mr Clarke were correct, it would tend to undermine the ability of the parties to a contract, recognised in the ***Peekay*** case, to agree that a certain state of affairs should form the basis for their transaction, whether it be the case or not. In any event, in the present case, it rests on a false foundation for here there was no mistake known to both parties prior to contracting. On the facts as I have found them, neither party was labouring under any mistake. Mr Pandher deliberately intended to mislead anyone to whom the false lease term representation was communicated as to the true length of the occupational leases of the ground floor of No 65; whilst Mr Singh neither knew nor cared about the length of those leases and his solicitors had not investigated the issue. The fact that, read literally, a contractual term is irrational and nonsensical may be a necessary pre-condition for rectification by construction; but it is not necessarily a sufficient condition, at least in the case of a provision that operates by way of a contractual warranty.

100. Second, rectification for common mistake. The leading modern authority is the decision of the Court of Appeal in the seminal case of *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch 365. In that case, Leggatt LJ (in whose judgment Rose and Flaux LJJ joined) summarised the underlying principle as follows, at [46]:

> "At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record."

101. After a thorough review of the authorities, Leggatt LJ concluded that the Court of Appeal were

> "… bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' - meaning that, as a result of communication between them, the parties understood each other to share that intention."

102. Mr Clarke recognises that this could only ever be a category (2) case. He submits that, following the conclusion of the evidence at trial, there can be no question as to: (1) the parties' subjective common intention in respect of the occupational leases; and (2) the parties' understanding of each other's intention. By virtue of the meeting of 9

February, and matters thereafter, Mr Pandher and Mr Singh must have intended, and understood each other to intend, that the property was to be sold subject to the ground floor leases, with their actual (rather than theoretical) contractual terms.

103. For the reasons I have already given, I reject Mr Clarke's submissions on the facts. I find that there was no subjective intention on the part of either Mr Pandher or Mr Singh that the property was to be sold subject to the ground floor leases with their actual (rather than theoretical) contractual terms. Mr Pandher's subjective intention was to deceive anyone to whom the false lease term representation was communicated as to the true length of the occupational leases of the ground floor of No 65; whilst Mr Singh neither knew nor cared about the length of those leases, and his solicitors had not investigated the issue. Nor was there the necessary outward expression of accord.

104. I therefore find that Victorygame is in breach of the contractual warranty as to the length of the occupational leases affecting the ground floor of No 65. Damages for breach of contract are intended to put the claimant into the position in which it would have been had the defendant complied with the terms of the relevant contract. Ahuja is therefore entitled to be put in to the same position as if the warranty had been true. The appropriate measure of damages is the difference between the price paid and the value of the property had the occupational leases of the ground floor been for terms of 15 years from 20 February 2015 rather than the actual contractual terms of the ground floor leases. I will address the issue of damages when I come to deal with the expert evidence.

VI: The statutory declaration

105. The second misrepresentation (or misrepresentations) forming the basis of Ahuja's claim arises (or arise) out of the statutory declaration that was made by Mr Pandher, in his capacity as a director of Victorygame, on 28 June 2018. Since this clearly post-dated the sale contract (by more than two years three months), it is said to be relevant only to the extent that it induced, and was relied upon by Ahuja when entering into, the loan agreement that was concluded contemporaneously with the completion of the purchase, and in order to fund the stamp duty land tax payable thereon. It is necessary to put this particular claim into context.

106. As a matter of contract, the rents under the ground floor leases had increased automatically by 10% on 20 February 2018 (and thus part of the way through the December 2017 quarter). No memorandum of rent increase was required. Victorygame sent out rent demands for the March and June 2018 quarters which included the 10% increase; but it is common ground that these rent increases were never collected by the defendants. There is a stark dispute of fact between the parties as to the reason for this.

107. For the reasons set out at paragraphs 98 to 103 of his written closing, Mr Holland invites the court to accept the evidence of Mr Singh and the 24 individual tenant witnesses adduced by Ahuja to the effect that Mr Pandher had agreed with the tenants that the 10% rent increase due with effect from February 2018 would not be enforced. Mr Clarke submits that on the basis of the evidence, and for the reasons set out at sub-paragraphs 253.1 to 253.6 of his written closing, the court cannot conclude that there was some kind of agreement between Mr Pandher and the tenants to 'waive' the 10% rent increase. Mr Clarke also emphasises that at the point in time when the rents

increased, the contractually-stipulated completion date was only two days away (on 22 February 2018). When completion did not occur on that date, Stradbrooks first suggested a revised completion date of 30 March 2018, which was only a few days into the March 2018 quarter. On a number of occasions over the following months, the completion date was pushed back, each time by a few weeks. In circumstances where Mr Pandher was given the impression that the transaction would be completing in short order, it is said to be readily understandable that he did not wish to take on the hassle of pursuing recalcitrant tenants for the uplifted rent. As he put it (in cross-examination at page 9 of the transcript of Day 6), he had taken the commercial decision "… not to get into any more correspondence because of the concentration was on the completion ...". Mr Clarke acknowledges that the schedules attached to the statutory declaration, and the various apportionment schedules produced during July and August 2018, do not identify any arrears of rent for part of the December 2017 quarter, the March 2018 quarter and part of the June 2018 quarter insofar as these are referable to the 10% increase; but he submits that this can sensibly be explained by "genuine" human error, as Mr Pandher said in his second witness statement and confirmed in his oral evidence (at page 133 of the transcript of Day 5).

108. I have carefully weighed these competing submissions when evaluating the evidence. I have also reminded myself of Mr Clarke's well-founded criticisms of the collective evidence of the pro-forma tenant witnesses, and of the need to factor them in to my findings on the issue of whether Mr Pandher agreed with the tenants of No 65 that the contractual rent increases due in February 2018 would not be enforced. However, I have arrived at the clear conclusion that Mr Holland's submissions are to be preferred. Despite Mr Clarke's strictures upon the nature, and the quality, of the evidence of Mr Gurwara and Mr Madhan, and my finding that the evidence of all the pro-forma tenant witnesses was "a collective effort", I consider that their evidence should be accepted. I find that Mr Pandher agreed with the ground floor tenants of No 65 that the contractual rent increases due from February 2018 would not be enforced. I find that Mr Pandher was lying to the court when he says that he simply allowed the rental arrears to arise and took a commercial decision not to collect them. His excuse for not noting the arrears on the various schedules is simply unbelievable unless he had agreed to waive the increases in the rents for the ground floor units. In my assessment, Mr Pandher is not the sort of man who would allow his tenants to build up arrears of rent without good reason; but he is certainly also not the sort of man who would overlook any opportunity to recover any rental arrears that might have built up.

109. Mr Clarke points out that under clauses 13.3 and 14.1 of the sale contract, Ahuja was obliged to pay to the seller any arrears of rent in respect of the period before the completion date, so it was in Victorygame's commercial interests not to waive the rental increases, even if the tenants claimed that they could not afford to pay them. However, it was equally not in Victorygame's commercial interests to fail accurately to record, to report to its solicitors, and to claim from Ahuja, any rental arrears that might have arisen and been due on completion. Mr Pandher's Option A and B schedules show that the 10% rental increases, and their effects, were very much in his mind. These alternative schedules were prepared at a time when Mr Pandher was weighing up his options. On his case, neither schedule was accurate because neither of them showed both the 10% rental increase and the consequential arrears of rent. In the event, Mr Pandher chose to go with the Option A schedule. I find that this was because it resulted in more money being paid over to Victorygame on completion.

Although the Option A schedule showed no relevant arrears of rent, it also falsely showed the 10% rental increase which I find that Mr Pandher had agreed to waive.

110. I find that Mr Pandher had agreed with the ground floor tenants of No 65 that Victorygame would not enforce the February 2018 rent increases; but I also find that such agreement had no contractual, or permanent, suspensory effect going forwards into September 2018. There was no consideration for such agreement; and Ahuja has not established any relevant detrimental reliance so as to give rise to any form of permanent estoppel. Indeed, I did not understand Mr Holland to contend otherwise. It is unnecessary for me to determine whether Mr Pandher might have sought retrospectively to revive the landlord's entitlement to increase the tenant's rent from February 2018 since he never sought to do so in advance of completion. However, I am satisfied that once completion had taken place, Ahuja was entitled to insist on the automatic 10% rental increase going forwards, irrespective of Victorygame's previous waiver of its right to such increase. Although I accept that by waiving the rental increase, Victorygame was in breach of the terms of clause 10.1 of the sale contract (which obliged the seller to "manage the Property until Completion in accordance with its normal management practices and the principles of good estate management"), I find that such breach has caused no loss to Ahuja since the effect of such rental waiver did not extend forward into the period of its ownership of the property. Ahuja has advanced no case that such breach caused or contributed to the entry into the loan agreement and rightly so. Such a case would have presented obvious difficulties of causation, and also remoteness (since the loan agreement was not even in contemplation until immediately before completion); and it would have been entirely speculative in nature. I do not find that there was any breach of the apportionment and arrears provisions of clauses 13.3 and 14.2 of the sale contract: on my findings of fact, there were no rental arrears referrable to the 10% rent increases prior to completion (because these had been waived by the defendants) and thus no related apportionment to be made to the seller or any arrears to be assigned to the buyer.

111. On 28 June 2018 Mr Pandher, as a director of Victorygame, swore a statutory declaration attaching two schedules detailing: (1) the "current rental/tenancy details for Units l to 32 of the tenanted property", and (2) the "verbal licences and leases for the first floor part of the tenanted property". This had been requested, pursuant to clause 27 of the sale contract, in an email sent to Mr Fagbemi by Mr Jandu over three months earlier, on 16 March 2018. This email had followed on from an email request, made on the same day, by the solicitors acting for Habib Bank (who were funding Ahuja's purchase of the property) for any documentation evidencing the lease term representation and any statutory declaration from the seller's solicitor pursuant to clause 27. It is common ground that the first schedule showed the March quarter's rent after the automatic 10% increase had been applied with effect from 20 February 2018, but it did not show any arrears of rent attributable to the failure to collect that rent increase.

112. On my finding that the defendants had waived the rental increase in February 2018, the figures for the March quarter's rent (which showed that increase) were incorrect, although the arrears column was accurate. This error was repeated (for the June quarter's rent) in all later versions of the apportionment (or completion statement) schedules. However, since (as I have also found) the defendants' agreement not to

enforce the February 2018 rent increases had no contractual or permanent suspensory effect going forwards into September 2018, I cannot view these misstatements of the quarterly rental payments as false in any material respect since they did not misstate the future quarterly rent that would actually be recoverable by Ahuja from the ground floor tenants going forward after completion. I therefore find that there was no material representation in any of these documents; and they are not actionable.

113. Mr Clarke also submits that it is very important not to lose sight of the fact that the request for the statutory declaration originated with Habib Bank; it was not something that Ahuja ever requested (although Mr Holland speculated that Mr Jandu might have requested a statutory declaration pursuant to clause 27 of the sale contract had Habib Bank not done so). Founding himself upon this fact, Mr Clarke invites the court to find that the statutory declaration was not something in which Mr Singh was remotely interested. This is said to be clear from the fact that Mr Jandu did not even send him a copy separately (with a suitably-worded covering letter explaining what it was) but merely copied Mr Singh into his email of 2 July 2018 to the solicitors acting for Habib Bank which attached the statutory declaration. There was no mention of the statutory declaration in the body of the email and nothing to draw it to Mr Singh's attention. Mr Clarke points to the fact that at paragraph 147 of his March 2021 witness statement, Mr Singh tacitly accepts that he did not read, or even look at, the statutory declaration at that time, stating: "… at some point before completion I did see Mr Pandher's statutory declaration (as it was drawn to my attention on a number of instances, including by Mr Jandu), but I do not remember exactly when". For the reasons set out at paragraph 261 of his written closing, Mr Clarke invites the court to reject this "self-serving" evidence and to find as a fact that Mr Singh never looked at, or paid any attention to, the statutory declaration.

114. In view of my earlier findings, it is not strictly necessary for me to determine whether, in fact, Mr Singh ever looked at, or paid any attention to, the statutory declaration. On the balance of probabilities, I find that he did not. I do so because of the vagueness, and the general unreliability, of Mr Singh's evidence, both on this issue (in his second witness statement and in cross-examination at page 49 of the transcript on Day 3) and generally, and also the fact that the schedules attached to the statutory declaration were overtaken by subsequent events, in the form of Mr Fagbemi sending to Mr Jandu a series of apportionment schedules calculated up to a series of dates commencing with 31 July 2018. I find that the inherent probability is that Mr Singh had regard to these later documents, and did not seek out, or go back to, the earlier statutory declaration, when it came to understanding what the rental and arrears position was concerning the property. In the light of my findings, it is not necessary for me to rule upon Mr Holland's oral submission that the "lies" in the statutory declaration were perpetuated in the later apportionment schedules, and that a claimant does not need to plead expressly the constant repetition of the same "lie".

115. Ahuja also asserts that the statutory declaration impliedly represented that the ground floor tenants occupied pursuant to the fifteen-year lease terms set out in the rental schedule attached to the second schedule to the sale contract, which contained the 'ALL TENANTS' text. The defendants deny that any implied representation was made, whether as alleged or at all. Mr Clarke submits that the statutory declaration simply lists the names of the individual tenants, the amount of the rents and service charges they were paying, and so forth. There is nothing in the statutory declaration,

or the circumstances surrounding its transmission to Ahuja's solicitors, that could, or might, have led a reasonable person to have understood the statutory declaration to contain any implicit representation about the contractual duration of the leases or tenancy agreements subject to which the property was sold, still less that either of the defendants subjectively had any such understanding.

116. I accept Mr Clarke's submissions. I confess that I have never understood how anyone could distil any implied representation as to the term of the relevant leases or tenancy agreements from the terms of the statutory declaration and its accompanying documents (or from the later apportionment schedules).

117. For all of these reasons, I find that the statutory declaration (and its associated documents) contained no actionable misrepresentation.

VII: The loan agreement

118. In accordance with clause 12.1 of the contract, the contractual date for completion had been 22 February 2018. However, Ahuja was unable to complete on that date and so Victorygame served notice to complete on Ahuja requiring completion by 22 August 2018. Notwithstanding the £12.5 million loan facility made available by Habib Bank, Ahuja still did not have sufficient funds available to complete the transaction. At paragraph 170 of his March 2021 witness statement Mr Singh claims that this was because he "… had come to realise that I required a further £800,000 … to complete the transaction as I had forgotten that stamp duty would apply to this transaction (as stamp duty did not apply to overseas property transactions)." Mr Clarke submits that this lapse of memory is implausible and I entirely agree: Mr Singh's own email to Mr Sohal of 26 February 2016 (sent from India at 05.07 local time) had recognised stamp duty as an additional expense; and in his report on title Mr Jandu had stated that the stamp duty payable on the freehold (at current rates) was £715,000, calculated at 4% of £17,875,000. I therefore reject Mr Singh's explanation for this shortfall on completion: Ahuja simply lacked the financial ability to complete. Be that as it may, Mr Singh continues: "At some point on 20 August 2018, Mr Sohal took me to [the defendants'] offices where Victorygame, acting through Mr Pandher, offered to loan [Ahuja] £800,000 so as to enable the transaction to complete." Mr Pandher's account – unchallenged in cross-examination – is at paragraphs 191-2 of his March 2021 witness statement and confirms that the discussions about the loan agreement were initiated on 20 August 2018 and not before.

119. Over the course of the remainder of 20 to 22 August 2018, the parties (via their respective solicitors) negotiated the terms of the documents to give effect to this loan arrangement. These documents included: (1) an offer letter; (2) a loan agreement; and (3) a legal charge in respect of a freehold property at 203 Tentelow Lane, Southall, Middlesex owned (and apparently occupied) by Mr Singh. In evidence (at pages 59-60 of the transcript of Day 3), Mr Singh accepted that the loan agreement was negotiated between solicitors; that his solicitors tried to negotiate on the interest rate that was being sought; and that he was talking to Mr Jandu throughout this process. As regards the offer letter, he accepted it was "possible" that he took independent legal advice; and that he understood, and accepted, the high rate of interest that was to be charged.

120. I have already found that neither the lease term representation nor the statutory declaration constituted actionable misrepresentations. Mr Clarke invites me to find as facts that, when entering into the loan agreement in August 2018, there was no question of Mr Singh thinking about either: (1) anything that had been said or done in February 2016, or (2) the statutory declaration in June 2018. I accept that invitation. I find that on 20 to 22 August 2018 Mr Singh was entirely focussed upon negotiating a loan for £800,000 to avoid the purchase falling through and the resulting forfeiture of Ahuja's deposit. I am entirely satisfied that the defendants have discharged any burden that may have rested upon them of demonstrating that neither the lease term representation nor the statutory declaration, or anything within it (or the apportionment schedules), was either present to, or acted in any way, however minor, upon Mr Singh's mind when taking out the £800,000 loan. Further, since the loan agreement was never in contemplation at the time either the lease term representation or the statutory declaration was made, I also find that the defendants never intended that either Ahuja or Mr Singh (or Mr Jagmit Singh Ahudja) should act in reliance upon either of them when entering into the loan agreement or its associated documentation. Given my other findings of fact, it is not necessary for me to determine whether that finding alone would be sufficient to negative any valid claim in misrepresentation relating to the entry into the loan agreement.

121. The offer letter was addressed to Ahuja and offered a bridging loan of £800,000 for four months from the date of drawdown. The borrower was to provide the lender's solicitors in advance with four post-dated cheques (each for the sum of £24,000.00) for the interest payable each month. On or before completion of the sale and purchase of the property, the borrower was to provide Chhokar & Co with a duly executed, but undated, legal charge over 203 Tentelow Lane, to be held "in escrow" and only to be dated and registered in the event that the monthly interest remained unpaid for one month. The offer letter was counter-signed by Mr Singh, on behalf of Ahuja, who certified that they had "taken independent legal advice on the … offer, and we understand and accept the high rate of interest shown, and are happy to proceed".

122. The loan agreement was between (1) Victorygame (as "Lenders") (2) Ahuja (as "Borrower") and (3) Mr Singh and his son, Mr Jagmit Singh Ahudja, (as "Guarantors") although they covenanted "as primary obligor and not merely guarantor", thereby imposing on Mr Singh and Mr Ahudja an indemnity obligation as well as a surety obligation. Under its terms, Ahuja undertook to repay the advance of £800,000 on the redemption date of 21 December 2018. The loan agreement recognises two types of interest payments: (1) under clause 4.1.2, the four contractually-agreed 'Interest' payments of 3% per month (£24,000 each) during the term of the advance; and (2) under clause 4.1.1, interest at the rate of 12% per month payable on "the amount that may remain outstanding from the Redemption Date". Clause 4.2 is a "Capitalisation" provision as follows: "If any Interest payable under this agreement is not paid within 7 days after the due date for payment it shall be capitalised and added to the outstanding balance and bear Interest from the due date for payment, such Interest to be payable at the Interest Rate and on the Interest Payment Days." By clause 5 of the loan agreement, Ahuja agreed that: "The Borrower shall repay the Loan in full (together with all other sums outstanding to the Lender under the Loan Agreement to the Lender on the Redemption Date." (There is a missing closing bracket.)

123. The legal charge was executed by Mr Singh and Mr Ahudja but, in accordance with the terms of the offer letter, it has not been dated or registered at HM Land Registry against the title to 203 Tentelow Lane. Mr Clarke notes that neither Mr Singh nor Mr Ahudja are parties to these proceedings, although they are affected by the relief sought by the counterclaim. In correspondence, their solicitors (Cardium Law) have confirmed that "they will adhere to any Order made by the Court"; and, on this basis, Mr Clarke says that the defendants have not sought to add them as third parties. However, as Mr Holland points out, no relief is sought against them, and therefore the court will not be making any order formally directed to them.

124. Upon execution of the loan agreement and its associated documents, Victorygame made available the sum of £800,000 to Ahuja. This enabled Ahuja to complete the transaction, thereby avoiding any repetition of the Palace Shopping Centre transaction where another company owned or controlled by Mr Singh had failed to complete its purchase and therefore forfeited its deposit. Mr Clarke points out that Mr Pandher could have decided not to assist Mr Singh, retaining the £1 million deposit in respect of the property, had he so wished. In accordance with the offer letter, Ahuja provided to Victorygame five post-dated cheques, one in respect of the principal sum of £800,000, and the other four in respect of the monthly interest payments of £24,000.

125. Following completion on 22 August 2018, Victorygame presented for payment the first three cheques without difficulty. No problems arose until 29 November 2018 (and thus a little over three months after completion), when Stradbrooks wrote to Chhokar regarding alleged "discrepancies between the information provided by our client at completion and the actual tenants in occupation, the actual rents paid to your client and the rent arrears position." A few days later, on 3 December 2018, Stradbrooks wrote a follow-up letter, this time including an allegation of fraudulent misrepresentation and stating: "Our client reserves its position and all its rights in this regard." At this stage nothing was said about the contractual terms of the ground floor leases or the accuracy of schedule 2 to the sale contract. Mr Clarke points out that this letter was sent only a short time before the redemption date under the loan agreement. He invites the court to find that the allegation of dishonesty was timed and raised in order to enable Ahuja to attempt to avoid its repayment obligations thereunder.

126. On 14 December 2018, Stradbrooks, acting on Mr Singh's instructions, wrote to Chhokar & Co indicating that their client was "prepared to meet your client in person as soon as possible in the next few days to try to reach an amicable conclusion to this dispute", and proposing that repayment of the £800,000 loan "is postponed until such time as the dispute between the parties is resolved". This letter was sent in response to a letter dated 11 December 2018 from Chhokar & Co. in which they had stated: "Please be informed that our client is prepared and willing to resolve any discrepancies amicably and to make necessary refund (if any) to your client." On or about 20 December 2018, Ahuja instructed Cardium Law in place of Stradbrooks. On 21 December 2018, Ahuja presented the remaining two cheques for payment, but these were dishonoured; and on 2 January 2019 Chhokar & Co gave notice of this fact to Stradbrooks. Six days later, on 8 January 2019, Stradbrooks wrote to Bank of Scotland plc informing it that Mr Singh and Mr Ahudja intended "… to grant a 2nd legal charge in favour of Victorygame Limited" over 203 Tentelow Lane (being the security provided for the loan). On 17 January 2019, Cardium Law wrote to Chhokar giving 'notification' of an intended claim, asserting that there were "strong elements

of recklessness" on the part of Victorygame "in the provision of information" to Ahuja. Cardium Law also purported to "advise that the Loan Agreement is rescinded immediately as of today's date". On 23 May 2019, Ahuja commenced these proceedings.

127. Ahuja accepts that it will have to give credit for the £800,000 loan which it received. It also recognises that it will have to give credit for the additional sum of £24,000 interest which was due prior to its purported rescission of the loan agreement.

128. Since I have already found that Ahuja had no right to rescind the loan agreement for any actionable misrepresentation, it is academic whether (as the defendants assert) Ahuja affirmed or ratified, or otherwise lost any right to rescind, the loan agreement. I can therefore deal with this aspect of the case quite shortly. The defendants rely upon: (1) the interest payments which were made by post-dated cheques handed over on 22 August 2018; (2) Stradbrooks' letter of 14 December 2018; and (3) the action contemplated by Stradbrooks' letter dated 8 January 2019. I accept Mr Holland's submission that, whether viewed individually or taken together, none of these matters would have prevented Ahuja from validly rescinding the loan agreement had any such right existed. None of them could conceivably amount to an unequivocal or clear indication that, objectively construed, Ahuja was electing to affirm the loan agreement regardless of any misrepresentation.

129. As to (1), the September, October and November interest payments were effected by way of post-dated cheques that had already been handed over by Ahuja to Victorygame as payee on 22 August 2018. As to (2), the suggestion of postponing repayment of the loan made in Stradbrooks' letter of 14 December was written in the context of an attempt to achieve an amicable resolution of the evolving dispute between the parties. As to (3), Stradbrooks' letter of 8 January 2019 to Bank of Scotland was written: (1) in the context of Chhokar & Co's letters of: (a) 17 December 2018 "seeking full compliance of the revised undertakings provided by your firm under cover of your letter dated 22 August 2018" to register a second charge over 203 Tentelow Lane in favour of Victorygame if the £800,000 loan was not repaid on 21 December 2018, (b) 2 January 2019 giving notice that Stradbrooks should forthwith comply with the terms of their undertakings, and (c) 4 January 2019 stating that Victorygame wanted to take a first charge over the property and asking for a redemption figure for the existing first charge; (2) by Stradbrooks on their own behalf and not on behalf of Ahuja; and (3) to Bank of Scotland and not to Victorygame or its solicitors, who were not informed that Stradbrooks were writing in such terms. I also note that by 2 January 2019, the two remaining cheques had been dishonoured on presentation, the loan had not been repaid on the redemption date, and the defendants' solicitors were clearly on notice of these facts.

130. Mr Clarke also points out that although Cardium Law purported to rescind the loan agreement, they did not purport to rescind any other related agreement, such as the offer letter. However, I would regard that as implicit in the purported rescission of the loan agreement. Mr Clarke also submits that Mr Singh and Mr Ahudja did not purport, and have never purported, to rescind anything at all. Given that they had each assumed independent indemnity obligations to Victorygame under the loan agreement, Mr Clarke submits that even if (contrary to his other submissions), the loan agreement was validly rescinded as between Victorygame and Ahuja, it will continue to be enforceable as between Victorygame and Mr Singh and Mr Ahudja.

Since I have found that the loan agreement was never validly rescinded as between Ahuja and Victorygame, it is unnecessary for me to decide this point; and it would be undesirable for me to do so in proceedings to which neither Mr Singh nor Mr Ahudja are formally parties.

131. That leaves, as the only remaining live issue in relation to the loan agreement, the question whether the interest provisions within it constitute an unenforceable penalty. A penalty is a provision which operates on a breach of contract. It is common ground that the one outstanding interest payment (the fourth) due under clause 4.1.2 is not in the nature of a penalty because it is not a provision which operates on a breach of contract. The obligation to pay the four initial interest payments, each of £24,000, is a primary, and not a secondary, obligation and represents the cost of borrowing the loan for the corresponding period of four months.

132. Mr Clarke's primary submission is that clause 4.1.1 is not a provision which operates on a breach of contract either. It is simply a primary obligation (or 'undertaking') "to pay to the Lenders [sic] Interest at the 12% per month [sic] on the amount that may remain outstanding from the Redemption Date." I have no hesitation in rejecting that submission. It is clear from the authorities that whether or not a clause imposes a secondary liability upon a breach of contract is a question of substance and not of form. If the substance of the contractual arrangement is the imposition of a punishment for a breach of contract, the concept of a disguised penalty may enable a court to intervene; although I recognise that it may prove possible to circumvent the rule by "careful drafting". In my judgment, the drafting in the present case is not sufficiently "clever" to circumvent the rule: the obligation to pay interest under clause 4.1.1 is a provision which operates upon any breach of the primary obligation (or undertaking) on the borrower (under clause 3.1) to repay the advance of £800,000 to the lender free from any legal or equitable right of set-off on the Redemption Date. As Mr Holland submits, the provisions in clauses 4.1.1 and 4.2.1, which provide for compound interest at the rate of 12% per month, only apply if the principal is not repaid by the Redemption Date. It therefore becomes necessary to consider the law on penalties. This has been comprehensively reviewed by the Supreme Court in the recent case of *Cavendish Square Holdings BV v Makdessi* [2016] UKSC 67, [2016] AC 1172.

133. Mr Holland relies on the following summary of the applicable law to be found in the judgment of Mr Timothy Fancourt QC (sitting as a Deputy Judge of the High Court) in *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch), [2017] L & TR 23 at [38]:

> "The law of penalties has been comprehensively reviewed recently by the Supreme Court: *Cavendish Square Holding BV v Makdessi* [2016] UKSC 67; [2016] AC 1172. The several judgments of the Justices reveal differences of approach on the application of the main principles to the facts of that case, however the main principles are clearly restated. These are that:
>
> (i) Whether or not a contractual provision is a penalty is a question of interpretation of the contract, and the real question is whether it is penal or punitive in nature (paras 9, 31, 243).

(ii) In English law, a penalty clause can only exist where a secondary obligation is imposed upon a breach of a primary obligation owed by one party to the other. It is to be distinguished from a conditional primary obligation, which depends on events that are not breaches of contract (paras 14, 32, 258).

(iii) Whether a clause imposes a secondary liability upon a breach of contract is a question of substance and not of form (para 15)

(iv) A provision that in substance imposes a secondary liability for breach of a primary obligation is penal if it imposes on the party in default a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation (para 32), or (using traditional language) which is exorbitant, extravagant or unconscionable in comparison with the value of that legitimate interest (paras 152, 255).

(v) The onus lies on the party alleging that a clause is a penalty to show that the secondary liability is exorbitant, extravagant or unconscionable (para 143)

(vi) Since the penalty rule is an interference with freedom of contract, it is not lightly to be concluded that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty (paras 33, 35)."

134. Mr Holland invites the court to note that:

(1) Whether or not something is a genuine pre-estimate of loss does not turn upon the genuineness or the honesty of the parties who have made the pre-estimate: the test is an objective one.

(2) It may be that an increased interest rate payable on default is not a penalty on the basis that a defaulting borrower is an increased credit risk and this justifies an increased rate. However such an assertion has to be justified by evidence in the individual case. Here there was a four-fold increase in the rate of interest on default; and Mr Pandher never sought to explain why such an extravagant, exorbitant, or unconscionable rate of interest had been chosen.

(3) Although whether or not the parties were on an equal footing and were legally advised can be relevant considerations, the test is still an objective one: that is whether the provision is exorbitant, extravagant, or unconscionable in comparison with the value of a legitimate interest of the innocent party.

135. Mr Holland submits that the facts the provisions are intended 'in terrorem' and the 'default' interest rate is extortionately high, can be measured by looking at:

(1) the interest rate payable prior to the redemption date under the loan agreement itself of 3% per month;

(2) the interest payable under the contract (of 4% over Base Rate); and

(3) the fact that the 12% per month rate is indeed described as 'default interest' in the facility letter.

The best illustration of this is that, if the defendants are correct and the provisions do not constitute a penalty, Ahuja would by now owe the following sums on an initial loan of £800,000 taken out only some 30 odd months ago:

(a) As at 14 June 2021: £23,862,975.83;

(b) As at 21st July 2021: £26,825,412.94;

(c) As at 21st August 2021: £30,143,342.48

There is said to be no evidence which would seek to justify that level of default interest. No legitimate interest has been identified other than the penalising of a breach by the failure to repay the principal on the redemption date.

136. In his oral closing, Mr Holland emphasised that there had been an element of urgency in negotiating and agreeing the terms of the loan, and that it was not sufficient, in order to avoid the characterisation of a provision as a penalty, that a party had known what it was getting into and had received professional advice.

137. Mr Clarke points to Nugee J's neat summary of the test for a penalty in ***Holyoake v Candy*** [2017] EWHC 3397 (Ch) at [467] as follows:

> "(4) Where the rule applies, the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable (per Lord Mance at [152]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255])."

Mr Clarke points out that (as recorded at [485]) in ***Holyoake*** it was not even submitted that a default interest rate of 15% compounded monthly was an extravagant or exorbitant rate for a commercial agreement. However, the rate there was 15% per annum, and not per month, and so does not really compare with the 12% per month here).

138. Mr Clarke invites the court to note the following additional points:

(1) The onus of proof as to whether a contractual provision is a penalty is on the person alleging that it is. That is clearly correct.

(2) Whether or not a contractual provision is in the nature of a penalty is a question of construction, to be determined by reference to the circumstances at the time of contracting. It is not a question to be determined at the date of the breach of contract, or any other date. Hence, it is legally irrelevant that the amount of interest now due under the loan agreement might run into the tens of millions of pounds or more. Mr

Clarke is correct as a matter of principle; but here the potential effect of clause 4.1.1, if repayment were to be delayed by some years, should have been apparent at the date of the loan agreement and does not depend upon unforeseeable supervening events.

(3) The power to strike down a penalty clause is an interference with freedom of contract. Understandably, therefore, particularly in the case of commercial contracts freely entered into between parties of equal bargaining power, the court is predisposed to uphold contractual terms wherever possible. That is a valid consideration.

(4) It is extremely difficult to demonstrate that a default interest rate applying prospectively from the time of a default in payment is a penalty. This is because, the additional amount payable is (ex hypothesi) directly proportional to the period of time during which the default in payment continues. Moreover, the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. I acknowledge that this may be difficult to establish but it is not impossible. The question is whether, in all the circumstances, the default interest rate actually applied because of the increased credit risk presented by a defaulting borrower is nevertheless, extravagant, exorbitant, or unconscionable.

139. Mr Clarke referred the court to *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) where, at [70], Bryan J summarised a number of cases where high rates of default interest had been upheld (including the *Holyoake* case, previously cited). However, in none of them was the default rate anywhere near as high as 12% per month compounded monthly. In *Cargill*, Bryan J upheld a "Default Compensation Rate" of "the rate per annum equal to one month LIBOR plus an additional margin of 12 per cent". However, in that case Bryan J had before him the benefit of evidence setting out the basis, and the rationale, for the particular default rate which was held to justify the rate set, and also evidence of market rates which were comparable. There is no such evidence in the instant case.

140. If, as I have found, clause 4.1.1 is a provision operating on breach, Mr Clarke contends that there is no basis for categorising it as penal in nature. In particular, he submits that:

(1) Ahuja does not allege, and Mr Singh does not adduce any evidence of, any facts whatsoever in support of the bare assertion that clause 4.1.1 is a penalty. Given that the burden is on Ahuja to prove that clause 4.1.1 is extravagant or exorbitant or unconscionable, this is sufficient to dispose of the issue.

(2) Indeed, Mr Singh hardly mentions the loan agreement in his witness statements: see his evidence at paragraphs 46-7 of his March 2020 and paragraph 170 of his March 2021 witness statements. He does not assert, for example, that he did not understand the rate of interest; or that Mr Pandher had reason to think he had not understood the rate of interest; or that he had demurred over the rate he now says is penal; or that Mr Pandher had applied any pressure on him to enter into the loan agreement (which is said to be unsurprising given that it was Ahuja's responsibility for the loan agreement coming into existence in the first place); and so forth. On the contrary, Mr Singh's evidence in cross-examination regarding the loan agreement showed the contrary to be true.

(3) Likewise, there is no evidence (expert or otherwise) to show that the rate of interest is uncommon in a loan agreement of the nature of this loan agreement (namely, short-term bridging finance between two commercial entities, one of which is a bad credit risk); or that there is no commercial reason for the existence of clause 4.1.1.

(4) In reality, the loan agreement represents a contract which was freely-negotiated at arms' length between two experienced commercial parties, both represented by solicitors at the time. There was (and is) a sound commercial justification for clause 4.1.1, not least given the risks involved in lending a large sum of money to an entity which did not have the funds (and was seemingly unable to raise the necessary funds from a bank or other financial institution) to complete the purchase of the property. Mr Clarke specifically refers me to Mr Pandher's evidence at paragraph 198 of his second witness statement which, he says, explains and justifies the interest rate in the loan agreement, evidence which went entirely unchallenged during cross-examination.

(5) For these reasons, in the facility letter Ahuja (acting by Mr Singh as its director) were willing to certify that they had "taken independent legal advice on the … Offer, and we understand and accept the high rate of interest shown, and are happy to proceed".

141. For all these reasons, Mr Clarke submits that the full amount of interest prescribed by the loan agreement is due and payable by Ahuja (and by Mr Singh and Mr Ahudja as primary obligors and guarantors).

142. I have borne all of these submissions in mind. Persuasively as Mr Clarke puts the defendants' case, I am satisfied that a default interest rate of 12 % per month, compounded monthly, representing a fourfold (400%) increase in the interest rate applicable prior to default, is properly to be characterised as a penalty.

143. I accept that a lender has a legitimate commercial interest in applying a higher rate of interest to a borrower who is in in default because such a borrower represents an increased credit risk. As Bryan J observed in *Cargill* at [50]:

> "… it is self-evident … that there is a good commercial justification for charging a higher rate of interest on an advance of money after a default in repayment. The person who has defaulted is necessarily a greater credit risk and 'money is more expensive for a less good credit risk than for a good credit risk'."

144. The real question for determination in any particular case is whether the borrower has demonstrated, on the balance of probabilities, that the default interest rate applied because of the increased credit risk presented by a defaulting borrower is nevertheless, in all the circumstances, extravagant, exorbitant, or unconscionable. In the present case, there is no evidence before the court detailing market interest rates at the time of the loan agreement; and there is no evidence other than that of Mr Pandher detailing the risk factors involved, or the rationale for the default interest rate being set at a rate four times that of the interest rate applicable prior to the redemption date. There is no evidence that the default interest rate was fixed to reflect the defendants' genuine assessment of Ahuja's creditworthiness in the event of default, particularly in the context of: (1) the perceived value of the personal covenants of Mr Singh and Mr

Ahudja as primary obligors and guarantors; and (2) the security provided by way of a second legal charge over Mr Singh's home. Indeed, at paragraph 195 of Mr Pandher's second witness statement, he says that he: "… did not know then (and do not know now) how much money was secured by the Halifax charge and how much equity might be left in the property after satisfaction of that charge". In the absence of any such evidence, in my judgment, Ahuja has discharged the burden of demonstrating that a 400% increase in the primary interest rate on default, when combined with the provision for monthly capitalisation of interest, is so obviously extravagant, exorbitant and oppressive as to constitute a penalty. Whilst I would be prepared to accept, without supporting evidence, an increase of up to 200% in the applicable rate of interest on default to reflect the greater credit risk presented by a defaulting borrower, in my judgment, and as a rule of thumb, I would expect an evidential burden to pass to a lender to adduce evidence to justify any greater increase, at least where the lender enjoys additional personal and real security for its loan.

145. Despite the lengthy written closing submissions that were presented to the court, I was not addressed on the consequences if I were to find (as I have) that the default interest rate of 12% per month, compounded monthly, constitutes a penalty. Clearly, interest would not be recoverable at that rate under clause 4.1.1 of the loan agreement. But does interest continue to accrue at the previous rate of 3% per month, compounded monthly, under clause 4.1.2? This provides: "The Borrower will pay Interest on each Interest Payment Date. Interest shall accrue and be payable on the Loan at the Interest Rate." By clause 1.3, the expression 'Interest Payment Dates' means 21 September 2019, 21 October 2018, 21 November and 21 December 2018; and by clause 1.2 'the Interest Rate' means "3% per month (total sum of £24,000.00 per month)". My provisional view, subject to any further submissions, is that despite the reference to four fixed interest payment dates in the first sentence of clause 4.1.2, interest continues to accrue and be payable on the loan at 3% per month after the redemption date by virtue of the second sentence of clause 4.1.2; and such interest continue to be capitalised on a monthly basis under clause 4.2.1. This view is reinforced by the provisions of clause 10.1, which provides that: "Each of the provisions of this agreement is severable and distinct from the others and if at any time one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired." However, if Ahuja wishes to contend otherwise, since this issue was not expressly addressed at trial, and in view of the sums involved, it seems to me that it should be open to it to present submissions to the contrary.

VIII: The expert evidence

146. Inevitably, both counsel urged the court to prefer the evidence of their party's expert to that of the other. Mr Holland's submissions appear at paragraphs 127 to 155 of his written closing. Mr Clarke's submission appear at paragraphs 455 to 480. I have borne all of those submissions firmly in mind; and I do not propose to add to this judgment unnecessarily by repeating them. I have had the opportunity of hearing the evidence of the two experts, and viewing them, over one and a half court days. I have also had the opportunity of re-reading their expert reports, and the transcripts of their oral evidence, with the benefit of counsel's written and oral closing speeches. With the benefit of hindsight, I consider that I would have been assisted by the two experts giving their evidence concurrently, rather than back-to-back, a proposal I had raised

with counsel on the morning of Day 1 (at pages 15-17 of the transcript) although I appreciate the practical obstacles in the way of this because of the perceived need to adhere to social distancing during the pandemic and the problems presented by the transcription being carried out remotely. Be that as it may, I have formed the clear view that the expert evidence of Miss Morris should be preferred to that of Mr Wolfenden.

147. There was agreement between both experts that the subject property is an unusual one and that there was no directly comparable evidence. In the light of that consensus, Mr Wolfenden's unchallenged evidence (at page 103 of Day 6) that valuation "is an art, not a science" has a particular resonance in the present case. As Mr Holland recognised, the principal difference between the two experts concerns the yield to be applied to capitalise the rental income for No 65: against a contractual purchase price of £17,875,000, Mr Wolfenden's valuation is £10,925 (split as to £8,725,000 for No 65 and £2,20,000 for No 67) whilst Miss Morris's is £18,200,000 (£15,300,00 for No 65 and £2,900,000 for No 67).

148. In valuing No 65, essentially Mr Wolfenden started with the Knight Frank Yield Guide for March 2016, adopting the 8.5% yield for secondary shopping centres "because I had to start from somewhere" (page 107 of the transcript of Day 6), in order to arrive at a valuation of £9,750,000. Mr Wolfenden then added 100 basis points (or 1%) to arrive at an initial yield of 9.5% to reflect "the various other driving factors that an investor would take into account, such as lease length, rent review increases that did not exist and the fact that many of the tenants were not able to afford increased rents"; although he then added: "Even if the leases had been as stated, I would add a minimum increase to the yield of 100 bps i.e. an initial yield of 9.5% would be expected.": see paragraph 9.20 of his report and the cross-examination at pages 108-9 of the transcript of Day 6, during which Mr Wolfenden accepted, in relation to the additional 100 basis points, that "I had nothing to support that. It was a professional judgement based on knowledge and experience." At paragraphs 9.24 to 9.26 of his report, Mr Wolfenden produced an alternative valuation for No 65 assuming "the information in the contract of sale had been correct" in which he adopted a "best" yield of 7% to produce an alternative valuation of £13,800,000.

149. In her report, Miss Morris included a market valuation of No 65 in the sum of £16,250,000 although she readily conceded in cross-examination (at page 73 of the transcript of Day 7) that the rental schedule she had been given on which it was based had been "probably the most optimistic of the rent schedules". I am satisfied that this valuation can be disregarded in favour of Miss Morris's three alternative valuations; and I did not understand Mr Clarke to contend otherwise. These were all in the sum of £15,300,000, based upon an initial net yield of 6%. Although they all started from slightly different rental figures, Miss Morris convincingly explained (at pages 74-7 of the transcript of Day 7) how these all worked to produce exactly the same market valuation for No 65.

150. Mr Holland criticises Miss Morris for using the wrong starting point for her appraisal of the property. He submits that "her consistent, though unsuccessful, attempts" to justify classifying the property as 'High Street Retail' and/or 'Prime' rather than 'Shopping Centre Secondary' have "fatally skewed her conclusions as to an appropriate yield … Without any intended discourtesy, The Broadway quite simply is not Bond Street, Jermyn Street or Piccadilly." This particular comparison is unfair to

Miss Morris. I note that according to the Knight Frank yield guide, in March 2016 Bond Street and Oxford Street commanded yields of 2 to 2.25% and market sentiment towards such locations was "positive". Even prime shops yielded 4% and market sentiment was "stable". Miss Morris has adopted a yield of 6%, broadly comparable to good secondary High Street retail (5.75% and "positive"). Mr Holland characterises Miss. Morris's evidence as "discursive to the point of rambling". In his oral submissions, he described her as resorting, when pressed, to "anecdotal flannelling". Again, this is unfair. Mr Holland submits that when one considers (using Knight Frank's own yield guide for March 2016) that a secondary shopping centre would provide a yield in the region of 8.5%, Mr. Wolfenden's view that the three factors he referred to properly justified a 100 base points increase in the yield (to 9.5%) is properly justified.

151. I reject these criticisms of Miss Morris, her approach, and her expert evidence. I prefer the competing analysis, and the submissions, of Mr Clarke. I find that Miss Morris starts with the significant advantage that, having been involved in the production of successive iterations of the Knight Frank yield guide, she naturally possesses a far deeper understanding and appreciation of its make-up, its uses, and particularly its limitations, than Mr Wolfenden. She accepted (at pages 80-2 of the transcript of Day 7) that it was "a blunt tool" but "very useful" and "a marketing tool". In answer to questions from the bench at the end of her evidence (at pages 138-9), Miss Morris explained that "High Street Retail" was "too wide a grouping", pointing out that "so we do not have a Greater London High Street grouping". Having listened to the evidence of both valuers, I find that Miss Morris has demonstrated a far greater understanding, of the yield guide, of the subject property, and of the relevant market. She has undertaken far more detailed, and relevant, research and analysis than Mr Wolfenden, who had made no attempt to investigate or consider the strong historic demand for units at the property. Mr Wolfenden agreed (at page 33 of the transcript of Day 7) that Miss Morris's approach to the valuation of the property (as set out at paragraph 5.36 of her report and following) was "a correct approach". This led her to conclude that the appropriate initial yield was 6%. I do not find Mr Wolfenden's adopted yield (of 8.5%, uplifted to 9.5%) at all consistent with the comparable evidence in the expert reports, whereas I find Miss Morris's yield (of 6%) to be more in line with the comparable evidence, however limited its direct applicability. Rather than trying, as Mr Wolfenden did, inappropriately to "shoe-horn" the property into one of the sectors, and sub-sectors, in her yield guide, Miss Morris recognised that it does not exactly fit into any of them; and she has applied her wisdom and judgment as a valuer to identify an appropriate "sui generis" category and yield.

152. In a case, such as the present, where one is dealing with a unique property, with no direct comparables, one is particularly reliant upon the skill and expertise of the professional valuer. I was impressed by Miss Morris's willingness to engage with cross-examining counsel, and with the court, to explain her thinking, and her willingness to accept that she could have expanded upon the reasoning in her report, and explained herself rather better in her oral evidence: see, for example: (1) Page 77 of the transcript of Day 7 (in cross-examination) as to how she had arrived at the same result for her Basis 2 to 4 valuations when her starting figures were different: "No, I have not given a full explanation of that, and neither have I given you full valuation printouts, which possibly would have been helpful." (2) Page 138 (explaining, in answer to a question from the court seeking clarification of her reference in cross-

examination to a tenant's right to renew, that she had meant a statutory, rather than a contractual, right of renewal): "No, no, sorry, I should have made that clear."

153. I find that the court can properly place confidence in Miss Morris's thoughtful and reflective analysis, which commends itself to me in preference to Mr Wolfenden's blunter, and (in parts, but not completely) more mechanical, approach. At pages 70-1 of the transcript of Day 7, Miss Morris explained that this property "… is not comparable to a purpose-built shopping centre at all, apart from the fact it is let to multiple retailers". Mr Holland asked Miss Morris: "If yield is all about risk and you have got a group of, as you say, local traders, why are you valuing this at the same yield or a lower yield than properties which have large anchor, large national retail anchor tenants? That is what you have done, is it not?" Miss Morris answered as follows: "No, it is not at all what I have done. If you look at the sort of shopping centre I think you have got in your mind, at that time, they probably would have achieved a yield of about five per cent. This is more comparable to -- because of its location in a high street, it is more comparable -- it is a tricky one. It is sort of halfway between a shopping centre and a high street shop. I mean, it is quite a difficult -- it took me a lot of thought to come to my decision on my yield for that reason, because a high street is a very specific location in that all roads lead to it, you are surrounded by your catchment audience, and high streets of themselves are always attractive, particularly in Greater London, and this is a very, very strong and busy high street. So I have to bear that in mind, and then also I have to bear in my mind that historically -- and I was given various valuation reports which go back historically, the building has always been fully let. And so even though my tenants in themselves would appear to be -- well, they are of unknown strengths, so I do not know the risk in them paying the rent, but on the face of it they look pretty risky, so even though that is the case, I felt that if I was buying it I would be confident that I would be able to replace them were they to go bust. So that is the thought process that was in my mind when I was trying to come to my valuation."

154. I accept Miss Morris's evidence and approach. In my judgment, Mr Wolfenden was wrong to value the property as if it were a 'secondary' shopping centre, or even a 'shopping centre', as those sector descriptions are used in the yield guide. I prefer Miss Morris's evaluation that the property is on a prime high street location in Greater London and therefore properly falls within the "High Street Retail" sector. At the very end of her evidence (at pages 138-9 of the transcript of Day 7), the following exchange took place between the court and Miss Morris:

> "JUDGE HODGE: Then finally, if you go to the yield guide at page 329, I appreciate your evidence that this is intended to demonstrate trends rather than actual yields, but is there any particular sector, and sector within a sector, to which you would attribute the subject property?
>
> THE WITNESS: I would probably most likely be looking at the high street retail, simply because of the location of the property as a high street location, and being a London high street location it would be keener than the 5.75 of the good secondary, and then -- you see, the shopping centre yields really? I just think it is too wide a grouping, I just do not think I can apply that to this because it is ...
>
> JUDGE HODGE: So it would be keener than a good secondary, and what do you mean by 'keener'?

> THE WITNESS: It would be a lower yield. So the high street retail grouping, the sixth, where it says, 'Good Secondary (Truro, Leamington Spa, Colchester, etc)', so we do not have a Greater London high street grouping. At the time, the London shops were particularly doing better than good secondary shops in that there were very few vacancies, etc. So where we have got the 5.75 I would expect a London shop in a London high street to go at a lower yield than that, so probably 5 would be it, it could even be 4.75.
>
> JUDGE HODGE: So 5 to 4.75.
>
> THE WITNESS: Thereabouts."

In my judgment, Miss Morris was right to value this property as "High Street Retail" and to apply a yield of 6% to this property in the light of her evidence, especially at pages 70-1 of the transcript of Day 7 (cited above). I reject Mr Holland's contention that market sentiment for properties similar to the subject property was 'negative'. Based on Miss Morris's evidence it was still 'positive' (or, at the very worst, 'stable'). I also accept Miss Morris's assessment of the potential market for this property.

155. Moving on to the issue of lease lengths, Mr Wolfenden provided no empirical evidence to support his assertion that an investor would be prepared to pay more for an investment property subject to longer leases even though the tenants were of poor, or uncertain, covenant strength. Miss Morris, on the other hand, was able to point to evidence to the contrary (at paragraphs 5.41 to 5.43 of her report) in the form of four shops forming part of a parade in Neasden where the unexpired lease terms varied between 0.64 years and 13.13 years yet the net initial yields only varied between 3.61% and 3.83%. From this evidence Miss Morris concludes (at para 5.41 of her report) that "… an investor will not pay a premium price for a shop that is let for a long term to an individual"; or (as she expressed it in cross-examination at pages 125 and 132 of the transcript of Day 7): "… investors do not pay more for longer leases to tenants who have low covenant strength … if you have got an insignificant tenant, you are not really that fussed about the length of the lease."

156. On first consideration, it may seem contrary to common sense, or counter-instinctive, for a valuer to proceed on the footing that an investor would not be prepared to pay more for a property subject to 15 year lease terms, with fixed minimum three yearly rent increases of 10%, than if the leases were for shorter terms of only 6 years 9 months. However, that is to ignore both the perceived level of demand for units at the subject property and also the nature and attributes of its particular class of tenants, comprising mainly local traders of relatively unknown covenant strength, who are dependent on the success of their retail business for their ability to pay the rent. Even Mr Wolfenden recognised the risk of "tenant failure" when explaining (at pages 51-2 of the transcript of Day 7) why he had applied a higher yield to the subject property. Miss Morris explained the position well when she was pressed by Mr Holland (at pages 113-4) to confirm that she was in fact saying that it made no difference whether the leases were for 6 years 9 months or for 15 years:

> "This what I have said, because the leases in place were for 6.9 years with increases at the third and the sixth year. Had they been for 15 years with increases every three years, the potential would be that they would become over-rented. Now, when you carry out a valuation, you always have regard to the

> market rent, which is broadly the rent that a tenant would be willing to pay, so anything above the market rent is perceived as very risky, and even more risky if you have tenants of limited covenant strength. So even though you might have had a 15-year lease, as the landlord or a potential purchaser, you would have had concerns about ever having actually received any increase in rent. So had I been valuing it, I probably would not have valued in those increases where they went in over the top of the market rent."

Miss Morris clarified and confirmed her hypothesis at page 118:

> "An investor is going to put very little value on that top slice because he would think that tenants are unlikely to be able to pay it. That is the situation."

I accept this hypothesis. With this type of retail property, and this class of occupational tenant (of unknown covenant strength), I find (consistently with Miss Morris' expert evidence) that a prospective purchaser would derive no real security, or comfort, from a longer lease of 15 years.

157. I agree with Miss Morris's analysis of the evidence at paragraph 7.49, and the reasoning at paragraph 7.50, of her report. I therefore accept Miss Morris's professional opinion (expressed at paragraph 1.18 of her report) that "the Market Value of the freehold interest in the Property, as at the Valuation Date, would not be affected if the leases of the ground floor of the Property were granted for terms of 15 years from 20 February 2015 rather than for the terms in fact granted". I reject Mr Wolfenden's assessment that the added security of 15 years' leases, even with provision for three yearly rental increases of at least 10%, had any effect in increasing the open market value of the property. Mr Holland contends that Miss Morris is trying to ride two horses – or, swapping metaphors, to have her cake and eat it too – by arguing for a low yield (and thus a high number of years' purchase) despite emphasising the poor covenant strength of the occupational tenants. However, I consider that this misses the points that Miss Morris makes within paragraph 7.50 of her report that a hypothetical purchaser would appreciate both that: (1) the property has historically been fully let, and many of the tenants have been in occupation for long periods, so the landlord would have confidence that they would renew at lease expiry; but (2) if any of the units should fall vacant, the owner would have been able rapidly to re-let the vacant unit.

158. So far as the market value of No 67 is concerned, I have no hesitation in preferring Miss Morris's valuation figure of £2,900,000 to Mr Wolfenden's figure of £2,200,000. Her valuation was informed, and supported, by Mr Monga's rental bid for No 67 in January 2016 (about which Mr Wolfenden had known nothing). In cross-examination (at pages 38-44 of the transcript of Day 7) Mr Wolfenden grudgingly accepted that Miss Morris's valuation assumptions about No 67 were "not unreasonable" and that the same would apply to her yield of 6.5% for No 67 should the court adopt her yield of 6% for No 65 (as I have). As for the residual valuation of No 67, applied by Miss Morris "by way of a check", despite Mr Wolfenden's view (at paragraph 9.35 of his report) that he would consider a developer's profit "of not less than 20% to be acceptable for this development", this was based upon his view that "the challenge would be to find a sufficient number of tenants to fill the new units". This overlooks the evidence that, historically, No 65 has been fully let. In my judgment, Miss Morris's allowance of 10% developer's profit on costs was fully

supported and justified by her evidence and reasoning at page 124 of the transcript of Day 7.

159. For all of these reasons, I accept Miss Morris's evidence: (1) that the true open market value of the property, as at 1 March 2016, was £18,200,000 and therefore Ahuja did not pay more for the property than it was actually worth, and (2) that the property would not have been worth any more had the ground floor leases of No 65 been for terms of 15 years from 20 February 2015. It follows that whether one applies the tortious, or the contractual, measure of damages, Ahuja has not demonstrated that it has suffered any loss. Had the fraudulent misrepresentation been actionable, Ahuja has suffered no damage. Nor has it proved that it has suffered any damage as a result of the breach of Victorygame's breach of contract.

160. For the sake of completeness, I should record that Mr Clarke advanced an alternative argument, founded upon decisions of Mocatta J in *Ceylon (Government of) v Chandris* [1965] 3 All ER 48 and Steyn J in *The 'Panaghia Tinnou'* [1986] 2 Lloyd's Rep 586, to the effect that even if the court preferred Mr Wolfenden's evidence, still no loss was recoverable by Ahuja in respect of the lease term representation. So far as relevant for present purposes, these two cases are said to be authority for the following two propositions:

(1) The starting point of the law is that loss inflicted by one person on another rests where it falls. If the aggrieved person wishes to transfer that loss he must prove all the essentials of a cause of action and the quantum of his loss. Thus, the general rule is that the burden of proof rests on the party claiming relief; and this applies both to the liability of the other party and the damages recoverable.

(2) If only part of the damage suffered by a claimant is shown to be due to a breach of contract, then the general rule applies, and the claimant must show how much of the damage was caused by the defendant's breach of contract, failing which the claimant can recover nominal damages only. The law is not unfamiliar with cases where the claimant fails owing to an inability to discharge the burden of proof falling upon him.

Although both *Chandris* and *The 'Panaghia Tinnou'* concerned claims for damages for breach of contract, they are said to have been decided on the basis of, and to provide binding authority for, an underlying point of general legal principle relating to the burden of proof which applies equally in a claim for damages in tort. I accept Mr Clarke's analysis of these authorities, which seems to me to accord with orthodox legal principles.

161. According to Mr Clarke, the relevance of these authorities is that at paragraph 2.4 of his report Mr Wolfenden attributed the difference between: (1) the price paid by Ahuja, and (2) his assessment of the true market value of the property to four factors; and this was confirmed in his evidence at page 101 of Day 6 onwards. However, only the first of those four factors relates to the lease term representation. Mr Wolfenden could venture no (or no reliable) opinion - and so the court has no evidence upon which it can decide one way or another - as to the extent (if at all) to which there might still be a difference in value when disregarding the extraneous and irrelevant factors. As Mr Wolfenden put it (at page 18 of the transcript of Day 7) when asked how much of an increase in the yield he had attributed to the lease term representation: "It was one of a number of factors for which I made a yield

judgement. It is not a precise science. I cannot say I added 100 basis points of which X was for this, and Y was for this and Z was this. I looked at the characteristics, I stepped back and put them all together and said what did I think the collective impact would be? And I arrived at that. But I did not do it by X, Y and Z equals whatever." Mr Clarke submits that, as such, the position is directly analogous to that in the *Chandris* and *The 'Panaghia Tinnou'* cases, in that the alleged loss is (on Mr Wolfenden's evidence) attributable to a number of causes, but it is impossible to demonstrate how much of the alleged loss has come about by virtue of the relevant operative cause, namely the lease term representation. So, Mr Clarke submits, the recoverable loss is nil.

162. As I have not accepted Mr Wolfenden's valuation evidence, it is not strictly necessary for me to rule upon this alternative argument; and, since it does not depend upon the determination of any disputed issue of fact, I do not propose to do so beyond commenting that I do not share Mr Holland's bafflement as to its relevance. I should also add that this argument would seem to me to apply equally to Mr Wolfenden's assessment of damages on the contractual measure since his assessment of "the valuation difference caused by incorrect information being provided by the defendants" (at paragraphs 2.3.6 and 2.3.7 of his report) in the sum of £5,075,000 appears similarly to be predicated upon a number of factors in addition to the lease term length.

IX: The counterclaim

163. I have already rejected Victorygame's counterclaim for correction by construction or rectification of the lease term representation.

164. Victorygame claims sums due under the sale contract. It says that the apportionment calculations under clauses 13 and 14 of that contract were incorrectly carried out because they omitted to take account of the rental increase which took effect part way through the December 2017 quarter. Properly calculated, the additional sum of £29,040.25 is said to be due to Victorygame (as set out in Appendix 3 to the Amended Defence and Counterclaim). In his oral closing, Mr Clarke accepted that there was no evidence to support the further claim for £10,147.96 in respect of service charges due from the buyer said to have been incorrectly credited on completion, and that this was not being pursued.

165. I reject this head of counterclaim. I have already found on the evidence that the defendants had waived the entitlement to this rental increase. In any event, having proceeded to completion on the basis of the figures presented in the apportionment schedules, I do not consider that it would have been open to the defendants to go behind those figures.

166. Victorygame claims the sums due under the loan agreement. There is no dispute as to its entitlement to repayment of the principal sum of £800,000 and the final month's accrued interest payment of £24,000. Victorygame is also entitled to maintain a claim for these sums on the two cheques that were dishonoured. I have already rejected the claim for default interest under clause 4.1.1 on the basis that it constituted an unlawful penalty. Subject to any further submissions, however, it would seem to me that Victorygame is entitled to interest on all sums outstanding under the loan agreement

at the rate of 3% per month, compounded monthly. Victorygame will need to produce a calculation showing the amount outstanding.

167. Under special conditions (b) and (c) of the offer letter, Victorygame is now entitled to date the legal charge over, and to register it against the title to, 203 Tentelow Lane. The court will grant and make any necessary declarations and orders to give effect to that entitlement.

X: Conclusions

168. For the reasons already given, Ahuja's claim for damages for misrepresentation is dismissed. Although Ahuja has established that there was a fraudulent misrepresentation, it was not actionable because the defendants have established that it did not induce Ahuja to enter into the sale contract; and, in any event, it has caused no loss to Ahuja. The fourth of the ingredients identified by Jackson LJ in *ECO3 Capital*, focussing upon what the claimant did, has not been established. Ahuja did not act in reliance on the representation; nor has it suffered any loss.

169. Although Ahuja has established its claim for breach of contract in respect of the lease term representation, it has not proved that it has suffered any actual damage as a result of that breach.

170. Ahuja's claims therefore fall to be dismissed.

171. Victorygame is entitled to judgment to its counterclaim to the extent indicated in section IX of this judgment (above).

172. I acknowledge the court's thanks to all four trial counsel for the skilful way in which they worked together to ensure that this trial concluded within its allotted time estimate and also for the considerable assistance they have provided, and the co-operation and good humour they have displayed, to this court throughout the course of this trial. It is only right that the court records the considerable debt that the parties owe to the skill and attention to detail of their respective counsel and solicitors. Neither side merited such application and effort on the part of their legal team.

173. Given that it is now the Long Vacation, it is likely that this judgment will fall to be handed down remotely, and in the absence of the parties. In this event, the claim and the counterclaim will both stand adjourned for agreement (or, in default of agreement, further submissions) on the form of order required to give effect to this judgment, costs, and any consequential matters. I will therefore extend the time for appealing, and for any application for permission to appeal, until 21 days after that adjourned hearing, with permission to the parties to apply to the court in the meantime.

Postscript

174. On the morning of 24 August, the day on which counsel were required to submit their list of any typing corrections and other obvious errors for incorporation in my handed down judgment, Chancery Listing forwarded to me an email from the claimant's solicitors. This read: "Following the hearing before HHJ Hodge QC on 1-14 July 2021 our client (the Claimant) feels that some of his responses were not translated accurately by the translator. As such, he would like to see the video recording of his

witness evidence. Is it possible to get a copy of this please? His evidence was given on the afternoon of day 1, day 2, day 3 and up to 10:50 am on day 4."

175. I requested Chancery Listing to respond: "The claimant chose to give his evidence through an interpreter. I am satisfied that he had a sufficient understanding of English to have been able to pick up on any inaccuracies and to alert his solicitors and counsel to them during the course, or, at the very latest, immediately after the conclusion, of the trial. I am not prepared to permit the video to be released over a month after the conclusion of the trial, and after I have already written and released my judgment in draft."