



Neutral Citation Number: [2023] EWHC 1122 (Ch)

Claim Nos: IL-2022-000043 and IL-2023-000027

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

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL
Date: 11 May 2023

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

(1) CLEARCOURSE PARTNERSHIP
ACQUIRECO LIMITED
(2) E-NOVATIONS (LONDON) LIMITED **Claimants**
- and -
(1) MANOJ JETHWA
(2) REKHA JETHWA
(3) PALMYRA HOLDINGS MANAGEMENT
LIMITED
(4) EPOS DIRECT EUROPE LIMITED **Defendants**

And Between:

(1) CLEARCOURSE PARTNERSHIP
ACQUIRECO LIMITED
(2) GERALD JOHN GUALTIERI
(3) JOSHUA BARRETT ROWE **Claimants**
-and-
MANOJ JETHWA **Defendant**

Andrew Mitchell KC and Joseph Leech (instructed by Gibson & Co) for the Claimants

James Harris (instructed on a **Direct Access basis**) for the **Defendants (apart from Palmyra Holdings Management Limited)**
Madeleine Heal (instructed by **Sherrards Solicitors LLP**) for the **Defendant, Palmyra Holdings Limited**

Hearing dates: 27-29 March 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Thursday 11 May 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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HHJ CAWSON KC

HHJ CAWSON KC:

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Introduction

1. This Judgment concerns five applications made within two sets of proceedings that relate to a share purchase agreement dated 30 September 2020 made between the Defendants, Manoj Jethwa (“**Mr Jethwa**”), Rekha Jethwa (“**Mrs Jethwa**”) and Palmyra Holdings Management Limited (“**Palmyra**”) (together “**the Sellers**”) (1), and the First Claimant, ClearCourse Partnership AcquireCo Limited (“**CPA**”) (2) (“**the SPA**”), for the sale to CPA of the entire issued share capital of the Second Claimant, E-Novations (London) Limited (“**ENL**”).
2. The first set of proceedings that I am concerned with was commenced in the Intellectual Property List (Chancery Division) in the Business and Property Courts on 27 May 2022 (Claim no. IL-2022-000043) (“**the Chancery Proceedings**”). The Claimants in the Chancery Proceedings are CPA and ENL, and the Defendants are Mr Jethwa, Mrs Jethwa, Palmyra and Epos Direct Europe Limited (“**EDE**”). In the Chancery Proceedings, CPA and ENL seek, primarily:
 - i) A Declaration that ENL is the legal and beneficial owner of certain intellectual property (“**the IP**”), said by the Claimants to belong to ENL,

but which Mr Jethwa contends belongs to EDE, and further relief consequential upon such declaratory relief;

- ii) Repayment of the sum of £200,000 loaned as to £150,000 to Mr and/or Mrs Jethwa and as to £50,000 to Palmyra, but which is now said by CPA and ENL to be repayable as to the entire £200,000 by Mr and Mrs Jethwa;
 - iii) An enquiry as to damages payable to CPA:
 - a) For breach of contract on the basis that if the Intellectual Property did not belong to ENL as at the date of the SPA, then Mr and Mrs Jethwa are in breach of a number of warranties given by them in the SPA; and
 - b) Further, on the basis that Mr Jethwa fraudulently misrepresented that the IP did belong to ENL thereby inducing CPA to enter into the SPA, it being alleged that Mrs Jethwa and Palmyra are also liable for Mr Jethwa's deceit, having authorised him to conduct the relevant negotiations leading to the SPA on their behalf.
3. The second set of proceedings that I am concerned with was commenced shortly prior to the Chancery Proceedings in the Media and Communications List in the Queen's Bench Division (as it then was) (Claim no. QB-2022-011077) on 1 April 2022 ("**the QB Proceedings**"). The Claimants in the QB Proceedings are CPA, Gerald John Gualtieri ("**Mr Gualtieri**") and Joshua Barrett Rowe ("**Mr Rowe**"). At the relevant time, Mr Gualtieri was CPA's Chief Executive Officer, and Mr Rowe was CPA's Head of Mergers and Acquisitions. The sole Defendant is Mr Jethwa.
 4. At the commencement of the QB Proceedings, the Claimants sought injunctive relief to restrain Mr Jethwa from disseminating information alleged to be confidential to the Claimants in the QB Proceedings, and damages for breach of confidence. Stacey J granted interlocutory injunctive relief on the Claimants' without notice application on 1 April 2022. This interlocutory injunctive relief was continued by Saini J at an inter partes hearing on 18 May 2022. I am not presently concerned with this aspect of the QB Proceedings, but rather with a counterclaim that Mr Jethwa has brought therein seeking to recover sums alleged to be due from CPA under the SPA by way of earn-out consideration, and alleging that Mr Gualtieri and Mr Rowe procured CPA to act in breach of contract, and conspired together with CPA to cause loss to Mr Jethwa ("**the QB Counterclaim**").
 5. The QB Proceedings were transferred from the King's Bench Division to the Chancery Division by Master Gidden on 21 February 2023, and on transfer have been assigned to the Intellectual Property List, with Claim no. IL-2023-000027.
 6. The five applications presently before me are the following:
 - i) An application dated 3 August 2022, brought by Palmyra in the Chancery Proceedings seeking an order that the claim therein as against

Palmyra be struck out pursuant to CPR 3.4(2)(a) and/or (b), and for reverse summary judgment in its favour against the Claimants therein pursuant to CPR Part 24 (“**the First Application**”);

- ii) An application dated 17 October 2022, brought by the Claimants in the Chancery Proceedings seeking permission pursuant to CPR 17.1(2)(b) to file and serve Re-Amended Particulars of Claim in the terms of the draft attached to the application (“**the Second Application**”). The effect of amendments proposed by the Second Application would be to limit the claim as against Palmyra to one of deceit (on the basis that Palmyra is liable for fraudulent misrepresentations alleged to have been made by Mr Jethwa), and the amendments proposed provide further particulars in relation to this deceit claim;
- iii) An application dated 16 September 2022, brought by the Claimants in the QB Proceedings seeking summary judgment pursuant to CPR Part 24 as against Mr Jethwa on the QB Counterclaim and/or an order that the QB Counterclaim be struck out pursuant to CPR 3.4 (“**the Third Application**”); and
- iv) An application dated 6 December 2022, brought by Mr Jethwa in the QB Proceedings whereby he seeks permission to file and serve a Re-Amended Defence and Counterclaim that would join Palmyra as a Defendant to the Counterclaim, and make certain amendments to the QB Counterclaim as formulated against CPA, Mr Gualtieri and Mr Rowe (“**the Fourth Application**”).
- v) An application dated 20 September 2022, brought by the Claimants in the Chancery Proceedings whereby they seek summary judgment pursuant to CPR Part 24 in respect of a number of the claims brought therein, and/or to strike out pursuant to CPR 3.4 those parts of the Defence of Mr and Mrs Jethwa that relate to those claims (“**the Fifth Application**”). The claims in question are: (a) the claim to recover as against Mr and Mrs Jethwa the £200,000 that had originally been loaned to Mr and Mrs Jethwa and Palmyra, (b) the claim of breach of warranty against Mr and Mrs Jethwa, and (c) the claim of deceit as against Mr and Mrs Jethwa, but not Palmyra. Whilst the evidence in support of the Fifth Application identified other issues for summary determination or dismissal, in the limited time available at the hearing they were not pursued. The Claimants have sought to reserve their position in respect of these issues with a view to restoring them for hearing if appropriate. In seeking summary determination or strike out in respect of the breach of warranty and deceit claims, the Claimants say that they do so on the basis of taking Mr and Mrs Jethwa at their word as expressed in the present proceedings so far as the ownership of the IP is concerned, i.e., on the basis that it does not belong to the Claimants. However, the claim for declaratory relief in respect of the IP to the effect that it belongs to ENL has not been formally abandoned. This is an issue to which I will return.

7. The parties were agreed that the First and Second Applications should be dealt with together, as should the Third and Fourth Applications, although there was some disagreement as to the order in which I should hear the five applications. In the event, I heard submissions on the First and Second Applications, before hearing submissions on Third and Fourth Applications, and finally hearing submission on the Fifth Application. Given the limited time available, I reserved judgment on all five applications.
8. Mr Andrew Mitchell KC and Joseph Leech appeared for the Claimants, Mr James Harris appeared for all the Defendants apart from Palmyra, and Ms Madeleine Heal appeared for Palmyra. I am grateful to them all for their helpful written and oral submissions.

Key Background Facts

9. ENL is a company that has at all relevant times specialised in the sale and supply of sophisticated electronic tills (otherwise known as electronic point-of-sale devices or ‘EPOS’) and associated software (“**the Emperium Software**”) for use by retail businesses. The tills in question not only record sales, but also store and provide the business using the same with detailed information about such matters as costs and stock levels. Thus, for example, in the case of a restaurant the till retains information so the business can obtain accurate information as to the cost of each component of each meal, and the usage of stocks for re-order purposes.
10. Both prior to and after the entry into of the SPA, ENL has contracted with all its customers using a standard form End User Licence Agreement (“**EULA**”). This EULA defined “*Licensor*” as meaning ENL, and “*Licensee*” as meaning the software user “*having accepted the agreement*”. Article 2 thereof described the purpose of the EULA as being: “*to enable the Licensor to grant the Licensee non-exclusive and nontransferable licence for the software as set forth hereunder for the whole term of protection of the rights over the said software.*”
11. It is the Claimants’ case that this document plainly purported to grant licences, and that in order to grant such licences, ENL must either have owned the IP in the Emperium Software, or at least itself held a licence in respect thereof on terms that entitled ENL to grant sub-licences. On the other hand, it is the Mr and Mrs Jethwa’s and EDE’s case that the EULA was merely intended to impose restrictions on the use that might be made by the purchaser of the IP in the Emperium Software.
12. Prior to the entry into the SPA, the issued share capital of ENL was held as to 80 shares by Mr Jethwa, 40 shares by Mrs Jethwa and 40 shares by Palmyra.
13. Palmyra is a company incorporated in the British Virgin Islands (“**BVI**”) on 31 January 2005 for the purpose of holding shares in ENL. There was initially a suggestion in Mr Jethwa’s witness statement dated 21 April 2022 in the QB Proceedings that Palmyra was controlled by Mr and/or Mrs Jethwa. However, I understand it to now be common ground that the position is as set out in the witness statement of Shamsher Prakash (“**Mr Prakash**”) dated 8 August 2022, made on behalf of Palmyra, namely that following an approach to Mr Prakash

made by Mr Jethwa, Palmyra invested £600,000 in ENL in 2005, and that Palmyra is beneficially owned by Ahmed Tayeb and his wife, Cherine El Maghraby. The latter were clients of Mr Prakash through his company, Archstone Management Ltd, that provides professional services to companies of high-net-worth individuals and families.

14. Mr Prakash was appointed as a director of ENL on 7 February 2005 in order to meet the conditions of Palmyra's investment in ENL, but he retired as a director of ENL on 15 April 2020.
15. From 15 April 2020 to the date of entry into the SPA, Mr Jethwa was the sole director of ENL.
16. CPA, or rather ClearCourse Partnership LLP ("**CP LLP**") on its behalf, initially approached Mr Jethwa with regards to a possible purchase of the share capital of ENL in August/September 2009. A non-disclosure agreement was entered into between ENL (1) and CP LLP (2) on 4 September 2009 ("**the NDA**") in connection with a possible transaction ("**the Transaction**") with ENL and/or its subsidiaries and Affiliates (as defined). The NDA related to the provision of "*Evaluation Material*", and provided that the latter should be used solely for the purpose of evaluating, negotiating and consummating the Transaction. Clause 6 thereof provided as follows:

"No Representations or Warranties. You hereby acknowledge that [ENL] shall not be deemed to have made any representations or warranties as to the accuracy or completeness of the Evaluation Material. Only those representations and warranties which are made by [ENL] in a final definitive agreement regarding a Transaction, when, as and if executed, and subject to such limitations and restrictions as may be specified therein, will have any legal effect."

17. An indicative offer was made by CPA in September 2019, but matters did not progress, and negotiations were put on hold. It is the Claimants' case that matters did not progress because CPA did not yet have a working payment processing system or solution suitable for use with EPOS. However, in May 2020, Mr Jethwa re-established contact with CPA, and as the latter's payment solution was closer to launch, negotiations recommenced.
18. A letter of intent ("**the LOI**") was signed by Mr Gualtieri on behalf of CP LLP and by Mr Jethwa on behalf of ENL on 11 June 2020. The LOI was headed "*Non-Binding Offer*" and set out a "*Deal Structure & Other Considerations*". The latter referred to a payment of £2 million in cash at completion of the Transaction, a deferred payment of £250,000 to be paid if ENL achieved £450,000 of EBITDA in the calendar year 2020, and to a mechanism for earn out referable EBITDA in the calendar year 2021. There was then, at paragraph 1(e) thereof, reference to further "*Earn-out 2*" under which: "*We will pay a multiple of the Net Revenue generated per payment transaction for the incremental credit and/or debit card payment volumes migrating onto the CPA payments solution, ClearAccept Limited ("**ClearAccept**")*" – in three periods that were then specified. The relevant paragraph went on to say that:

- i) *“By incremental we mean the Net Revenue generated by credit and/or debit card payments processed by ClearAccept in a given period, over and above the Revenue in the previous period.”*
 - ii) Revenue per payment transaction would be calculated using the formula: Net Revenue = Fees to Merchant – (Transaction Costs + Merchant Defaults), with definitions then being provided in respect of the respective components of this definition.
19. The negotiations leading to the SPA were conducted on behalf of the Sellers by Mr Jethwa. There is no evidence or even suggestion that any representative of Palmyra, such as Mr Prakash, played any part in the negotiations. The only distinct involvement of Palmyra or its representatives in the process related to certain due diligence in respect of its incorporation as a BVI incorporated company.
20. EDE is a company controlled by Mr Jethwa, of which he is sole director. It was incorporated on 25 April 2017, and has never been a subsidiary of ENL. The Defendants maintain that the IP in the Emperium Software was developed by an Indian company controlled by Mr Jethwa, namely Epos Guru Private Ltd (“**Epos Guru**”), between 2008 and 2013, and that Epos Guru supplied the Emperium Software to till manufacturers until 2017. It is further alleged that Epos Guru transferred all its rights in the IP relating to the Emperium Software to EDE by way of a transfer document dated 9 June 2017.
21. Prior to the entry into of the SPA, CPA was desirous of formalising the relationship between ENL and EDE, which led to an Outsourced Services Agreement between EDE and ENL (“**the OSA**”) being signed on 7 August 2020, by Shivaji Aravinthan, described as Finance and Operations Manager, on behalf of EDE, and by Mr Jethwa on behalf of ENL. There is an issue between the parties as to whether this is the effective agreement as between these parties, in that CPA suggested certain revisions to the terms of the OSA, and whilst Mr Jethwa said that he was happy to sign this revised version of the OSA, it is unclear whether he ever did so. For present purposes, it is not suggested otherwise than that I should proceed on the basis that the effective document is that signed on 7 August 2020.
22. The OSA provided for ENL to purchase services from EDE described as “*Helpdesk Support*”, “*Customer Service/Admin*”, “*Marketing*”, “*Software Development*”, and “*Digital Marketing Support*”. So far as software development was concerned, a cost per hour of £11.50 (fixed) and £16.20 (on-demand) was specified, with reference to “*fixed resources*” of 4, “*average hours*” of 175, and an “*average monthly cost*” of £8,050.
23. Clause 6 of the OSA, headed “*Exclusion of Liability*”, provided as follows:

“We both recognise that there is a risk that the services may not perform as expected and may not be satisfactory. When services are rendered the risk of it not working satisfactorily or according to any representations made may be assumed by you, us or the supplier/provider of it. You and we both appreciate that the allocation of risk is a matter of agreement and have

decided that you shall bear the risk on the terms set out herein as you acknowledge that we are only provide (sic) outsourced services and you yourself have provided the relevant training and take ownership. [Emphasis added].

24. It will be necessary to consider the terms of the SPA in more detail when determining the respective applications, however, the essential structure thereof, so far as is relevant, was as follows:
- i) Clause 1.1 included a number of definitions.
 - ii) Clause 2 dealt with the sale and purchase of the entire share capital of ENL, i.e., the 200 shares held by the Sellers.
 - iii) Clause 3 provided for payment of:
 - a) the “*Initial Payment*”, i.e., of £2,342,718, on completion, subject to adjustment calculated in accordance with Schedule 6;
 - b) the “*EBITDA Earn-Out Consideration*” (if any) to be calculated and satisfied in accordance with Schedule 7; and
 - c) the “*Revenue Earn-Out Consideration*” (if any) to be calculated and satisfied in accordance with Schedules 8 and 9.
 - iv) Clause 6 dealt with Warranties and Limitations. In essence:
 - a) Each of the “*Sellers*”, i.e., each of Mr and Mrs Jethwa and Palmyra, severally warranted that each of the “*Warranties*” at paragraphs 1 and 2.1 of Schedule 3 was true and accurate and not misleading at the date of the SPA;
 - b) Each of the “*Warrantors*”, i.e., only Mr and Mrs Jethwa, severally warranted to CPA that each “*Warranty*” (with the exception of those at paragraphs 1 and 2.1 of Schedule 3) and “*Tax Warranty*” was true and accurate and not misleading as at the date of the SPA subject only, so far as relevant, to:
 - i) “*any matter Disclosed in the Disclosure Letter*; and
 - ii) “*the limitations and qualifications set out in this clause 6*”.
 - v) Clause 8 dealt with earn-out provisions, and provided that the parties agreed that the provisions of Schedule 7, Schedule 8 and Schedule 9, should apply in relation to the calculation of the EBITDA Earn-Out Consideration, the Revenue Earn-Out Consideration and the management and direction of ENL during the “*EBITDA Earn-Out Period*” and the “*Revenue Earn-Out Period*”.
 - vi) Clause 9 dealt with “*Intellectual Property Rights*”. It provided that the “*Target Intellectual Property Rights*” and the “*Third Party Intellectual*

Property Rights” comprised all IP rights necessary for ENL to operate its business as it operated at the date of the SPA. “*Target Intellectual Property Rights*” had been defined in clause 1.1 as meaning “*all Intellectual Property owned, used, controlled or held for use by [ENL] including the Intellectual Property listed in Schedule 4*” [emphasis added], and “*Third Party Intellectual Property Rights*” had been defined in clause 1.1 as meaning “*all Intellectual Property used by [ENL] in connection with the business of [ENL] but not owned by [ENL] as listed in Part 4 of Schedule 4*”.

- vii) Clause 16 comprised an entire agreement provision as follows:
 - a) Clause 16.1 provided that the SPA and the other “*Transaction Documents*” constituted the entire agreement between the parties relating to its subject matter and superseded any previous agreements or arrangements between them relating to the acquisition of “*the Shares*”; and
 - b) Clause 16.2 provided that CPA agreed that it had not: “*... entered into this agreement or any other Transaction Document in reliance on any representation, statement, covenant, warranty or undertaking made or given by or on behalf of any other party except as expressly set out in this agreement or any other Transaction Document. Nothing in this clause shall operate to exclude or limit any liability on the part of the Sellers for fraud or fraudulent misrepresentation.*”
 - viii) Schedule 1 set out details in respect of the Sellers.
 - ix) Schedule 2 set out details in respect of ENL.
 - x) Schedule 3 set out the Warranties and Tax Warranties provided for by clause 6.
 - xi) Schedule 4 related to IP, and under the headings of each of “*Registered Intellectual Property Rights*”, “*Patents*”, “*Unregistered Intellectual Property Rights*” and “*Third Party Intellectual Property Rights and IP Licences*”, stated simply “*None*”.
 - xii) Schedule 7 contained provisions in respect of “*EBITDA Earn-Out Consideration*”.
 - xiii) Schedule 8 contained provisions in respect of “*Online Sales Revenue Earn-Out Consideration*”.
 - xiv) Schedule 9 contained provisions in respect of “*Point of Sale Revenue Earn-Out Consideration*”.
25. Contemporaneously with entering into the SPA, Mr and Mrs Jethwa signed a Disclosure Letter dated 30 September 2020 (“**the Disclosure Letter**”), which was expressed to be that referred to in the SPA and as constituting full disclosure

to CPA for the purposes of the SPA of the facts and circumstances which were or may have been inconsistent with the Warranties referred to in clause 6 and contained in Schedule 3 of the SPA. The Disclosure Letter provided general disclosure in respect of certain specific matters including “*The Transaction Documents*” and documents contained in the folder titled “*Shadow*” within the “*Data Room*”, as well as providing specific disclosure against individual Warranties.

26. The present dispute arose because, sometime after entry into the SPA, Mr Jethwa contended that the IP in the Emperium Software did not belong to ENL, but rather to EDE, and that ENL, as now owned by CPA, has no rights in respect of the Emperium Software, whether of ownership, or the right to licence others, by way of sub-licence or otherwise, to use the Emperium Software. It is this stand taken by Mr Jethwa that prompted the issue of the Chancery proceedings in which Claimants maintain that the IP in the Emperium Software did at all relevant times and does now belong to ENL, or, at the very least that ENL has the right to licence purchasers of EPOS hardware and software in respect of the use of the same.
27. Following the entry into the SPA, Mr Jethwa continued to be employed by ENL until 31 December 2021.

Principles to be applied in respect of summary judgment, strike out and amendment

28. The respective applications involve applications for summary judgment, applications to strike out statements of case, and applications to amend statements of case. I do not understand the principles to be applied in determining these applications to be in dispute.
29. So far as applications for summary judgment pursuant to CPR Part 24 are concerned:
 - i) The question is whether the respondent to the application can show that they have a “*real prospect*” of succeeding on the relevant claim or issue, or of successfully defending the relevant claim or issue, as appropriate, within the meaning of CPR 24.2.
 - ii) What this means was helpfully explained by Lewison J (as he then was) in his oft approved and applied passage in *Easyair Ltd (ta Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], referred to in Civil Procedure 2023 at 24.2.3. In short:
 - a) The court must consider whether the respondent to the application has a “*realistic*” as opposed to a “*fanciful*” prospect of success.
 - b) The question boils down to whether the claim carries some degree of conviction, is more than merely arguable and has reality to it;

- c) The Court should not conduct a “*mini trial*” in reaching its decision, although that does not mean that it is bound to accept everything that a party says if factual assertions lack reality, particularly if contradicted by contemporaneous documents;
 - d) Although micawberism will not assist a party seeking to rely on something that might turn up at trial, the Court should take account of evidence that can reasonably be expected to be available at trial. Thus if reasonable grounds exist for believing a fuller investigation into the facts would add to or alter the evidence available to a trial judge, or if a factual dispute is unlikely to be able to be resolved without reference to further (and especially oral) evidence, then a case should be permitted to proceed to trial – see *Three Rivers DC v Bank of England* [2003] AC 1, and *Doncaster Pharmaceuticals v Bolton* [2007] FSR 63 at [18];
 - e) On the other hand, if a case or issue can be disposed of on the basis of a short question of law or construction, and all the relevant materials are before the court to enable it to do so, then the Court should grasp the nettle and decide it.
- iii) The decision of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [23] – [27], provides some helpful guidance as to the correct approach to an application for summary judgment in cases of deceit / fraudulent misrepresentation. Summary judgment can be granted in such cases, where the defence lacks the necessary realism.
30. Under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses: “*no reasonable grounds for bringing or defending claim*”. For this purpose:
- i) It is to be assumed, broadly speaking, that the relevant facts pleaded in the statement of case are true, the question being whether they disclose a sustainable case in law. There is thus a potential distinction with an application for summary judgment where evidence is admissible to show that the pleaded allegations are fanciful, albeit that the court should be cautious about rejecting a parties’ factual case at the summary judgment stage – see *King v Stiefel* (supra) at 26.
 - ii) The Court is entitled to take into account, in considering an application to strike out a statement of case, a proposed amended (or re-amended) statement of case, at least if it is properly considered appropriate to grant permission to amend (or to re-amended).
31. The principles to be applied on an application to amend a statement of case under CPR 17.1(2)(b) were helpfully summarised in the recent decisions of *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) at [10] per Lambert J, and *Front Door (UK) Ltd v Lower Mill Estate Ltd* [2021] EWHC 2324 (TCC) at [29] per O’Farrell J. In essence:

- i) The Court must decide whether to allow the amendments by applying the overriding objective.
 - ii) Applications to amend necessarily involve balancing the injustice to the applicant if permission to amend is refused against the injustice to other parties if it is allowed and the impact on the management of the proceedings at proportionate cost.
 - iii) The timing of the application is of crucial importance. Thus a “*very late*” application (meaning one that threatens the trial date) faces a more significant burden than one made promptly and at an early stage of the proceedings.
 - iv) The amendments will be allowed only if the statement of case, as amended, has a real prospect of success, which requires the application of the well-understood test to be applied on an application for summary judgment referred to above.
32. It follows from the above that the key question in respect of the claims or defences that are proposed be disposed of on a summary basis is as to whether they disclose a real prospect of success.

The First and Second Applications

Introduction

33. I have set out in paragraph 2 above the primary heads of claim in the Chancery Proceedings. As issued, the claim against Palmyra extended to seeking declaratory relief in respect of the IP in the Emperium Software, the recovery of the £50,000 loaned to Palmyra as referred to in paragraph 2(ii) above, as well as claims of breach of warranty and deceit as referred to in paragraph 2(iii) above to be pursued in the event that the Claimants fail to establish that ENL had ownership or other sufficient rights over the Emperium Software, i.e., they fail in their primary claim that the Warranties and representations made as to ownership of the IP in the Emperium Software were true.
34. By the First Application, Palmyra seeks to strike out the whole of the claim as against it. The Second Application, with the attached Re-Amended Particulars of Claim, issued in response thereto, seeks permission to re-amend the Particulars of Claim so as to limit the claims as against Palmyra to a claim for declaratory relief and deceit, and develop its case that Palmyra is liable for any deceit on the part of Mr Jethwa because he acted as its agent in the relevant negotiations.
35. So far as the £50,000 loan is concerned, the Claimants accept that Palmyra repaid this. It is now the Claimants’ case that these monies, upon repayment, were simply paid out to Mr and/or Mrs Jethwa so as to increase the sum owed by then to £200,000. So far as the breach of warranty claim is concerned, the claim was initially pleaded on the basis that all of the Warranties had been given by Mr and Mrs Jethwa and Palmyra whereas, as referred to above, the only

warranties given by Palmyra were those referred to in paragraphs 1 and 2.1 of Schedule 3 to the SPA, which provide no basis for a claim.

36. However, the Claimants maintain their deceit claim against Palmyra. They do not allege that Palmyra itself acted fraudulently or dishonestly; rather, it is their case that Mr Jethwa, if ENL did not own the IP in the Emperium Software, or have sufficient rights thereover, knowingly made false representations to the contrary in the lead up to the SPA, and that Palmyra is liable together with Mr and Mrs Jethwa for his actions in doing so, because Mr Jethwa acted as agent for all of them in respect of the negotiations leading to the conclusion of the SPA.
37. In paragraph 20 of Amended Particulars of Claim, which it is not sought to re-amend, pleads that the negotiations were primarily conducted by Mr Jethwa for CPA.
38. In paragraph 24 of the Amended Particulars of Claim (which again it is not proposed to re-amend), it is pleaded that during the negotiations leading to the conclusion of the SPA, Mr Jethwa was asked to provide and did provide “*on behalf of ENL and the Sellers*” (i.e. including Palmyra - my emphasis) the written responses that are relied upon as giving rise to the representations in question (“**the Representations**”).
39. The Representations themselves are set out in paragraph 29 of the Amended Particulars of Claim (which, again it is not sought to re-amend). It is pleaded in paragraphs 30 and 31 of the Amended Particulars of Claim that the Claimants’ primary position is that the Representations were at all material times true, but that if “*any of the Representations were not true*”, then Mr Jethwa knew that they were not true, or, was at least reckless as to whether they were true or false, and intended that they should be relied upon by CPA. Only a minor re-amendment is proposed to paragraph 31 to add “*either in whole or substantial part*” after the extract from paragraph 31 quoted above.
40. However, paragraphs 31A, 31B and 31C then go on to specifically pleaded as follows:

“31A. Further, in making the Representations, Mr Jethwa acted as agent for the other Sellers. From the start of the communications between CPA and Mr Jethwa and throughout the Negotiations, Mr Jethwa negotiated for the sale of the entire shareholding in ENL, thereby acting and holding himself as acting for all the Sellers. It is reasonably inferred (sic) that he was authorised by the other Sellers to do so. All the Sellers instructed the same solicitors, Kidd Rapinet, on or about 19 June 2020. The Data Room, which contained the Technical Response Spreadsheet and the General Response Spreadsheet (referred to in paragraphs 24 to 26 above), which were uploaded on or around 26 June 2020 and 10 July 2020, was provided by or on behalf of all the Sellers, as recorded in cl. 1.1 of the SPA. The contents of the Data Room were later Disclosed to CPA by the Disclosure Letter, which, as stated in cl. 1.1 of

the SPA, was “from the Sellers to the Buyer” (notwithstanding that it was only signed by Mr and Mrs Jethwa).

31B. Mrs Jethwa did not communicate with CPA or CPA or their representatives during the Negotiations, except through Mr Jethwa and Kidd Rapinet. Neither did Palmyra, except from 6 to 14 August 2020, when a few emails passed between CPA’s solicitors and Shamsher Prakash, Palmyra’s managing agent, and BVI counsel appointed for Palmyra, all in relation to the provision of the standard legal opinion required to give CPA comfort in relation to contracting with such a BVI company (which opinion contained nothing relevant to these proceedings).

31C. Accordingly, Mrs Jethwa and Palmyra are liable for the Representations, as they were made by Mr Jethwa on their behalf. Clause 16.2 does not serve to exclude their liability and does not apply in respect of representations made in the SPA or any other Transaction Document (which term covers the Disclosure Letter and the contents of the Data Room and/or the Technical Response Spreadsheet and/or the General Response Spreadsheet) or in case of fraud or fraudulent misrepresentation.”

41. Paragraph 32 of the proposed Re-Amended Particulars of Claim, which does contain significant proposed re-amendments, goes on to plead that CPA entered into the SPA in reliance upon the Representations, the point being made that the group of companies of which CPA formed part specialised in the acquisition of software companies, and would not have been interested in purchasing the share capital of ENL had CPA and not been led to believe that it was purchasing the IP in the Emperium Software. It is then alleged that if the Representations were false, then CPA has suffered substantial loss in entering into the SPA, and thereby acquiring a company worth less than the price paid for it if that was the case.

Palmyra’s Case

42. On behalf of Palmyra, Ms Heal submits that the deceit claim as against Palmyra, even as now sought to be pleaded in the proposed Re-Amended Particulars of Claim fails to disclose a claim with a real prospect of success.
43. It is submitted that no case that Mr Jethwa was authorised by Palmyra to sell its shares as agent is pleaded re-Amended Particulars of Claim. Ms Heal submits that as a matter of true interpretation of the SPA, it cannot be true both that Palmyra severally sold its share entitlement in ENL to ClearCourse as pleaded in the Re-Amended Particulars of Claim on the one hand, and that Palmyra’s shares in ENL were sold to CPA by Mr Jethwa acting as Palmyra’s agent and that Mr Jethwa had authority to do so as sought to be alleged on the other hand. Ms Heal submits that, as a matter of true interpretation of the SPA, Palmyra severally sold its shares, and therefore it is not open to CPA to maintain that Mr Jethwa acted as Palmyra’s agent.

44. Ms Heal relies upon In *Universal Steam Navigation v James McKelvie* [1922] 1 K.B. 518 at 534-535, per Atkin LJ, as upheld by the House of Lords at [1923] A.C. 492, as authority for the proposition that the identity of a contracting party, and whether he was authorised to act as agent, is a question of construction of the written contract.
45. Ms Heal submits that a number of provisions of the SPA clearly demonstrate that Palmyra entered into the SPA in its own capacity, and not through the agency of Mr Jethwa. In particular she refers to the reference to the separate entitlements of the respective shareholders in Schedule 1 to the SPA, the fact that the SPA was separately signed on behalf of Palmyra, the reference to the Sellers “*severally*” covenanting in clause 2.2 and the reference to joint and several liability in clause 2. 4..
46. Ms Heal sought to distinguish the case of *Breiss v Woolley* [1954] AC 333 on the basis that, in that case, other shareholders had expressly authorised the managing director to enter into negotiations with regard to the sale of their shares, and on that basis were liable together with him in respect of fraudulent misrepresentations made by him in the course of acting as agent on their behalf in respect of the negotiations, even though the other shareholders themselves were not party to the making of the fraudulent misrepresentations. It is submitted that, in the present case, there is no evidence of any such express authorisation being given, rather, it is submitted, an offer was simply made for Palmyra’s shares, which it accepted. As Ms Heal put it, “*that is all that happened*”. It is submitted that, in these circumstances, there can have been no agency, and so Palmyra cannot be held responsible for any fraudulent misrepresentations made by Mr Jethwa.
47. Further, Ms Heal points to other terms of the SPA, and the Disclosure Letter, as demonstrating an intention on the part of the parties to the SPA that responsibility for the matters covered by the Warranties, apart from those referred to in paragraphs 1 and 2.1 of Schedule 3, should be limited to Mr and Mrs Jethwa, without exposing Palmyra to potential liability in respect thereof. As I understand Ms Heal submission, it was to the effect that CPA must have known therefrom, and the parties were proceeding on the basis that, Palmyra was making no representations. Consequently, it cannot be said that any representations on Palmyra’s part induced CPA to enter into the SPA. It is thus submitted that as deceit is not actionable *per se*, and is dependent upon damage, here inducing entry into the SPA, there can be no properly constituted cause of action against Palmyra.
48. Further, Ms Heal relies upon clause 6 of the NDA referred to in paragraph 16 above as preventing CPA from asserting that it is relied upon any misrepresentation arising from matters disclosed on behalf of ENL during the negotiation process, to the extent that Palmyra might not be entitled to rely upon clause 16.2 of the SPA.
49. So far as CPA’s claim for declaratory relief is concerned, Palmyra’s position, as expressed in paragraph 29 of Mr Prakash’s witness statement, is that Palmyra is prepared to give an undertaking to the Court in respect of IP in the terms therein referred to.

CPA's case

50. CPA relies upon *The Ocean Frost* [1986] AC 717 and *Hockley Mint v Ramsden* [2018] EWCA Civ 2480, recently applied by Henshaw J in *Ivy Technology Ltd v Martin & Bell* [2022] EWHC 1218 (Comm), as authority for the proposition that a principal may be liable for fraudulent misrepresentations made by its agent if those misrepresentations are made within the scope of the agent's actual or ostensible authority, or (more specifically) "*in the course of a negotiation which the agent had the principal's actual or ostensible authority to carry out*" (per Henshaw J at [428]). It is submitted that these authorities show that it is not necessary that the agent has actual or ostensible authority either to make the specific fraudulent misrepresentations on which the claimant relies or to commit fraud. It suffices that the agent is authorised (actually or ostensibly) to act in a way that would involve making representations of the kind that they did.
51. Mr Mitchell KC submits on behalf of CPA that it is important to distinguish between authority to enter into the SPA on Palmyra's behalf on the one hand, and authority to negotiate on Palmyra's behalf the terms for the sale of the relevant shares as then reflected in the SPA entered into by the parties on the other hand. It is accepted that Palmyra entered into the SPA on its own account, and otherwise than through the agency of Mr Jethwa as demonstrated by the provisions that Ms Heal has referred to. However, it is said that this is beside the point, and the key question is as to whether Palmyra authorised Mr Jethwa as its agent to conduct the negotiations on its behalf that led to the entry into SPA, during the course of which the alleged fraudulent misrepresentations were made.
52. Mr Mitchell submits that the facts of *Ivy* are similar to the facts of the present case. In *Ivy*, one shareholder in a number of companies (Mr Martin) negotiated the sale of the share capital of the companies to the claimant. In the course of the sale negotiations, he made a number of fraudulent misrepresentations. Whilst 100% of the share capital was in Mr Martin's name and he purported to be selling as sole shareholder, Mr Bell was the beneficial owner of 50% of the share capital. The sale was essentially negotiated by Mr Martin on Mr Bell's behalf (although Mr Bell did attend one meeting with the claimant and made some representations himself at that meeting). The claimant claimed in deceit against Mr Bell in respect of the misrepresentations made by Mr Martin, on the basis that Mr Martin acted as Mr Bell's agent and the representations were within the scope of his actual or ostensible authority. Henshaw J held Mr Bell liable on that basis.
53. Mr Mitchell KC submits that a sufficient case as to agency is pleaded in paragraphs 20, 24 and 31A-31C of the proposed Re-Amended Particulars of Claim, in particular with the plea in paragraph 31A that, in the circumstances pleaded, it is reasonably to be inferred that Mr Jethwa was authorised by the other Sellers, including Palmyra, to negotiate for the sale of the shares of each of them. Thus, so it is said, there is a sufficient plea of express authority, or failing that ostensible authority, to negotiate the sale, and it follows that such authority extended to Mr Jethwa making representations of the kind that he did, in the form of responses to CPA's due diligence enquiries and providing information about ENL.

54. As to the factual basis for the inference sought to be drawn, prior to disclosure, reliance is placed by the Claimants on:
- i) Mr Jethwa holding himself out as acting for all the Sellers in negotiating the sale of ENL, giving rise to a reasonable inference that he was actually authorised to do so;
 - ii) The fact that the Sellers were all content for Mr Jethwa to act for them, that Palmyra did not itself instruct anyone else, or itself take part in the negotiations, and that the Sellers all instructed the same solicitors for the sale;
 - iii) The fact that responses to CPA's due diligence requests given by Mr Jethwa were expressly made on behalf of all Sellers; and
 - iv) The fact that Palmyra appointed Mr Jethwa as its representative, with authority to address all matters in the SPA, pursuant to Clause 17.8 of the SPA.
55. Mr Mitchell KC accepts that, ultimately, there may be an issue as to the basis and circumstances in which Mr Jethwa came to negotiate a sale of the entire share capital of ENL, and as to the precise scope of Mr Jethwa's authority. However, it is submitted that that is a matter in respect of which disclosure may be highly relevant, and an issue for trial, such that it cannot be said, at this stage of the proceedings, that a claim in deceit that includes Palmyra as a defendant can have no real prospect of success.
56. As to Ms Heal's reliance upon the clause 6 of the NDA, Mr Mitchell KC responded to the effect that:
- i) Whilst Palmyra would fall within the definition of "*Affiliates*" in the NDA, Clause 6 of the NDA does not extend to Affiliates, it merely purports to confirm that ENL should not be deemed to be making any representations;
 - ii) Properly construed, clause 6 does not extend to liability for fraudulent misrepresentations, and liability for fraudulent misrepresentations would have required to be expressly dealt with; and
 - iii) Clause 6 is properly to be regarded as superseded by Clause 16.2 of the SPA which does not extend the agreement as to non-reliance to representations made in any Transaction Document, or to liability on the part of the Sellers for fraud or fraudulent misrepresentation.
57. So far as the claim for declaratory relief is concerned, Mr Mitchell's response is that it is simply not addressed by Palmyra, and that CPA is entitled to seek declaratory relief in respect of the ownership of the IP against all the parties to the SPA.

Determination of the First and Second Applications

58. I agree with Mitchell KC that it is necessary to distinguish between authority to negotiate, and authority to bind the principal to the contract negotiated – see e.g., *Ivy* (supra) at 380-382. One can envisage a number of instances in which an agent might be authorised to negotiate the terms of a contract but require specific authority to bind the principal to that contract by entering into it on behalf of the latter. Thus, as Henshaw J indicated in *Ivy* at [381]-[382], an agent may be authorised to make representations to a third party in the course of negotiating a transaction even if the agent lacks authority to conclude the transaction itself. The question as to whether authority to make representations has been conferred being a question of fact in each case.
59. It follows that I do not consider that the fact that Palmyra entered into the SPA on its own account and otherwise than through the agency of Mr Jethwa, as I understand to be common ground, is determinative of the claim against CPA. It is necessary, as I see it, to consider whether CPA has any real prospect of demonstrating that Palmyra authorised Mr Jethwa to conduct negotiations as agent on its behalf in the circumstances leading up to the entry into the SPA, and whether the scope of that agency extended to making the Misrepresentations alleged by the Claimants.
60. The *Ivy*, whilst in some ways similar to the present case, is not wholly analogous. In that case, Mr Martin not only negotiated the relevant sale, but must have entered into the relevant sale contract as agent on behalf of Mr Bell given that Mr Bell only had beneficial interest in the shares the subject matter thereof and was not a party to the sale contract. Further, given Mr Bell’s beneficial interest in the shares, the conclusion that Mr Martin acted as Mr Bell’s agent was, perhaps, more obvious than in the circumstances of the present case.
61. Nevertheless, I consider that I can extract from *Ivy*, and the cases referred to therein, the following principles:
- i) A principal may be liable for fraudulent misrepresentations if made by its agent if those misrepresentations are made within the scope of the agent’s actual or ostensible authority or, as Henshaw J put it at [428] “*in the course of a negotiation which the agent had the principal’s actual or ostensible authority to carry out.*”; and
 - ii) It is not necessary that the agent has actual or ostensible authority either to make the specific fraudulent misrepresentations on which the claimant relies or to commit fraud. It suffices that the agent is authorised (actually or ostensibly) to act in a way that would involve making representations of the kind that it did.
62. Ms Heal observed by reference to *Ivy* at [377] that the mere fact that someone does something to benefit another does not create a relationship of agency. This may be true, but it is to be noted that Mr Prakash’s witness statement does not deal with the circumstances in which Palmyra came to be involved in the relevant sales process, and Palmyra is yet to serve a Defence. The factors identified in paragraphs 31A to 31C of the proposed Re-Amended Particulars of Claim that I have referred to in paragraph 49 above do, in my judgment,

without more, support an argument that stands a real prospect of success that Mr Jethwa was given authority, actual or ostensible, by Palmyra to negotiate the terms of a sale of all the shares in the share capital of ENL including those of Palmyra. Ms Heal's submission that an offer was made, the shares were sold, and that that is all that happened (as she put it), is, as I see it, somewhat unrealistic. Certainly, I do not consider that the Court can safely conclude, at this stage of the proceedings that this was the case.

63. Further, I consider that it follows that CPA stands a real prospect of demonstrating that the scope of the agency extended to making representations of the kind that Mr Jethwa did in response to CPAs due diligence enquiries and providing information about ENL, being representations that might be expected to have been made in ordinary course as part of the negotiating process leading to the conclusion of the SPA.
64. One can see that, as Mr Mitchell KC accepts, there may be issues to be addressed in due course, following disclosure and/or at trial, as to the scope and extent of Mr Jethwa's agency, or indeed whether there was truly an agency relationship. One can, for example, see that there might be an argument open to Palmyra that Mr Jethwa's authority to make representations was necessarily limited in circumstances where, as between themselves and Palmyra, Mr and Mrs Jethwa assumed specific responsibility as "*Warrantors*" and for the Disclosure Letter. However, I consider that issues such as this can only properly be evaluated in the light of the evidence as a whole, following disclosure and after Palmyra has provided its own explanation as to its involvement in the sale process, and/or the relevant issues are ventilated at trial.
65. I do not consider that there is merit in Ms Heal's point that, given the terms of the SPA, CPA cannot have relied upon any representation as having been made by or on behalf of Palmyra as opposed to Mr Jethwa. If the necessary authority and agency is established, then Palmyra will be liable for the actions of its principal, Mr Jethwa, in accordance with the principles referred to above. Issues as to the scope and extent of such agency may arise, but this is a matter that I have addressed in the previous paragraph.
66. I do not consider that the terms of clause 6 of the NDA provide Palmyra with any form of knockout blow for, essentially, the reasons advanced by Mr Mitchell KC. Apart from the fact that this was an agreement between CP LLP and ENL, and that the benefit thereof was not expressed extend to "*Affiliates*" such as Palmyra, which were not a parties to the NDA, I consider it to be a good point that the NDA was superseded by the terms of the SPA, and specifically the terms of clause 16.2 thereof which do not extend to representations by any Transaction Document, or fraudulent misrepresentations. In any event, I consider that very much clearer wording will be required before clause 6 of the NDA could properly be construed as applying to fraudulent misrepresentations.
67. In short, therefore, I consider that the deceit claim sought to be advanced in the Chancery Proceedings as against Palmyra, as now reformulated in the Re-Amended Particulars of Claim, does stand a real prospect of success. I do not therefore consider that Palmyra is entitled to summary judgment or to have the claim against it in deceit struck out.

68. Further, I see no reason why CPA should not be entitled to advance a claim for declaratory relief in respect of the IP in the Emperium Software as against Palmyra as a party to the SPA.
69. The Re-Amended Particulars of Claim makes clear that no claim is now pursued against Palmyra in respect of the £50,000 loan or for breach of the Warranties. Consequently, the objectionable parts of the Amended Particulars of Claim that might have been susceptible to summary judgment or strike out have now been deleted.
70. In the circumstances, I consider that the appropriate course is to dismiss Palmyra's application for summary judgment and/or strike out, and to grant CPA permission to re-amend the Particulars of Claim in the terms of the proposed Re-Amended Particulars of Claim before the Court.

The Third and Fourth Applications

Introduction

Applications

71. By the Third Application, the Claimants in the QB Proceedings seek to strike out the QB Counterclaim by which Mr Jethwa seeks to recover "*Earn-Out Consideration*" under Clause 3.1 and Schedules 7-9 of the SPA, and to pursue a claim against Mr Gualtieri and Mr Rowe for wrongfully procuring breach of contract and conspiracy. By the Fourth Application, Mr Jethwa seeks permission to re-amend the QB Counterclaim.

The SPA Earn-Out Provisions

72. As referred to above, Clause 3.1 of the SPA provides that in addition to the "*Initial Payment*", the Sellers are to be paid the "*Earn-Out Consideration*" in accordance with Schedules 7-9.
73. Schedule 7 sets out the calculation of the "*EBITDA Earn-Out Consideration*", and provides, in essence, as follows:
 - i) The EBITDA Earn-Out Consideration is to be calculated in two periods, namely from 1 January 2020 to 31 December 2020 (the "*First EBITDA Earn-Out Period*"), and then from 1 January 2021 to 31 December 2021 (the "*Second EBITDA Earn-Out Period*") (see the definitions in Schedule 7, paragraph 1).
 - ii) The dispute on the QB Counterclaim concerns only the second of these periods. For the Second EBITDA Earn-Out Period, the consideration payable ("*the Second EBITDA Earn-Out Consideration*") is 5.5x any net profit in excess of a threshold sum of £400,000 (see Schedule 7, paragraphs 1 and 4.3).
 - iii) At the end of each period, "*the Buyer*" (CPA) is to prepare and provide to "*the Sellers' Representative*" (Mr Jethwa) ENL's unaudited profit and loss account and balance sheet for the period, together with a

statement of ENL's EBITDA for the period (excluding salary and expenses paid to the sellers or their associates) (Schedule 7, paragraphs 2.1 and 2.2).

- iv) Mr Jethwa is to inform CPA within 20 business days of receipt of the statement whether or not he accepts it. If he does not, then (i) the parties are to hold discussions in good faith to resolve the matter (see Schedule 7, paragraphs 2.4 to 2.6) and (ii) if they are unable to resolve it, they may avail themselves of the dispute resolution procedure in paragraph 3.
- v) The dispute resolution procedure is to refer the accounts to an independent firm of accountants for final and binding determination as an expert, following the detailed procedure set out in paragraph 3. No party has availed themselves of this contractual right.

74. Schedule 8 sets out the calculation of the Online Revenue Earn-Out Consideration. In essence, this provides as follows:

- i) The consideration is to be calculated over four periods of 6 months, beginning on the day of completion (30 September 2020). At the end of each of those periods, "*the Buyer*" (CPA) is to prepare and provide an unaudited consolidated profit and loss account of ENL and a statement setting out the "*Online Net Revenue*" for the period and the "*Relevant Online Earn-Out Consideration*" payable as a result (see Schedule 8, paragraph 2). A dispute resolution procedure in identical form to that set out in Schedule 7 is provided in the event that Mr Jethwa disputes that statement ("*the Online Revenue Earn-Out Statement*") (see Schedule 7, paragraph 3).
- ii) The "*Online Net Revenue*" has a precise meaning under Clause 1:
 - a) It means the total "*Online Fees to Merchant*" for the period (minus costs and merchant defaults).
 - b) The "*Online Fees to Merchant*", in turn, means "*the amount charged by the Buyer (or any member of the Buyer's Group) to merchants in order to process the payments made by Customers [i.e., of ENL] through the Online Processing Solution.*"

75. The "*Online Processing Solution*" is defined as meaning: "*the online sales debit/credit card payment processing solution and the direct debit processing solution offered by the Buyer (or any member of the Buyer's Group) to customers*".

76. It is to be noted that clause 1.1 of the SPA defines "*Buyer's Group*" as meaning: "*the Buyer, any subsidiary of the Buyer, any holding company of the Buyer and any subsidiary of any holding company of the Buyer and, from Completion, shall include the Target.*" Thus, as from completion, the definition of "*Buyer's Group*" includes ENL.

77. Schedule 9 provides for an identical procedure to Schedule 8, but in respect of sales at point of sale, rather than online sales. Thus “*POS Processing Solution*” has a like definition to that of “*Online Processing Solution*” in Schedule 8. There are, however, the following differences so far as the operation of the relevant mechanism is concerned:
- i) The “*First POS Revenue Earn-Out Period*” is defined by paragraph 1.1 of Schedule 9 as meaning: “*the 6 month period beginning on the date on which the Buyer notifies the Seller’ Representative that the POS Processing Solution is ready to accept point of sale transactions.*”
 - ii) Paragraph 4.6 of Schedule provides that: “*if the POS Processing Solution is not ready to accept point of sale transactions by 31 January 2021 (“POS Date”) the Buyer will within 15 Business Days of POS Date pay to the sellers the sum of £100,000 (“POS Payment”) to be satisfied by the issue of the POS Consideration Shares to the Sellers in accordance with paragraph 4.8 in the proportions set out in column 6 of Schedule 1.*” Paragraph 4.7 provides that the Sellers may elect to receive the POS Payment in cash by serving written notice within 10 Business Days of the POS Date.
78. It is the Claimant’s case that the references to “*Online Processing Solution*” and “*POS Processing Solution*” in Schedules 8 and 9 are each a reference to CPA’s group’s processing system “*ClearAssist*” referred to in the LOI (“**the CC Payment Processing System**”). On the other hand, it is Mr Jethwa’s case that this is a reference to all payment systems offered to ENL’s customer’s *apart from* the CC Payment Processing System. The significance of this is that the definitions of “*Online Processing Solution*” and “*POS Processing Solution*” in turn form an important part of the definition of “*Online Fees to Merchant*” and “*POS Fees to Merchant*”, which, in turn, form an important component of the definition of “*Online Net Revenue*” and “*POS Net Revenue*”, and ultimately the definition of “*Online Earn-Out Consideration*” and “*POS Earn-Out Consideration*” as provided for by paragraph 4.2 of each Schedule 8 and Schedule 9 respectively.

QB Counterclaim

Second EBITDA Earn-Out Consideration

79. There is no issue in respect of the First EBITDA Earn-Out Consideration payable in respect of the 12 month period ended 31 December 2020. Following the sending to Mr Jethwa of the requisite accounts and statements, an issue was raised by Mr Jethwa in respect of the adjustments provided for by paragraph 2.2(a) of Schedule 7, but the figure payable was ultimately agreed and paid.
80. So far as the Second EBITDA Earn-Out Consideration is concerned, payable in respect of the 12 month period ending 31 December 2021, it is the Claimants’ case that the requisite accounts and statement were sent to Mr Jethwa under cover of an email dated 1 March 2022, which showed that because the threshold target of £400,000 had not been met (the relevant EBITDA figure being only

£318,433), nothing was payable by way of Second EBITDA Earn-Out Consideration.

81. In advance of the hearing, it was maintained on behalf of Mr Jethwa that whilst the email dated 1 March 2022 attached a brief statement, there had not been provided the underlying profit and loss accounts and balance sheet required to satisfy the requirements of paragraph 2.1 of Schedule 7 to the SPA. However, at the hearing, the Claimants produced a profit and loss account which it was said had been sent as an attachment to the email dated 1 March 2022. I pointed out at the hearing that it ought to be possible for Mr Jethwa to find the relevant email dated 1 March 2022, and check what was attached to it, and specifically whether the attachments included the profit and loss account that has been produced. It was not subsequently suggested on his behalf that it had not been possible to find the email, or that having done so the profit and loss account was not attached.
82. Whilst there was some correspondence following the receipt of the email dated 1 March 2022, Mr Jethwa did not seek to challenge the figures contained statement (or profit and loss account) as such. In an email dated 9 March 2022, Mr Jethwa stated that he disputed the statement. In response to that, CPA responded by email dated 10 March 2022 to note that the matter was disputed, stating *“we will revert shortly”*. By email dated 24th of March 2022, Mr Jethwa responded to remind CPA that *“I have not heard anything back from you in relation to the Earnout”*. Matters appeared to have simply rested there.
83. So far as the counterclaim in respect of the Second EBITDA Earn-Out Consideration is concerned, in paragraph 28 of his Amended Counterclaim, Mr Jethwa refers to the Claimants having *“sent Accounts and a Schedule on 1st March 2022”*, and to having disputed the same by email dated 9 March 2022. He alleges that the Claimants are not acting in good faith and that they had made *“no attempt to discuss these issues”*. He then *“estimates”* liability under Schedule 7 as $£100,000 \times 5.5 = £550,000$. He continues by pleading that: *“This is calculated at achieving any excess over and above £400,000 net profit as defined in Schedule 7, 1.1(b) and referring to Schedule 7, 4.3 for the calculations. The Defendant was asked by [CPA] To produce a forecast budget which was finalised in November 2020. This budget sets out the complete expenditure and investment required to achieve a net profit of £500,000, therefore the excess being £100,000 and as per the calculation of x 5.5 being £550,000.”*

Online Sales Revenue Earn-Out Consideration

84. The CC Payment Processing System was not ready to process payments by 1 January 2021. Consequently, at the end of March 2021, CPA caused shares in CPA worth £100,000 to be issued to the sellers (which they accepted) pursuant to Clause 4.6 of Schedule 9 of the SPA.
85. On 25 November 2021, CPA sent the POS Revenue Earn-Out draft accounts and statement for the First POS Revenue Earn-Out Period to Mr Jethwa, showing consideration of £773 payable. Further draft accounts and statements for the Second POS Revenue Earn-Out Period were sent on 12 May 2022,

showing consideration payable of £1,215. These figures were calculated on the basis of taking into account amounts charged by ENL to merchants in order to process payments made by customers of the latter through the CC Payment Processing Solution, but not payments otherwise processed. The accounts provided were a simple profit and loss account showing the relevant “*Payment Volume*” through the CC Payment Processing System, the relevant “*Fees to Merchant*”, and deducting relevant “*Transaction Costs*” and “*Merchant Defaults*”, so as to arrive at a “*Revenue figure*” to which a multiplier of 1.5 was applied.

86. On 15 June 2021, as confirmed by an email exchange of that date, the parties agreed to proceed on the basis that the start date for the First POS Earn-Out Revenue Period should be treated as being a little later than provided for, namely on 15 June 2021. There are exhibited to the Claimants’ evidence revised POS Revenue Earn-Out figures for the first three periods, which show that, on that basis, revenue worth a total of £3,897 is due to Mr Jethwa. CPA does not dispute its obligation to pay this sum, which is payable under the SPA to the Seller’s Solicitors. However, this sum has not been accepted by Mr Jethwa, who contends that very much more is due and payable.
87. Paragraph 29 of Mr Jethwa’s proposed Re-Amended Counterclaim pleads a claim to Online Revenue Earn-Out Consideration alleged to be due pursuant to Schedule 8 of the SPA of £2,489, being £1,319 in the first period, £1,170 in the second period, and nothing thereafter. It is pleaded that no accounts or statements had been provided by CPA as required by paragraph 2 of Schedule 8, but no particulars are provided as to how the figures asserted by Mr Jethwa were arrived at.
88. Paragraph 30 of the proposed Amended Counterclaim pleads a very much more significant claim to POS Revenue Earn-Out Consideration alleged to be due pursuant to Schedule 9 of the SPA OF £5,212,189. It is alleged that no accounts or statements have been provided by CPA as required by paragraph 2 of Schedule 9, and paragraph 30 goes on to set out some detail as to how the figure of £5,212,189 is said to have been arrived at. I have struggled to see how the figure of £5,212,189 is arrived at, but what is clear is that the relevant calculations have been done on the basis that one is concerned with amounts charged in order to process not merely payments made using the CC Payments Processing System, but payment processing systems provided by others.

The QB Counterclaim against Mr Gualtieri and Mr Rowe

89. The counterclaim against Mr Gualtieri and Mr Rowe is contained in paragraphs 30B and 30C of the proposed Re-Amended Counterclaim, wherein it is alleged as follows:

“30B The Second and Third Defendants to the Counterclaim were at all material times the directors of the Claimants/First Defendants to the Counterclaim, and it was their duty at common law not to procure a breach of the SPA by the First Claimants/First Defendants to the Counterclaim nor to conspire together or separately with the First

Claimants to cause loss to the Defendant, the Second Claimant to the Counterclaim, and the Fourth Defendants to the Counterclaim.

30C In breach of that duty the Second and Third Defendants together or separately conspired with the First Claimant and/or procured a breach of the SPA by the First Claimants/First Defendants to the Counterclaim so as to cause loss to the Sellers (being the Defendant, the Second Claimant to the Counterclaim and the Fourth Defendants to the Counterclaim).

Particulars

The Second and Third Defendants to the Counterclaim well knew what the obligations of the Claimants were under the SPA, but intended and arranged that the Claimant/First Defendant to the Counterclaim would breach its obligations under the SPA to pay the Sellers the sums stipulated and arranged and/or together and/or separately conspired with the Claimants to produce that result, being at all material times aware this would cause the Sellers the heavy financial loss set out in this pleading and its prayer. The First Claimants then declined to pay the Sellers the 'earn-outs' prescribed by Schedules 7 to 9 inclusive of the SPA as more particularly set out above, causing the loss set out in this pleading and prayer."

90. Whilst not pleaded as such, in paragraph 6 of his witness statement dated 6 December 2022, Mr Jethwa says that: “My contention is that Clearcourse, under the directions of Messrs. Gualtieri and Rowe, may have resorted to both of these avoidance stratagems forbidden by the SPA’ both running down E-Novations, and diverting business through the ClearCourse group, so as to try to avoid liability under the Schedules I have referred to above”. The provisions to which Mr Jethwa is understood to refer are paragraph 5 of each of Schedules 7, 8 and 9, which all, in terms, respectively provide that ENL’s business is to continue as a going concern in the ordinary course and that CPA is to refrain from frustrating the Earn-Out Consideration payable pursuant to the relevant Schedule.

The Claimants’ case

Second EBITDA Earn-Out Consideration

91. The essential point made by the Claimants in respect of Mr Jethwa’s claim in respect of Second EBITDA Earn-Out Consideration is that unlike in the case of First EBITDA Earn-Out Consideration, Mr Jethwa did not raise reasoned objections to the accounts and statement produced by CPA, Mr Jethwa in that case raising objections in respect of certain of the deductions with agreement ultimately being reached as to the amount payable. Rather, in this case, he simply objected without raising reasoned objections, and also failed to invoke the dispute resolution machinery provided for by paragraph 3 of Schedule 7.
92. On behalf of the Claimants, Mr Mitchell KC submits that it is obviously wrong to maintain, as paragraph 28 of the proposed Re-Amended Counterclaim seeks

to do, that the Second EBITDA Earn-Out Consideration should be based upon a “*forecast budget*” produced by Mr Jethwa that was finalised in November 2020, when the Claimants have produced the actual figures, and did so by CPA’s email dated 1 March 2021, and the attachments thereto. It is said that this is particularly so where the forecast budget has not been produced, and there has been no attempt to explain why the actual figures that have been produced might be wrong in the light of specific matters contained in the forecast budget.

93. It is submitted on behalf of the Claimants that a complaint by Mr Jethwa in paragraph 14 of his witness statement dated 6 December 2022 that the accounts and statements provided to do not meet the requirements of paragraph 2.1 of Schedule is misconceived and wrong. The profit and loss account attached to CPA’s email dated 1 March 2022 constituted “*an unaudited consolidated profit and loss account*” for the relevant period, i.e., the year ended 31 December 2021, sufficient for the purpose.
94. In the circumstances, it is submitted that the counterclaim in respect of Second EBITDA Earn-Out Consideration based upon the “*budget forecast*” referred to in paragraph 28 of the proposed Re-Amended Defence and Counterclaim has no real prospect of success, and therefore that summary judgment thereon ought to be awarded in the Claimants’ favour, the relevant paragraph 28 be struck out, and the application for permission to re-amend this paragraph dismissed.

Online and POS Sales Revenue Earn-Out Consideration

95. In respect of Mr Jethwa’s claim for Online and POS Sales Revenue Earn-Out Consideration under Schedules 8 and 9 of the SPA, the Claimant maintain that the accounts and statements produced in respect thereof were properly prepared on the basis of limiting “*Fees to Merchant*” to amounts charged by CPA or any member of the Buyer’s group to merchants in order to process the payments made by customers of ENL through the CC Payment Processing System, without bringing into account amounts charged in order to process payments made by customers of ENL through other payment processing systems as Mr Jethwa maintains should have been done.
96. Mr Mitchell KC submits that it was correct to prepare the accounts and statements on this basis, and that the issue between the Claimants and Mr Jethwa raises an issue of construction in respect of the definitions of “*Online Processing Solution*” and “*POS Processing Solution*” in paragraph 1.1 of each of Schedule 8 and 9, being a short point of construction that it is appropriate to determine on an application for summary judgment such as that brought by the Claimants.
97. As to this question of construction, it is common ground between the parties that the correct approach to construction is to consider what the words used might reasonably been understood to mean by an objective observer with knowledge of the admissible background facts.
98. On behalf of the Claimants, it is submitted that a number of matters clearly support the construction contended for by them, in particular:

- i) It is submitted that paragraph 1(e) of the LOI can be relied upon as explaining the genesis of the SPA, and this envisages this particular stream of earn-out consideration as relating to the CC Payment Processing System (known as ClearAccept), in that paragraph 1(e) talks in terms of: *“Net Revenue generated per payment transaction for the incremental credit and/or debit card payment volumes migrated onto the ClearCourse payment solution, Clear Accept Ltd (“ClearAccept”)”* in the three relevant periods.
 - ii) It is submitted that the provisions in paragraph 4.6 et seq of Schedule 9 to the SPA make little sense if the *“POS Processing Solution”* referred to therein was not the CC Payment Processing System. If the expression *“POS Processing Solution”* meant payment processing systems more generally, then, so it is submitted, it is difficult to see that there would be any need for the relevant provisions.
 - iii) The definitions of *“Online Fees to Merchant”* and *“POS Fees to Merchant”* in paragraph 1.1 of Schedules 8 and 9 referred to *“the amount charged by the Buyer (or any member of the Buyer’s Group) to merchants”*. Whilst the definition of *“Buyer’s Group”* does, post-completion of the SPA, extend to ENL, the fact that the definition does not refer more generally to amounts charged by other payment processing providers points, it is submitted to the definition being intended to extend to the CC Payment Processing System alone.
 - iv) The same point is made in respect of the reference to *“online”* and *“point of”* ... *“sales/debit card payment processing solution offered by the Buyer (or any member of the Buyer’s group) to Customers”*, in the definition of *“Online Processing Solution”* in paragraph 1.1 of Schedules 8 and 9 respectively.
99. On this basis, it is submitted that if the question of construction is determined in the Claimants’ favour, as the Claimants submit that it should be, then, there being no specific challenge to the figures produced by CPA on the basis of its construction of the meaning of the relevant provisions, the counterclaim in respect of Online and POS Sales Revenue Earn-Out Consideration can properly be seen to have no real prospect of success even in its proposed re-amended form.
100. As to the complaint in paragraph 14 of Mr Jethwa’s witness statement dated 6 December 2022 with regard to the accounts and statements produced by CPA, it is submitted that clause 2.1, and the relevant definitions within clause 1.1 of Schedules 8 and 9 respectively merely required the production of an unaudited consolidated profit and loss account and a statement setting out the amounts due, which it is submitted were provided as referred to in paragraph 85 above. Whilst the definition of *“Online Revenue Earn-Out Accounts”* refers to unaudited consolidated profit and loss accounts *of ENL* in respect of the relevant periods, it is submitted that this can only mean profit and loss accounts relating to the figures required to carry out the application of the formula provided for by paragraph 4 of the respective Schedules, which applies a multiplier of 1.5 to the relevant *“Net Revenue”*, i.e. Fees to Merchant, less Transaction Costs +

Merchant Defaults. These figures were, it is said, included in the accounts provided to Mr Jethwa.

101. On this basis, the relevant counterclaim in respect of Online and POS Sales Revenue Earn-Out Consideration having no real prospect of success, it is submitted on behalf of the Claimants that they ought to be awarded summary judgment on this element of the QB Counterclaim, that paragraphs 29 and 30 the Amended Defence and Counterclaim ought to be struck out, and that Mr Jethwa's application to re-amend these paragraphs should be dismissed.

Counterclaim against and Mr Gualtieri and Mr Rowe

102. The simple point made by the Claimants in respect of this aspect of the proposed Re-Amended Counterclaim, as pleaded therein, is that it is parasitic upon the counterclaim as against CPA, and that if CPA is not in breach of the terms of the SPA by failing to pay the various types of Earn-Out Consideration that it is alleged that CPA has failed to pay, then there can be no question of Mr Gualtieri or Mr Rowe having procured CPA to act in breach of contract, and there can be no unlawful means conspiracy, because the illegality relied upon in respect of the claim of unlawful means conspiracy is the alleged breach of contract by ENL in failing to pay the Earn-Out Consideration that it is alleged that it has failed to pay.
103. As referred to above, in paragraph 6 of his witness statement dated 6 December 2022, Mr Jethwa contends that CPA, at the direction of Mr Gualtieri and Mr Rowe, has deliberately run down the business of ENL and diverted business through the ClearCourse group, in an attempt to avoid liability for Earn-Out Consideration under Schedules 7 to 9 to the SPA. On behalf of the Claimants, Mr Mitchell KC makes the point that these allegations are not pleaded, even in the proposed Re-Amended Counterclaim, and go beyond anything pleaded therein. It is submitted that the allegations are effectively ones of dishonesty, and that if Mr Jethwa wishes to pursue them, then they must be pleaded in clear terms.
104. In any event, the Claimant submits that the allegations of deliberately running down the business of ENL and diverting the business elsewhere are totally without foundation and should not have been made. It is submitted that:
 - i) Mr Jethwa cannot point to a single piece of evidence to support his allegations. In particular, CPA makes the following points:
 - a) The only specific complaints as to reduction of ENL's EBITDA are those contained in paragraph 13 of his Witness Statement dated 6 December 2022, in which he refers to a run of emails as evidence that: "*it is clear that the buyers have actively arranged to reduce the staff, including the sales staff, and investment in E-Novations*". However, it is submitted that these emails are simply emails from Mr Jethwa himself (or in one instance from Mr Shivaji, an employee of his) complaining that in his view ENL's marketing budget ought to have been higher than the level set. It is said that this disagreement on the part of Mr Jethwa as to the

strategy chosen by new management provides no evidence that there was a deliberate scheme to destroy ENL, and paragraph 5 of Schedules 7 to 9 of the SPA did not require CPA to maintain the marketing budget at any particular level.

b) Whilst Mr Jethwa further says that he believes that CPA has sought to divert payments that should have passed through ENL through “*some other system, whether ClearAccept or some other portal*”, this is unsurprising, because diverting payments through its own systems was a central point of CPA’s acquisition of ENL, and is the very reason why the Online Sales Earn-Out Consideration and the POS Revenue Earn-Out Consideration were structured so that Mr Jethwa was rewarded only for payments made through the CC Payment Processing System. In other words, the more customers of ENL that CPA was able to divert through its own payment systems, the more earn-out consideration Mr Jethwa would receive under Schedules 8 and 9. What Mr Jethwa is complaining of was therefore an effort to increase the earn-out consideration to which he was entitled. This, therefore, does not support his allegations. Rather it undermines them.

c) It is said that Mr Jethwa appears to go some way to recognising the inadequacy of the foundation for his allegation at paragraph 6 of his Witness Statement, when he says: “*I cannot say with exactitude what Messrs Gualtieri have been doing*”. It is submitted that, in truth, he cannot say at all what they have been doing, and that there is no evidence or indication that they have been doing anything other than running ENL as they should.

ii) The allegation is contrary to all logic on the basis that:

a) There is no good reason why CPA would have wanted to deliberately destroy a business that it had just acquired, and CPA had every interest in running the business as profitably as possible, maximising its EBITDA, thereby building a profitable business going forward.

b) Likewise in respect of Online Sales Revenue and the POS Revenue. It is said that the purpose of these Earn-Out provisions was to incentivise ENL (which was still managed by Mr Jethwa for a considerable period following its acquisition) to integrate its business with the CC Payment Processing System, and to encourage its customers to use those systems. If it had done so successfully, that would have been to CPA’s advantage as well as that of Mr Jethwa.

105. Returning to the claims of procuring breach of contract and conspiracy as sought to be advanced by paragraphs 30B and 30C of the proposed Re-Amended Defence and Counterclaim, apart from the point referred to above that such claims are parasitic upon a breach of contract claim as between Mr Jethwa and

CPA, and ought for that reason to be determined against Mr Jethwa and/or struck out, it is further submitted by CPA that the claims are in any event as baseless as the allegation that CPA deliberately reduced the Earn-Out Commission, for the same fundamental reason that Mr Jethwa cannot point to any coherent evidence at all to the contrary. Whilst Mr Jethwa does seek to support his case by reference to a number of matters referred to in paragraph 19 of his witness statement dated 6 December 2022, it is submitted that each of the matters advanced in the respective sub-paragraphs of paragraph 19 of this witness statement is lacking in foundation. Thus:

- i) In sub-paragraph 19(1), Mr Jethwa refers to the evidence before the Court at the hearing before Saini J on 12 May 2022. CPA understands that Mr Jethwa is referring to paragraphs 12-13 of Mr Gualtieri's witness statement dated 6 May 2022 in the QB Proceedings, where Mr Gualtieri sets out what Mr Jethwa contends that he overheard Mr Gualtieri saying to Mr Rowe on 13 August 2020. In response, CPA submits that the allegation as to what was said is implausible, for the reasons that Mr Gualtieri gives in his witness statement, but that even if true, in circumstances where there is no other evidence in support of such an allegation whatsoever, even Mr Jethwa's account does not support an inference that Messrs Gualtieri and Rowe subsequently conspired to avoid the Earn-Out payments.
- ii) In subparagraph 19(2), Mr Jethwa refers to the annual accounts of CPA for the year ended 31 December 2020 as showing a contingent liability for earn-outs of £1,635,000 in respect of the acquisition of ENL. In response thereto, CPA makes the point that the liability was, as Mr Jethwa himself says, described as contingent, i.e., it was an estimate, and could change in the course of events. It is said that, in the event, the estimate proved to be too large, and that contingent estimate of what CPA might be liable to pay demonstrates nothing other than that its expectations of ENL's performance were too optimistic.
- iii) In sub-paragraph 19(3), Mr Jethwa complains that when he raised the question of liability under Schedule 7 of the SPA with Mr Rowe at the end of 2020, Mr Rowe provided no answer and simply abused Mr Jethwa, reference being made to emails dated 8 December 2020 and 9 December 2020. Mr Jethwa relies upon this "*savage and irrational response*" to support his case that there was a "*settled decision*" not to pay Earn-Out Consideration. In response, it is said on behalf of CPA that Mr Jethwa seems to be alleging that because he says he had some form of verbal altercation with Mr Rowe, that is evidence that Mr Rowe was manipulating the Earn-Out consideration. It is said that the allegation (even if true) is unrelated to Mr Jethwa's claim.
- iv) In paragraph 19(4), Mr Jethwa maintains that his case is supported by the fact that, in early 2021, Mr Gualtieri declined to agree with his assessment of what he was owed by way of Earn-Out Consideration, and that Mr Gualtieri pressed for payment of the £200,000 alleged to be outstanding as a tactical "*pre-emptive strike*". In response, CPA disputes that these matters support Mr Jethwa's case, and it is submitted on behalf

of CPA that Mr Gualtieri's behaviour was entirely rational given: (i) that Mr Jethwa's assessment of his entitlement to Earn-Out payments was incorrect; and (ii) that he does owe £200,000 to ENL. Consequently, the claim for £200,000 was obviously not a pre-emptive strike, but rather a valid claim that ENL is entitled to pursue.

- v) In subparagraph 19(5), Mr Jethwa complains that he has not received the accounts and statements that he ought to have received pursuant to paragraph 2 of Schedules 7, 8 and 9 of the SPA. In response, CPA disputes that this was the case for the reasons referred to above.
 - vi) In sub-paragraph 19(6), Mr Jethwa Mr Jethwa complains that the only payment that he has received in respect of Earn-Out Consideration is the £450,000 in respect of the First EBITDA Earn-Out Consideration, whereas "*on the basis of my reasoned computation, the true level of 'earn-outs' is clearly in the millions of pounds.*" In response CPA says that this is merely a repetition of Mr Jethwa's misconceived case as to his entitlement to Earn-Out Consideration.
 - vii) In sub-paragraph 19(7), Mr Jethwa appears to be suggesting that CPA's assertion of an entitlement to the IP in the Emperium Software, and the assertion of its claims in the Chancery Proceedings support his case as to conspiracy. In response, CPA disputes that the raising of the various claims supports any such thing. It is said that they plainly do not, and that the Claimants are entitled to pursue their claims, which are well-founded.
 - viii) In sub-paragraph 19(8), Mr Jethwa asserts that Mr Gualtieri and Mr Rowe can never have held the belief that the Earn-Out Consideration due to be paid was as little as CPA contends, and that as they were plainly in control of CPA: "*it must follow that they procured a breach of contract by that company*". In response, it is said by CPA that this is not a new point, but a repetition of Mr Jethwa's ill-founded belief that he is entitled to more Earn-Out Consideration than has been paid.
106. In short, therefore, it is submitted on behalf of CPA that Mr Jethwa's counterclaim as against Mr Gualtieri and Mr Rowe, on any view, lacks reality, there being no legal, evidential or logical basis to support. Consequently, it ought to be summarily dismissed or struck out at this hearing, and the application seeking permission to re-amend the QB Counterclaim ought to be dismissed.

Mr Jethwa's case

Second EBITDA Earn-Out Consideration

107. As referred to above, in advance of the hearing, and as set out in a Note dated 24 March 2023 prepared by Mr Harris on behalf of Mr Jethwa, it was Mr Jethwa's case that he had only received a statement, and not accounts relating to the Second EBITDA Earn-Out Consideration under cover of CPA's email dated 1 March 2022. This was relied upon in support of a case, as understood,

that because CPA had failed to comply with its obligations under paragraph 2 of Schedule 7 to the SPA, the Second EBITDA Earn-Out Consideration should not be treated as having failed to reach the EBITDA threshold of £400,000 provided for in respect of any payment, and that in the absence of anything else, the “*forecast budget*” referred to in paragraph 28 of the proposed Re-Amended Defence and Counterclaim provides the best evidence as to the relevant figures, or at least that that ought now to be some form of account or enquiry as to the proper sums due.

108. This remains, as I understand it, the essence of Mr Jethwa’s case, and why he says that summary judgment or not to be granted against him on this element of the QB Counterclaim, why the latter ought not to be struck out, and why he ought to be given permission to re-amend.

Online and POS Sales Revenue Earn-Out Consideration

109. As to Online and POS Sales Revenue Earn-Out Consideration, again it is maintained that the accounts and statements purported to have been produced pursuant to paragraph 2 of Schedules 8 and 9 are insufficient and unsatisfactory, particularly given that the accounts produced do not include an unaudited profit and loss account in respect of all of ENL’s dealings that it is submitted is required by the relevant definition in paragraph 1.1 of Schedules 8 and 9, being simply an unaudited profit and loss account relating to the calculation of Net Revenue Earn-Out.

110. More fundamentally, Mr Jethwa challenges the construction sought to be placed on the definition of “*Online Processing Solution*” and “*POS Processing Solution*” in Schedules 8 and 9, it being maintained that this was not a reference to the CC Payment Processing System, but rather to payment processing systems generally deployed in respect of payments made by customers of ENL and, on Mr Jethwa’s case as advanced at the hearing, actually excluding the CC Payment Processing System.

111. In support of the construction contended for on behalf of Mr Jethwa, Mr Harris relied, primarily, upon the following:

- i) Mr Harris submitted that what was intended to occur after completion of the SPA, and what did occur, did not accord with how matters were expressed in the LOI. It is submitted that whilst paragraph 1(e) of LOI talks in terms of payment transactions being migrated onto ClearAccept, i.e. the CC Payment Processing System, so far as the SPA is concerned the wording of the definition of “[*Online*][*POS*] *Processing Solution*” and that of paragraph 4.6 of Schedule 9 to SPA is talking of something different, not involving a migration as such onto the CC Payment Processing System, but rather the reverse with the latter being incorporated into ENL’s systems. It is submitted that the LOI is therefore of no assistance on the point.
- ii) Mr Harris points to the fact that the definition of “*Online*” and “*POS*” “*Revenue Earn-Out Accounts*” refers to unaudited profit and loss accounts of ENL. If one is concerned simply with revenue earned

through the CC Payment Processing System, then it is not clear why the accounts of ENL should be referred to rather than account simply limited to revenue earned through the CC Payment Processing System. It is therefore submitted that the definition of “*Processing Solution*” must be wider than that contended for by CPA.

- iii) Reliance is placed upon paragraph 2.2(a)(ii) of each of Schedules 8 and 9. These provisions deal with the basis upon which the respective Revenue Earn-Out Accounts require to be prepared and provides:

“any payments by Customers using the [Online][POS] Processing Solution shall only be included as Online Payment Volume if such Customer is using the Online Processing Solution to process both its existing payment gateway and its existing Visa and MasterCard member card acquirer at the time of such transaction.”

It is submitted by Mr Harris that the reference to “*existing payment gateway*” must be reference to the gateway that existed as at the date of the SPA. At that time there were no payments processed by the CC Payment Processing System, and so the condition provided for by paragraph 2.2(ii) could not be met in respect of payments made through the CC Payment Processing System. That being the case, the reference to “*Processing Solution*” in Schedules 8 and 9 can only be a reference to processing solutions other than the CC Payment Processing System.

112. On the above basis, it is Mr Jethwa’s case that the figures provided for by CPA have been prepared on an incorrect basis and put forward without reference to proper accounts and statements.
113. It is Mr Jethwa’s case that very much more is due by way of POS Earn-Out Consideration, if not Online Earn-Out Consideration in respect of which there is little, if anything, between the parties. On behalf of Mr Jethwa, it is submitted that a proper basis for counterclaiming the sum of £5,212,189 in respect of POS Earn-Out Consideration is set out in paragraph 13 of the proposed Re-Amended Defence and Counterclaim. Failing that, it is submitted that there ought to be some form of account or enquiry as to the proper sum due.
114. For these reasons and based upon what is submitted to be the proper construction of the definition of “*Processing Solution*”, it is Mr Jethwa’s case that paragraphs 29 and 30 of the proposed Re-Amended Defence and Counterclaim advancing the case in respect of Online and POS Sales Revenue Earn-Out Consideration are soundly based. On this basis, the Claimants are not entitled to summary judgment, or to have the relevant parts of the Amended Defence and Counterclaim struck out, and Mr Jethwa ought to be granted permission to re-amend.

Counterclaim against Mr Gualtieri and Mr Rowe

115. On Mr Jethwa’s case, breach of contract in respect of a failure to pay Online and POS Sales Revenue Earn-Out Consideration has been established. Consequently, the counterclaim as against Mr Gualtieri and Mr Rowe for

procuring breach of contract and unlawful means conspiracy does not fail simply because there has been no breach of contract.

116. As to the case of procuring breach of contract and unlawful means conspiracy, it is submitted that the case is sufficiently pleaded and developed in paragraphs 30B and 30C of the Re-Amended Defence and Counterclaim and supported by the matters referred to in Mr Jethwa's witness statement dated 6 December 2022 – in particular paragraph 19 thereof. I have sought to set out in paragraph 105 above the essence of what Mr Jethwa says therein.
117. Notwithstanding the contents of paragraph 6 of Mr Jethwa's witness statement dated 6 December 2022, and the contentions therein referred to in paragraph 90 above, it was not suggested that there was any intention on the part of Mr Jethwa to seek to further re-amend the Defence and Counterclaim so as to extend the procuring breach of contract allegations to a breach of paragraph 5 of Schedules 7, 8 and 9 of the SPA, or otherwise.

Determination of the Third and Fourth Applications

Second EBITDA Earn-Out Consideration

118. The central question is, as I see it, as to whether the allegations in respect of Second EBITDA Earn-Out Consideration contained in paragraph 28 of the proposed Re-Amended Defence and Counterclaim, and the counterclaim for the sum of £550,000 made thereby, or for an account or enquiry, has any real prospect of success, and discloses reasonable grounds for bringing the counterclaim sought to be advanced.
119. As I have said, a point taken by Mr Jethwa is that accounts were not provided with CPA's email dated 1 March 2022, and without such accounts, no proper basis has been put forward to support CPA's contentions that the relevant threshold of £400,000 was not reached. However, as referred to above, at the hearing CPA did produce an unaudited profit loss account said to be for ENL for the 12 month period ended 31 December 2021, and which was said to have been attached to the relevant email dated 1 March 2022 together with the statement which Mr Jethwa accepts was received.
120. I suggested to Mr Harris that it ought to be possible for Mr Jethwa to dig out the relevant email and check whether the profit and loss account was also sent as an attachment to it. Mr Harris did not subsequently suggest that this exercise was not possible, or that it had been carried out and no profit loss account could be found as an attachment. Further, as I have mentioned, in paragraph 28 of the proposed Re-Amended Defence and Counterclaim, it is specifically pleaded that the Claimants sent "*Accounts and a Schedule on 1st March 2022*". Mr Jethwa did not in the email correspondence following on from the email dated 1 March 2022 contemporaneously complain that a profit and loss account had not been provided. In these circumstances, I consider that I must proceed on the basis that the profit and loss account that CPA says was sent as an attachment to the email dated 1 March 2022 was in fact so sent.

121. The profit and loss account produced shows an EDITDA of £318,000, below the threshold amount of £400,000 required to trigger the payment of Second EBITDA Earn-Out Consideration. Mr Jethwa has not sought to challenge specific figures within the profit and loss account as he might have done, and I note that Mr Jethwa remained employed managing the business of ENL until the end of the relevant period, 31 December 2021. Further, he did not invoke the dispute resolution procedure provided for by paragraph 3 of Schedule 7. All he has, effectively, done is to say that the figures produced do not accord with his undisclosed “*forecast budget*” which he says he produced in late 2020.
122. In the circumstances, I consider that Mr Jethwa has failed to plead or otherwise provide any credible basis for maintaining the EBITDA for the period ended 31 December 2021 was any greater than that referred to in the profit and loss account produced by CPA, and more specifically that it was sufficiently large to reach the requisite threshold of £400,000. In particular, I do not consider that any significant weight is to be attached to the “*forecast budget*” that Mr Jethwa refers to given that it was only a budget, it has not been produced, and Mr Jethwa has not identified any specific items therein that form a proper basis for challenging any of the figures asserted in the profit and loss account provided by CPA.
123. I should add that I note that the definition of “*EBITDA Earn-Out Accounts*” in paragraph 4.1 of Schedule 7 does refer to an unaudited profit loss account and balance sheet, and there is no suggestion that any balance sheet was, in fact, provided. However, I do not consider that this, in itself, sufficient to support to Mr Jethwa’s case, whether to recover £550,000 or for an account or enquiry, given that balance-sheet figures form no part of the mechanism for the determination of the amounts properly due pursuant to Schedule 7.
124. In the circumstances, and subject to any further submissions that the parties may wish to make as to the appropriate form of relief, I consider that the appropriate course is to order that paragraph 28 of the Amended Counterclaim be struck out and that permission to re-amend be refused.

Online and POS Sales Revenue Earn-Out Consideration

125. The dispute between the parties does, as I see it, ultimately, boil down to a short point of construction as to the meaning of “*Online Processing Solution*” and “*POS Processing Solution*” in Schedules 8 and 9 respectively of the SPA. I consider this to be the sort of short point of construction that it is appropriate to determine on an application for summary judgment in that I consider that all materials necessary to consider the relevant and admissible background circumstances are before the Court – see *Easyair* (supra) at 15(vii) Lewison J.
126. As to this question of construction, I consider it to be plain from any objective consideration of the relevant wording of the SPA, having regard to the relevant and admissible background, that the reference to “*Online*” and “*POS*” “*Processing Solution*” is, in each case, a reference to the CC Payment Processing System.

127. I consider that each of the provisions relied upon by CPA and referred to in paragraph 98 above strongly support this construction. In particular, the wording of paragraph 4.6 of Schedule 9 relating to delay in achieving the POS Date of 31 January 2021 makes no real sense if the “*POS Processing Solution*” referred to therein is not one associated with CPA, namely the CC Payment Processing System.
128. So far as paragraph 1(e) of the LOI is concerned, I have had some concerns as to whether this is properly admissible as an aid to construction given that the parties negotiations are not admissible as an aid to the construction of the contract that they have entered into. However, on balance, I consider that this provision is properly admissible on the basis that, although headed “*Non-binding offer*”, it was signed by the parties, and had the effect at least of recording the genesis of the transaction in a formal way – see: *Glenmere Plc v F Stokes & Sons Ltd* [2008] All ER (D) 92 (Jan), and Lewison, *Interpretation of Contracts*, 7th Ed, at 3.27. Having said this, I do not consider that the relevant question of construction turns on a consideration of the LOI. Nevertheless, to the extent that it is properly admissible, I consider that it supports CPA’s case, and certainly does not undermine it. I take Mr Harris’ point that the role of ClearAssist as described in paragraph 1(e) thereof is, on one view, different from how matters were subsequently expressed in the SPA. Notwithstanding, I consider the more significant consideration is that “*Earn-out 2*” was expressed as relating to income generated through the use of ClearAccept, and nothing else.
129. On proper consideration, I do not consider that paragraph 2.2(a)(ii) of Schedules 8 and 9 supports Mr Jethwa’s construction. It is to be noted that the word “*existing*” therein applies to both the “*payment gateway*” and “*Visa and MasterCard member card acquirer*”. I consider that the reference to “*at the time of such transaction*” plainly applies to the use of the payment gateway and the Visa and MasterCard member card acquirer. This makes perfect commercial sense when one understands that a card transaction depends upon the use of various services, including the use of a payment gateway, and a relevant member card acquirer. I certainly do not consider that paragraph 2.2(a)(ii) requires that the gateway should have existed in the sense of one being used as at the date of the SPA.
130. There remains the point with regard to the definition of the relevant “*Revenue Earn-Out Accounts*”, and the reference to an unaudited consolidated profit loss account of ENL, and not simply a profit loss account relating to the relevant “*Net Revenue*” provided for by Schedules 8 and 9. However, I do not consider that, considering all else, this leads to a different construction of the definition of “*Processing Solution*”, and that what the definition is intending to provide for is in fact a profit loss account prepared by ENL relating to relevant “*Net Revenue*”.
131. I therefore conclude that the reference in Schedules 8 and 9 to “*Online Processing Solution*” and “*POS Processing Solution*” respectively is, as matter of true construction of the SPA, a reference to the CC Payment Processing System, and nothing else.

132. This, to my mind, fundamentally undermines the counterclaim that Mr Jethwa seeks to pursue in respect of Online and POS Sales Revenue Earn-Out Consideration in paragraphs 29 and 30 of the proposed Re-Amended Defence and Counterclaim, being founded upon an incorrect construction of the relevant provisions of the SPA.
133. There is, to my mind, no reason to otherwise challenge the accounts and statements produced by CPA in respect of Online and POS Sales Revenue Earn-Out Consideration, which provide a profit loss account showing how the relevant consideration has been calculated and arrived at.
134. In the circumstances, I do not consider that the counterclaim sought to be advanced by paragraphs 29 and 30 (and 30A) of the proposed Re-Amended Defence and Counterclaim stands a real prospect of success. Again, subject to further submissions as to the appropriate form of relief, I consider the appropriate course is to strike out the existing paragraphs 29 and 30 of the Amended Defence, and to refuse permission to re-amend the same.

Counterclaim against Mr Gualtieri and Mr Rowe

135. I agree with CPA's submission that Mr Jethwa's counterclaim alleging that Mr Gualtieri and Mr Rowe procured CPA to act in breach of contract, and are guilty of unlawful means conspiracy, together with CPA, is parasitic upon the claim for breach of contract as against CPA. If, as I consider must be the case, that claim for breach of contract ought to be struck out, then so in my judgment ought the counterclaim sought to be advanced in paragraphs 30B and 30C of the proposed Re-Amended Defence and Counterclaim against Mr Gualtieri and Mr Rowe. In the circumstances, there was no breach of contract to be procured, and no unlawful act to form the basis of any conspiracy as alleged in paragraphs 30B and 30C.
136. I do not consider it necessary to say very much more about the matters referred to in paragraph 6 and 19 of Mr Jethwa's witness statement dated 6 December 2022. They do raise the possibility of a wider procuring breach of contract and/or conspiracy claim based upon the suggestion of a deliberate winding down of the business of ENL, and the diversion of business away to other companies within CPA's group. However, no pleading has been produced to support any such allegations, there is no suggestion that Mr Jethwa seeks a further opportunity to seek to re-amend, and essentially for the reasons advanced by CPA, the evidential basis for any such claim appears to be extremely thin.
137. In the circumstances, I consider that the appropriate course is to refuse permission to re-amend so as to introduce paragraphs 30B and 30C. If I have misunderstood the position and these paragraphs already form part of the Amended Defence and Counterclaim, then I consider that the appropriate courses that they should be struck out as failing to disclose reasonable grounds for bringing the counterclaim sought to be pursued thereby.

Overall Conclusion in respect of the Third and Fourth Applications

138. Having concluded that the counterclaims contained within paragraphs 28 to 30B of the proposed Re-Amended Defence and Counterclaim stand no real prospect of success, and that the relevant paragraphs ought to be struck out, and the permission to re-amend the Amended Defence and Counterclaim ought to be refused, I consider that it must follow that the counterclaim as a whole ought to be struck out. I will require further submissions from the parties as to whether it is appropriate, or indeed necessary for me to grant summary judgment in favour of CPA in respect of the counterclaim if the same is struck out.

The Fifth Application

Introduction

139. By the Fifth Application, brought in the Chancery Proceedings, the Claimants seek summary judgment or strike out in respect of a number of issues raised in the Defendants' Defence as identified in the draft order attached to the Fifth Application. Whilst other issues were identified in this draft order, the Fifth Application as pursued before me was limited to 3 distinct issues, namely:

- i) ENL's claim to recover the sum of £200,000 advanced initially as to £150,000 to Mr and Mrs Jethwa and as to £50,000 to Palmyra, but where the £50,000 was repaid by Palmyra and subsequently paid to Mr and Mrs Jethwa;
- ii) CPA's claim for breach of a number of the Warranties by Mr and Mrs Jethwa; and
- iii) CPA's claim of deceit/fraudulent misrepresentation against Mr and Mrs Jethwa.

140. The Claimants' primary claim remains that ENL owns the IP in the Emperium Software. The breach of warranty and fraudulent misrepresentation claims are pursued as an alternative to the primary claim, if it should be determined that ENL did not at the time of the SPA, and therefore does not now own the IP in the Emperium Software. In short, CPA maintains that if that is the case, then a number of Warranties said to be to contrary effect must be untrue, and that the Misrepresentations (that I have referred above in determining the First and Second Applications) must be false. Thus, in dealing with the Fifth Application, I am invited by the Claimants to take Mr and Mrs Jethwa at their word.

141. I propose to deal with the three issues in turn.

Directors Loan claim to recover £200,000

Introduction and background

142. The position in respect of this claim is as follows.

143. Clause 4.4 of the SPA required that: "*The Sellers shall, and shall procure that their respective Associates shall pay all monies (if any) then owing by the Sellers and their Associates to the Target, and any such amounts outstanding at Completion shall be included in the Completion Accounts as a deduction in*

calculating the Net Cash and shall be deemed to be repaid through that calculation.”

144. Annex A to Schedule 6 to the SPA included a “*Statement of Net Cash*”. This recorded a “*Directors Loan*” of £200,000 as a credit (meaning that it was outstanding). Paragraph 6.3 of the Disclosure Letter recorded that the: “*Target has lent the shareholders a loan of £200,000. £150,000 to Manoj and Rekha and £50,000 to Palmyra Holdings Management Limited*” – as indeed, indisputably, was the case. It would appear that the monies in question had been earmarked for payment as a dividend but were not ultimately treated as such.
145. The terms of clause 4.4 of the SPA required the Director Loans to be repaid on completion, but they were not.
146. Palmyra did repay its £50,000 loan back to on 9 October 2020, having been asked by Mr Jethwa to do so.
147. The Completion Accounts should have been produced within 60 days of Completion but were produced marginally late on 2 December 2020. Mr Rowe emailed them to Mr Jethwa that morning. In the Completion Accounts, the Directors Loan is recorded in the same way as it was recorded in the Statement of Cash, namely has a credit.
148. The Completion Accounts showed Mr Jethwa as owing £16,337. Mr Jethwa replied to Mr Rowe’s email that afternoon saying: “*I will repay the 16,337 back to [ENL’s] bank account and my position with regards to any repayment closed.*”
149. Mian Zubair of CPA emailed Mr Jethwa later that afternoon to say: “*As discussed, we have noted that you transferred £50k in the business on 9th October whilst the completion accounts are based on overdrawn loan account of £200k. Now that the completion figure has been agreed and if you have not transferred the £50k back to yourself yet, you can make the transfer now.*” The reference to this £50,000 is a reference to the money that Palmyra had repaid. Mr Jethwa then responded to say: “*Thank you for the confirmation and now that the completion accounts are agreed and closed as discussed with you and Joshua. I have transferred the £50k back to me in the matter concluded and nothing owing to Clearcourse or E-Novations.*”
150. In March 2021 there were a series of email exchanges between Mr Gualtieri and Mr Jethwa, the gist of which was that Mr Gualtieri emailed Mr Jethwa to the effect that the £200,000 Directors Loans were outstanding, and that he was chasing this up as a matter of “*housekeeping*”. Mr Jethwa responded to the effect that matters of housekeeping had already been dealt with, stating that Mian Zubair would be aware of this, reference being made to the email exchange in December 2020 referred to above.
151. In response to this, Mr Gualtieri, in an email dated 10 March 2021 set out CPA’s position, stating that: “*I’ve done some further investigation around this and can help clarify the confusion. Our normal practice is that loans (like other debt items) would be cleared pre-transaction but in this instance we agreed this*

could take place post deal completion. Your solicitor should be able to confirm that the loan amount was not deducted from the proceeds. In terms of the completion accounts, our team assumed that the loan had been repaid and that is why it was shown as a cash item in the completion accounts summary that Josh sent you. Clearly this assumption is incorrect as the repayment was never received and remains outstanding, therefore the amount owed remains £216,337...". Mr Gualtieri thus contended that the £200,000 had not, in fact, been taken into account in arriving at the sum of £16,337 shown as outstanding in the Completion Accounts as due from Mr Jethwa, thus meaning that whatever might have been said at the time, the £200,000 had not, in fact, been repaid.

152. In response, Mr Jethwa continued to maintain that the £16,337 figure was a figure agreed as a full and final settlement in respect of all outstanding sums due on completion, and thus that there was no Directors Loan outstanding. On the other hand, in response thereto, Mr Gualtieri continued to maintain that the Directors Loan remained outstanding.
153. On 31 March 2021, Mr Jethwa was provided with the EBITDA Earn-Out Accounts in respect of the First EBITDA Earn-Out Consideration. On the same day, and in response to Mr Jethwa sending another email contending that the question of the Directors Loans had been closed in December 2020 when the amount outstanding in respect of the Completion Accounts had been confirmed at £16,337, Mr Gualtieri wrote to say: *"There definitely seems to be some confusion on your part, I'm not sure if this has been caused by my communication, I apologise if that is the case. I will attempt to summarise... Completion accounts. As you state, finalised last year with a position of you owing £16,337. I am not revisiting these accounts, simply asking you to pay what is owed. Director Loan. As you are aware, an exception was made in regard to the Director Loan (our respective legal counsels will have records of this) allowing the deal to close without this debt being cleared with an expectation that it would be cleared post closing. Whilst our team were remiss in not chasing this, the obligation remains and, per my earlier request, we appreciate your providing either proof of repayment or to make payment to close this matter out."*
154. As touched upon above, on receipt of the EBITDA Earn-Out Accounts in respect of the First EBITDA Earn-Out Consideration, Mr Jethwa challenged a number of the deductions that CPA and sought to include pursuant to paragraph 2.2 of Schedule 7. He did so in an email dated 1 April 2021. This email made no mention of the Directors Loan.
155. On 14 April 2021 a formal written agreement was entered into between (1) *"the Buyer"* (CPA) and (2) *"the Sellers"* (Mr and Mrs Jethwa and Palmyra) agreeing a figure of £450,000 *"in full and final settlement of the First EBITDA Earn-Out Consideration"*. This settlement was expressed to be on the basis that it was not be construed as an admission by CPA of a proper calculation for the purposes of the SPA, and that it should not set a precedent in relation to the calculation of the Second EBITDA Earn-Out Consideration. This agreement made no reference to the Directors Loan.

156. On 16 April 2021, Mr Tiverton Brown of CPA emailed Mr Jethwa to say: *“Thanks Manjoi – I understand that there is approximately £16k due from the completion accounts process. Do you want me to net this off the £450,000 payment?”*. Mr Jethwa replied the same day to say: *“If you can please”*. Mr Tiverton Brown then emailed Mr Jethwa to say: *“I understand the completion balance sheet amount is 16,337 - so will transfer £433,663”*.
157. The Directors Loan is not then mentioned in open correspondence until CPA’ Solicitors, Gibson & Co, wrote a letter of claim to Mr Jethwa on 3 March 2022 requiring payment of the £200,000. I understand that has been without prejudice correspondence and/or have been negotiations between the parties between April 2021 and March 2022, but understandably this was not further explored at the hearing.
158. The claim in respect of the £200,000 Directors Loan is pleaded in paragraphs 53-62 of the proposed Re-Amended Particulars of Claim. In their Defence thereto, at paragraphs 35 and 36 thereof, the Defendants plead as follows:
- “35 The director’s loan has been repaid by the First Defendant, and confirmation of that fact contained in an email exchange of 2 December 2020 to Mr. Rowe, and an email response from him that same day accepting that the only sum that needed repayment was £16,337, and the further assurance of Mr. Zubair the accountant on 3 December 2020, and that of Jonathan Tiverton Brown the Group finance Director on 16 April 2021 (the £16,337 being duly repaid by way of deduction from the Sellers’ first earn-out payment). The suggestion that the Claimants made a mistake is denied.*
- 36 The draft completion accounts were put forward with the email from Mr. Rowe already referred to, so the alleged effect of the draft accounts is denied. All other allegations in paragraphs 53-62 are denied.”*
159. Mr Jethwa dealt with the allegations in relation to the Directors Loan in paragraphs 28-30 of his witness statement dated 6 December 2022, Were he said as follows:
- “28. As I have said in my Defence, Clearcourse's accountant assured me that all I had to pay was £16,333, and at the time I took that at face value. Mr. Gualtieri later started to say that was a mistake, and the £200,000 was still due from me, but this was only after I had started to press for my earn-outs - another pre-emptive strike by Mr. Gualtieri. Because of the dispute with Clearcourse over the earn-outs, and the issue of the £200,000 director's loan, I incorporated both of these issues in an agreement with Mr. Gualtieri to settle these issues by an agreed payment of £450,000 less the agreed indebtedness of £16,337 (and I only agreed to this relatively small figure of £450,000 because I was then employed by E-Novations, and knew I would shortly be entitled to millions of pounds of earn-out pursuant to Schedule 9...*

29. *As regards the completion accounts, I have never accepted these, and contrary to what Mr. Gibson claims, under the provisions of the SPA they did not become final and are still open for challenge.*
30. *If therefore I was at the time of the SPA bound to pay £200,000, that liability has been compromised by the agreement with Mr. Gualtieri, and nothing is therefore outstanding. Mr. Gibson does not accept the allegations in my Defence, but that once again appears to raise a triable issue.”*
160. Mr Jethwa dealt with the matter further in a witness statement dated 17 January 2023. Responding to an assertion that the £450,000 agreed to be paid in respect of the First EBITDA Earn-Out Consideration did not take into account the £200,000 Director Loans liability, at paragraphs 3 and 5 of his witness statement, Mr Jethwa said this:
- “3 *There is no truth in this; in a three-way telephone discussion on 9th April between myself Mr Gualtieri and Mr Tiverton Brown, it was agreed that the agreed sum of £450,000 was to include any alleged indebtedness on my part to Clearcourse of £200,000. Knowing Mr Gualtieri as I do, he would never have agreed to pay me £450,000 if the real sum outstanding was £450,000 less agreed indebtedness of £200,000.*
- ...
- 5 *What is not in any email is the conversation I had with Mr Tiverton Brown on 13th April, in which he told me that he had cleared the director’s loan and the agreement that has to be put together by Squires will be brief to reflect the earn-out term only and rest assured the directors loan accounts are settled.”*
161. The email correspondence exhibited to this further witness statement of Mr Jethwa does refer to setting up a Teams meeting at 12:30 PM on Friday, 9 April 2021, and there is further reference in a later email dated 12 April 2021 to “*our telecon of Friday*”, supporting Mr Jethwa’s evidence that a three-way discussion did take place between himself and Mr Gualtieri and Mr Tiverton Brown on 9 April 2021.
162. However, in an email dated 13 April 2021 to Mr Jethwa, Mr Tiverton Brown refers to Squires pulling together the paperwork “*to reflect the settlement of the 2020 EDITDA Earnout at £450,000*”, without making any reference to the Directors Loan.

The parties’ respective cases in respect of the Directors Loan issue

163. It is the Claimants’ case that, up to the date of the entry into the formal agreement in respect of “*the First EBITA Earn-Out Consideration*” on 14 April 2021 at least, the position was as explained by Mr Gualtieri in his emails to Mr Jethwa dated 10 March 2021 (19:27) and 31 March 2021 (20:46), i.e., the Completion Accounts showed a balance of £16,337 due, but on the basis that the Directors Loan remained outstanding and due in addition thereto. To the

extent that representatives of CPA or ENL might have suggested otherwise in correspondence, they were incorrect. However, the £16,337 was not paid at this time, whether on the basis that it was being paid in full and final settlement of sums due completion as adjusted by the Completion Accounts, or otherwise and so there was no agreement by CPA or ENL to forego ENL's entitlement to recover the Directors Loan, and no waiver.

164. That leaves the question as to whether there was an agreement between Mr Gualtieri and Mr Jethwa as touched on in Mr Jethwa's witness statement dated 6 December 2022 to the effect that the £200,000 outstanding in respect of Director Loans would be brought into account in agreeing a sum of £450,000 in respect of the First EBITDA Earn-Out Consideration. As to this, it is submitted that it is very clear that this was not dealt with by the formal written agreement concluded on 14 April 2021, and it is submitted on behalf of the Claimants that the suggestion that there was some other oral agreement as between Mr Gualtieri and Mr Jethwa is simply not credible.
165. On this basis, it is the Claimants' case that Mr and Mrs Jethwa have no real prospect of successfully defending the claim to recover the £200,000 advanced by way of the Directors Loan, and that they are entitled to summary judgment in respect thereof.
166. As to Mr and Mrs Jethwa's case in defence to this element of the claim in the Chancery Proceedings, the emphasis in Mr Jethwa's witness statement dated 6 December 2022 appears, realistically as I see it, to be upon the compromise agreement with Mr Gualtieri referred to in paragraphs 28 and 30 thereof under which, so it is alleged, it was agreed that the £200,000 outstanding in respect of Directors Loan be brought into account as against the claim for First EBITDA Earn-Out Consideration, and therefore in arriving at the agreed sum of £450,000 in respect thereof.
167. This was certainly the focus of the case on behalf of Mr and Mrs Jethwa advanced by Mr Harris at the hearing, the submission being that paragraphs 28 to 30 of Mr Jethwa's witness statement raised factual issues in relation to the alleged compromise agreement that could not properly be determined against Mr and Mrs Jethwa on an application for summary judgment and/or strike out, such that Mr and Mrs Jethwa have a real prospect of successfully defending this claim.
168. On this basis it is submitted by Mr Harris that this aspect of the application for summary judgment and strike out ought to be dismissed.

Determination of the Directors Loan claim

169. It is reasonably clear that the Completion Accounts were prepared on the basis that the £200,000 Director Loans to shareholders remained outstanding given that the latter were recorded in the same way as in the Statement of Cash in Annex A to Schedule 6 to the SPA, coupled with the fact that the Directors Loan had not been repaid as at the date thereof. This was the basis upon which the balance of £16,773 was recorded in the Completion Accounts, although one can

see how confusion might have arisen given the way that the Directors Loan had been recorded, and the fact that a balance of £16,773 was identified.

170. However, I do not consider there to be any proper basis for saying that there was any form of compromise agreement concluded in December 2020 to the effect that the total outstanding balance due was £16,773, not including the additional £200,000 in respect of the Director Loans. Further, I do not consider that the circumstances demonstrate that there was any waiver on the part of the Claimants. The position might have been different if the £16,773 due had been paid at that time and paid on the specific basis that the balance outstanding thereafter was nil. However, that was not the case, and the £16,773 did not actually come into account until very much later, and in different circumstances.
171. Therefore, I consider that any defence that might be available to the Directors Loan claim turns upon whether Mr and Mrs Jethwa can demonstrate that there is a real as opposed to a fanciful prospect of being able to establish at trial that a compromise agreement wrapping up the £200,000 in the £450,000 agreed to be paid in respect of First EBITDA Earn-Out Consideration was concluded in a three-way conversation on 9 April 2021 between Mr Gualtieri, Mr Tiverton Brown and Mr Jethwa.
172. There are, as I see it, a number of forceful points that serve to undermine the credibility of Mr Jethwa's evidence with regard to the agreement in respect of the Directors Loan that he says was concluded during the course of a three-way conversation with Mr Gualtieri and Mr Tiverton Brown on 9 April 2022, namely:
- i) There was no mention of the alleged agreement concluded during any three-way conversation on 9 April 2021 in Mr Jethwa's letter dated 10 March 2022 responding to Gibson & Co.'s letter of claim dated 3 March 2022. Further, there was no mention of any such agreement or conversation in Mr and Mrs Jethwa's Defence dated 1 July 2022, served well before Mr Jethwa made his witness statement dated 6 December 2022. One might have expected any compromise agreement concluded during the alleged three-way conversation to have been pleaded at that point, and pleaded in some detail, if, in fact, agreement had been reached in respect of the Directors Loan in the course of such conversation.
 - ii) The relevant paragraphs of Mr Jethwa's witness statements dated 6 December 2022 and 17 January 2023 dealt with the alleged agreement in respect of the Directors Loan concluded during the course of a three-way conversation on 9 April 2021 in somewhat brief and perfunctory terms, without really explaining the context in which the alleged agreement was concluded against the background of the formal agreement signed by the parties on 14 April 2021. One might have expected rather more detail if there were credibility in Mr Jethwa's case as to the relevant conversation.
 - iii) The conclusion of the agreement with Mr Gualtieri and Mr Tiverton Brown on 9 April 2021 to take the £200,000 in respect of the Directors Loan into account in agreeing the £450,000 in respect of the First

EBITDA Earn-Out Consideration does not rest easily with the formal agreement signed on 14 April 2021. This formal agreement was, it would seem, prepared by Squire Patton Boggs, Solicitors, and if a component of the agreement was a compromise of the Director Loans claim, then one might perhaps have expected the formal agreement to have dealt with it. To the contrary, the formal agreement stated that it was in full and final settlement of the First EBITDA Earn-Out Consideration and nothing more.

- iv) A copy of the formal agreement was sent to Mr Jethwa by Mr Tiverton Brown of CPA/ENL under cover of an email dated 14 April 2021. In response, commenting on the formal agreement, Mr Jethwa said that it: *“seems as per our discussions.”* If there had been wider discussion with regard to the Directors Loan that Mr Gualtieri had been chasing repayment of during the course of a three-way conversation on 9 April 2021, then one might have expected Mr Jethwa to have raised the issue at this point.

173. As against these points that do, as I say, serve to undermine the credibility of the agreement alleged by Mr Jethwa, are the following points:

- i) The existence of a three-way conversation between Mr Jethwa, Mr Gualtieri and Mr Tiverton Brown on 9 April 2020 is supported by evidence provided by the contemporaneous emails referred to in paragraph 161 above, although I recognise that Mr Jethwa may have used this evidence to create a false narrative.
- ii) Given that Mr Gualtieri had been very active in seeking to chase down recovery of the £200,000 Directors Loan in the lead up to the formal agreement being signed on 14 April 2021, it is perhaps somewhat odd that CPA and/or ENL should, at least without explanation, have paid the £450,000, only netting off the £16,073 are not the £200,000 which, on its case, remained outstanding. I note Mr Jethwa’s observation in paragraph 3 of his witness statement dated 17 January 2023 that knowing Mr Gualtieri as he did: *“he would never have agreed to pay me £450,000 if the real sum outstanding was £450,000 less an agreed indebtedness £200,000”*. This, to my mind, has ring of truth about it.
- iii) Again, given that the repayment of the £200,000 had pursued in correspondence in the period leading up to 14 April 2021, it is perhaps somewhat odd that Mr Tiverton Brown should have written on 16 April 2021 in terms suggesting merely netting of the 16,773 as against the £450,000 agreed in respect of First EBITDA Earn-Out Consideration, without any reference to any outstanding £200,000.
- iv) If £200,000 had remained outstanding and had not formed part of the agreement relating to the payment of £450,000, one might have expected Mr Gualtieri to have subsequently sought to chase up payment prior to Gibson & Co writing on 3 March 2022, nearly a year later. However, I recognise that I must place limited weight on this consideration bearing

in mind that there was, apparently, some without prejudice correspondence and/or negotiation in the meantime.

- v) One can, perhaps, understand how Squire Patton Boggs may have been instructed to prepare a formal written agreement dealing simply with the formality of recording the agreed First EBITDA Earn-Out Consideration, without necessarily dealing with how the figure of £450,000 agreed upon had been arrived at.

174. Whilst, in the light of the matters identified above, I have considerable reservations with regards to the credibility of the agreement alleged by Mr Jethwa with regard to including the £200,000 outstanding in respect of the Director Loans within the agreed figure of £450,000 in respect of the First EBITDA Earn-Out Consideration, in the light of the considerations referred to in paragraph 173 above, I am on balance persuaded that Mr and Mrs Jethwa's do stand a real prospect of successfully defending this particular claim on the basis that an agreement to this effect was concluded during a three way meeting on 9 April 2021.
175. In the circumstances, I do not consider that the Claimants are entitled to summary judgment in respect of the claim to recover the £200,000 Directors Loan.

Breach of warranty claim

Introduction

176. As I have mentioned, the Claimants' primary case is that, at all relevant times, ENL owned the IP in the Emperium Software, or at least enjoyed sufficient rights in respect thereof to properly and effectively carry on its business. The breach of warranty claim is pursued in the event that this should not be the case. In simple terms, it is CPA's case that if ENL did not have the requisite IP rights in respect of Emperium Software, then it follows that Mr and Mrs Jethwa must be in breach of warranty. It is on this basis that CPA seeks summary judgment on this issue, or that the relevant paragraphs of the Defence be struck out.
177. Paragraph 1 of the Defence pleads that ENL never owned the relevant IP. Paragraph 2 of the Defence then goes on to plead that:

“2. *The IP was developed by an entirely separate company, namely EPOS Guru Private limited from 2008 to 2013, and then licensed by them to the manufacturers of the two machines. These manufacturers pre-loaded this IP into the new tool machines, and solar machines complete with embedded IP to [ENL]. In 2017, EPOS Guru Private Limited transferred ownership of the IP to [EDE], who thereafter licensed use of the IP to the manufacturers of the tools, who pre-loaded the software into the tools and sold these tools with the embedded IP to [ENL]. [EDE] were at no time included in the SPA, nor was the IP.*”

178. In a response to a request for further information, Mr and Mrs Jethwa sought to amend paragraph 2 of the Defence by saying: *“There was no formal agreement governing the supply of the IP to manufacturers, so “licensed” should be replaced with “supplied””*.
179. In response to a subsequent request for further information under paragraph 2 of the Defence regarding the granting of licences to manufacturers by EPOS Guru, Mr and Mrs Jethwa responded: *“No licences were granted to manufacturers. The IP was simply supplied to manufacturers (up to 2017) by EPOS Guru Private Limited, and after that time, by [EDE], directly to the manufacturer.”*
180. Paragraph 7 of Mr and Mrs Jethwa’s Defence denied an allegation in the Particulars of Claim that ENL had, at all material times, conducted business as a supplier of electronic point-of-sale hardware and software, and associated services, and that it had over the years since its establishment developed POS software which it had at all material times marketed under the Emperium brand. Paragraph 7 of the Defence referred to EPOS Guru developing the IP and to having *“supplied”* the IP to manufacturers of till machines, which with IP installed were then sold to ENL, which in turn sold the till machines with preloaded IP to its customers. Paragraph 7 goes on to allege that under the SPA, CPA was buying ENL *“with a couple of thousand existing customers, and a history of supplying well-known brand of tool machines with pre-loaded IP, and this was a valuable asset for which [CPA] agree to pay the consideration set out in the SPA”*.
181. In paragraph 7 of the Amended Particulars of Claim, the Claimants describe the features of the Emperium Software including that it included not only features directly required for making and managing sales but also back office and business management, record keeping and analysis functions. In paragraph 8 of their Defence, Mr and Mrs Jethwa pleaded to this paragraph as follows:
- “8. Paragraph 7 is admitted in so far as the software supplied to customers of the Second Claimants in the tills up to the time of the SPA did do what is pleaded, and the use of that software as between the Second Claimants and their customers was licensed to those customers by the Second Claimants when they sold the tills (under an End-User Licence Agreement, referred to here as EULA). Prior to the execution of the SPA, the Second Claimants were a member of a group of companies controlled by the First Defendants, and the Defendants deny that the requirement for customers of the Second Claimants to execute a EULA when the customers bought a till from the Second Claimants was intended to mean or did mean that the Second Claimants themselves owned the IP. Subject to that, paragraph 8 is also admitted.”*
182. It is the Claimants’ case that, at all relevant times, ENL carried on business on the footing that it had developed the Emperium Software and owned the IP therein. The Claimants thus point to the fact that ENL’s website at the date of the SPA included an image that stated that ENL was a *“manufacturer of Emperium EPOS software”* and that *“Emperium software”* was shown as

falling within the software component of ENL's business' activities. Further, a link under "*Products*" included reference to "*Software solutions*".

183. Reference is also made by the Claimant to, amongst other things, the EULA which I have referred to in paragraph 9 above. I refer therein to Article 2 of EULA, but reliance is also placed by the Claimant's upon a number of other provisions thereof including Article 4 (Scope of Rights Granted) and Article 6 (Intellectual Property). The point is made that, pursuant to the EULA, ENL, in selling the hardware in the tills to its customers, thereby purported to grant the customer a licence to use the Emperium Software embedded therein. If ENL did not own the software or appropriate rights thereover, then it could not lawfully have contracted on the terms that it did.
184. It has at all relevant times been a feature of the way that ENL carried on business that as well as affecting hardware sales and receiving the price of till sold on sale, it also received licence fees from purchasers on a recurring basis in respect of the software embedded therein. Thus, the breakdown of income of ENL for the year ended 31 December 2021, as shown in the unaudited profit loss account provided to Mr Jethwa under cover of the email dated 1 March 2022, refers to recurring revenue in the form of "*Licence - Subscription*" in an amount of £574,000, and non-recurring revenue in the form of "*Hardware sales*" of £989,000.
185. A number of allegations of breach of warranty are included within paragraphs 66 and 67 of the proposed Re-Amended Particulars of Claim. However, for the purposes of the application for summary judgment/strikeout made by the Fifth Application, Mr Mitchell KC limited the Claimants' case to breaches of the Warranties contained in paragraphs 9(a), 7.18(a) and (b), 7.5(a) and (b), 8.2, and possibly 9.0 and 10 of Schedule 3 to the SPA.
186. I have referred to in paragraph 23(iv) above to the basis upon which the Warranties were given by Mr and Mrs Jethwa as "*Warrantors*", warranting the truth of the relevant Warranties.
187. The Warranties in Schedule 3 to the SPA relied upon for present purposes are in the following terms:

"7 *TRADING AND COMPLIANCE*

...

7.5 *Validity of agreements*

- (a) *All agreements to which the Target is a party constitute valid and binding obligations on the parties to such agreements, which are enforceable in accordance with their respective terms.*
- (b) *Neither the Target nor any of the Sellers has any knowledge of the invalidity of, or a ground for termination, rescission,*

avoidance, repudiation or material change in terms of any agreement or arrangement to which the Target is a party.

...

7.18 Licences and consents

- (a) *The Target has obtained all licences, permission, authorisations and consents from any person, authority or body which are necessary for the carrying on of its business in the places and in the manner in which such business is now carried on.*
- (b) *A copy of each such licence, permission, authorisation or consent is attached to the Disclosure Letter.”*

...

“8. ASSETS

...

8.2 Assets sufficient for the business

The assets owned by the Target together with the services and facilities to which it has a contractual right comprise all the assets, services and facilities necessary for the carrying on of the business of the Target as now carried on at the date of this agreement.”

...

“9 INTELLECTUAL PROPERTY RIGHTS

- (a). *The Target Intellectual Property Rights¹ and the Third Party Intellectual Property Rights² comprise all the Intellectual Property rights necessary for the Target to operate its business as it is operated at the date of this agreement.*

...

- (o) *Whether in the carrying on of its business or otherwise, so far as the Warrantors are aware the Target does not infringe and has not, at any time during the last six years, infringed any Intellectual Property owned by any third party or breached any obligations of confidence owed to any third party.”*

¹ Defined in clause 1.1 of the SPA as meaning: “*all Intellectual Property owned, used, controlled or held for use by the Target including the Intellectual Property listed in Schedule 4*” [emphasis added].

² Defined in clause 1.1 of the SPA as meaning: “*all Intellectual Property used by the Target in connection with the business of the Target but not owned by the Target, as listed in Part 4 of Schedule 4.*”

...

“10 INFORMATION TECHNOLOGY

...

10.2 *The Target is entitled as owner, lessee or licensee to use each part of the IT System for all purposes necessary to carry on its business in the manner in which it is carried on at the date of this agreement and has put in place all necessary arrangements and has obtained all necessary rights from third parties to enable the Target to fulfil the foreseeable future requirements and to enable the Target to make unrestricted use of the IT System following Completion.”*

CPA’s case

188. CPA’s case, in simple terms, is that if it has no ownership or other rights in respect of the Emperium Software as contended by Mr and Mrs Jethwa, then it has been, and is selling and supplying tills with embodied software on a fundamentally flawed basis, with no right to grant the licence to the customer to use the software that the EULA purports to grant and in respect of which a licence fee is payable by the customer.
189. The point is made that paragraph 8 of the Defence pleads *that “the use of that software as between [ENL] and their customers was licensed to those customers by [ENL] when they sold the tills (under ... EULA)”*. This begs the question as to how ENL was to do so if it had no rights over the Emperium Software. The OSA as between EDE and ENL might have provided the opportunity to formalise matters so far as any licence as between these two parties was concerned, but it did not do so, and indeed provided for EDE to provide ENL with software development services.
190. Given these identified fundamental flaws in the way that ENL has conducted its business if, in fact, it does not own or have the requisite rights in respect of the Emperium Software, then it is the Claimants’ case that the Warranties relied upon for the purposes of the present application were all untrue, albeit that Mr Mitchell KC accepts that the case in respect of paragraph 10.2 of Schedule 3 is more debatable.
191. It is submitted by the Claimants that paragraph 9(a) provides a paradigm example of where there is a breach of warranty in the present case. On Mr and Mrs Jethwa’s case as to the ownership of the IP in the Emperium Software, the Target Intellectual Property Rights and the Third Party Intellectual Property Rights cannot have included the Emperium Software. But the consequence of this is that the latter cannot than have comprised all the Intellectual Property rights necessary for ENL to operate its business as it was operated at the date of the SPA. It is submitted that the warranty was, in these circumstances, therefore, clearly untrue.

192. Similar points are made in respect of the other Warranties relied upon by CPA, e.g., paragraph 7.18(a) of Schedule 3. On Mr and Mrs Jethwa's case as to ownership of IP, ENL cannot have "*obtained all licences, permissions, authorisations and consents from any person, authority or body which are necessary for the carrying on of the business in the places and in the manner in which such business is now carried on.*" A similar point can be made in respect of paragraph 8.2 of Schedule 3 relating to "*assets sufficient for the business*".
193. Further, given the flaws that are said to exist as to the basis upon which ENL entered into EULAs, if Mr and Mrs Jethwa are correct as to the ownership of IP, then it is the Claimants' case that they must be in breach of the Warranty in paragraph 7.5(a) of Schedule 3 in that it could not truthfully be said that: "*All agreements to which the Target is a party constitute valid and binding obligations on the parties to such agreements, which are enforceable in accordance with their respective terms.*" As to this, Mr Mitchell KC relies, amongst other things, upon the fact that in submissions, Mr Harris conceded that, on Mr and Mrs Jethwa's case, the licence agreements entered into by ENL with customers, providing for payment of a licence fee, could not be enforced by ENL if, as they contend, ENL had no ownership of or rights over the Emperium Software.
194. On this basis, it is submitted that a case of breach of warranty is clearly made out in respect of the Warranties in question, to which Mr and Mrs Jethwa have no defence if they right in their case as to the ownership of the IP. Consequently, CPA is entitled to summary judgment and/or to have the relevant paragraphs of the Defence defending this aspect of claim struck out.

Mr and Mrs Jethwa's defence

195. The essence of Mr and Mrs Jethwa's case as advanced by Mr Harris in submissions was to the effect that the Claimants' complaint that transactions as between ENL and its customers are fundamentally flawed is itself misconceived and wrong because, on proper analysis, all that the EULA was seeking to do was to impose restrictions on what the customer might do with the software embedded into the tills that were supplied. Particular reference was made by Mr Harris to Article 4 of the EULA in imposing restrictions on the customer, and he submitted that the purpose of the EULA was simply to restrict cloning or misuse of the relevant IP. He submitted that the EULA did not purport to say that ENL was the owner of the relevant IP.
196. Mr Harris repeated the position adopted in paragraph 7 of the Defence that, in essence, what CPA had acquired under the SPA was a list of customers, and he submitted that ENL did not need any licence in respect of the relevant IP to supply machinery with the relevant software embedded therein and could freely change manufacturer it wished.
197. Mr Harris submits that CPA knew exactly what it was getting in purchasing the share capital of ENL and was aware that the latter did not own the relevant IP in the Emperium Software or enjoy any third party licences in respect thereof, not least because Schedule 4 to the SPA, apart from in respect of Dominion

Names, did not identify any IP and referred in Parts 1, 2 and 4 thereof to “None”.

198. In these circumstances, it is Mr and Jethwa’s case that the relevant Warranties are properly to be regarded as true, and that there was no breach thereof, and that their Defence, on the evidence before the Court, demonstrates that they have a real prospect of successfully defending this element of the claim made in the Chancery Proceedings. Consequently, they submit that the Fifth Application should be dismissed so far as it relates to the breach of warranty claim against them.

Determination of the breach of warranty claim

199. I consider that Mr and Mr Jethwa, through Mr Harris, take an unduly restrictive view of the scope of the EULA in suggesting that it was effectively limited to restricting cloning or misuse of software. I consider that it did and does purport to grant rights in the form of a licence to use the relevant IP, and to do so on the basis of ENL owning the relevant IP or having the requisite rights conferred by third parties to do so. I note, in particular:

- i) Clause 2 of the Terms and Conditions of Sale attached to the EULA, which states that such terms and conditions set out “*the conditions under which [ENL] shall supply equipment and software including third party’s and perform the services purchased by the customer except the software is licensed on an annual basis through payment of an annual licence fee non-payment which will revoke the licence to use such software*” [emphasis added].
- ii) Clause 3 of the Terms and Conditions, which refers to software, including third party software, being detailed in the schedule, and to licence conditions being set out in clause 7. Clause 7 refers to an “*Annual Licence Fee*”, which pursuant to clause 9 is payable as part of the “*Support Fee*”. That these provisions were given effect to is, as I see it, evidenced by the receipt by ENL of licence fee income as shown in its accounts.

200. I consider it important to note that, in defining “*Target Intellectual Property Rights*”, clause 1.1 of the SPA refers to all Intellectual Property owned, used, controlled or held for use by ENL “*including*” the IP listed in Schedule 4. Schedule 4 was not therefore intended to be a compendious record of all IP owned by ENL, and the Warranty in paragraph 9(a) of Schedule 3 was to the effect that the Target Intellectual Property Rights and the Third Party Intellectual Property Rights comprised all the IP rights necessary for ENL to operate its business as it operated at the date of the SPA.

201. It is true that the definition of Third Party Intellectual Property Rights refers to the IP listed in Schedule 4 without the use of the word “*including*”. However, as I see it, this merely leads the conclusion that it was being warranted that ENL itself owned the IP rights necessary for it to operate its business as it operated at the date of the SPA, without reliance on third party licences.

202. Further, I do not consider that it is open to Mr and Mrs Jethwa, for these purposes, to say that CPA was aware that ENL did not own the requisite IP, or otherwise enjoy the requisite rights in respect thereof. As I have said, in the light of the definition of Target Intellectual Property Rights, Schedule 4 is not properly to be regarded as a compendious list of IP owned by ENL. Further, pursuant to clause 6.2 of the SPA, the Warranties were warranted to be true and accurate and not misleading as at the date of the SPA subject only to the matters referred to in sub-paragraphs 6.2(a) to (c). It was not suggested that any of these exceptions apply and is difficult to see that they did. Indeed, so far as matters “Disclosed” by the Disclosure Letter are concerned, the matters referred to therein tended to be to the effect that ENL did own the relevant IP, rather than that it did not do so given the matters therein that I shall refer to in dealing with the deceit allegations.
203. In the circumstances, I am persuaded that if Mr and Mrs Jethwa are correct in their case as to the ownership of the IP in the Emperium Software, then Mr and Mrs Jethwa have breached the Warranties contained in, at least, paragraph 7.5(a) and (b), 7.18(a) and (b), 8.2 and 9(a) of Schedule 3 to the SPA, and that that Mr and Mrs Jethwa have no real prospect of successfully defending the warranty claim against them in this event.
204. This does raise the question as to the appropriate relief to be granted. If the definitive position was that Mr and Mrs Jethwa are correct in their case as to the ownership of the relevant IP, then it would, as I see it, be appropriate to grant the Claimant’s summary judgment. However, subject to further submissions on the point, I do not see how judgment can be entered for damages to be assessed on the breach of warranty claim if the untruthfulness of the relevant Warranties is yet to be confirmed. In the circumstances, as presently advised, I consider that all that it would be appropriate to do is to strike out the relevant paragraphs of the Defence that sought to advance a defence to the breach of warranty claim.
205. I would merely add that it is trite law that the aim of any award of damages for breach of warranty would be to put CPA in the position that it would have been had the Warranties being true, i.e., if ENL did own or enjoy the appropriate IP rights.

Deceit claim

The Claimants’ case

206. The essence of the Claimants’ case is that, in the course of the due diligence process leading to the SPA, Mr Jethwa clearly conveyed, and thereby represented that ENL owned the IP in the Emperium Software. It is the Claimant’s case that this emerges unequivocally from responses to various requests made as part of the due diligence process, and that if Mr and Mrs Jethwa are correct in their case as to the ownership of the IP, then the relevant misrepresentations must have been made on a knowingly false basis.
207. The representations said to have been made and that relied upon by the Claimants for present purposes are those set out in paragraphs 29(a) and (c) of

the Amended Particulars of Claim in the Chancery Proceedings, which are in the following terms:

“29. Through the aforesaid communications as particularised above, the Sellers made the following representations to ClearCourse and CPA ('the Representations'):

a. ENL owned the Emperium Software and the intellectual property in it and was not using and supplying that software to its own customers under licence from any third party. This follows from the extensive disclosure in respect of the many versions of the Emperium Software and the development and licensing of that software under the EULA, and the fact that no licences to ENL from any third party owner were disclosed.

...

c. EDE acted as a supplier of the POS hardware ENL supplied to its customers and a supplier of outsourced services to ENL's customers on ENL's behalf but did not act as a source and/or supplier of the Emperium Software. This was disclosed in the form of the OSA v1 (referred to further below) and the response referred to in paragraph 26f above [being the response referred to in paragraph 212(vi) below].”

208. The Claimant’s primary position for the purposes of the present proceedings is that the representations were true on the basis that ENL did own the IP in the Emperium Software. However, in the event that this is not the case, then:

- i) In relation to the first of the representations, the Claimants rely, in particular, upon: (i) the extensive disclosure in respect of the many versions of the Emperium Software, which the Claimants say was always characterised as being ENL’s products; (ii) the development of the software partly in-house and partly by contractors whose access to the software was said to be strictly controlled; (iii) the licensing of that software under the EULA, which dictated that ENL as licensor must be owner or at least licensor of the software; (iv) the fact that no licences to ENL from any third party owner were disclosed; and (v) the fact that no supplier of software or software licences, or supplier of development services (other than as referred to in (ii)) was disclosed in the due diligence documents.
- ii) In relation to the second of the representations, the Claimants rely, in particular, upon (i) the wording of the OSA; (ii) the due diligence response that *“Target has arrangement with Epos Direct Europe LTD to supply hardware and to provide back office support services”*; and (iii) the due diligence responses relating to suppliers, which did not list any suppliers of the software.

209. The communications in the due diligence process leading up to the SPA that are said to have given rise to the relevant representations essentially fall into three categories, namely:

- i) The provision by Mr Jethwa of responses in the form of an amended spreadsheet and other spreadsheets cross-referenced thereto (“**the Technical Responses**”) to technical requests made on behalf of CPA in a technical spreadsheet (“**the Technical Requests**”);
 - ii) The provision by Mr Jethwa of responses in the form of and amended spreadsheet and other documents (“**the General Responses**”) to general requests made on behalf of CPA in a general spreadsheet (“**the General Requests**”);
 - iii) The contents of ENL’s website, which was formerly disclosed pursuant to the Disclosure Letter, and which made extensive reference to ENL’s business extending to the development and provision of software .
210. So far Technical Responses to Technical Requests are concerned, the key matters relied upon are as set out in paragraph 25 of the Amended Particulars of Claim. For present purposes, particular reliance is placed upon:
- i) Dataroom document 1.01 – This comprised a spreadsheet entitled “*Product Strategy*”, that gave details of software releases delivered in the past year plus planned and projected future releases, a Product SWOT and Product Census. The Claimants’ case is that these can only be read as conveying that ENL had developed and released components of the Emperium Software and was planning to do so in future. The Product SWOT referred to ENL as being a “*pioneer*” with 20 years’ experience in the UK POS industry which has “*continuously maintained and updated feature rich POS solutions in multiple verticals*”, effected “*numerous integrations to industry leading solutions*” and made “*bespoke features and customisations available*”. Digital delivery options were referred to as being available, as well as an API for integrations. Opportunities for future development were listed, including additions to functionality. Threats and weaknesses were set out in the SWOT but no reference was made to any dependence on any third party owner of the IP.
 - ii) Dataroom document 2.01 – As to this document:
 - a) It set out (on sheet 1 of the spreadsheet) a list of the various applications and versions of the Emperium Software, together with release dates and information on the frontend and backend technologies they used (e.g., languages, web services, etc.).
 - b) Other sheets within the document referred to ENL having the source code (“*this enables us to maintain a single codebase for all customers of the package*” – “*Customisations*” sheet). Third part components were listed but nothing owned by EDE was listed despite it being Mr and Mrs Jethwa’s case that EDE owned the relevant IP. The “*Product Architecture Abilities*” sheet states “*we have carried out a large number of integration work with ERP systems,*”.

- c) The document listed out investments over the last few years, and reference was made to what ENL had “*on the roadmap*” over the next 2-3 years. The Claimants make the point that ENL could not have done what was proposed without ownership of or an entitlement to use and licence the IP in the Emperium Software.
 - d) The Claimants submit that, given the terms of the request and the response thereto, the fact that nothing was said to the effect that ENL did not own or otherwise have the right to utilise what was being described amounted a representation that CPA was to acquire ENL with the benefit of what was being described, namely the IP in the Emperium Software.
- iii) Document 3.01 – This document:
- a) Provided a “*Description of the end-to-end software development life cycle (SDLC) from Product Vision and Roadmap through deployment, engineering deliverables, reports, workflow, and core tools*”, and is relied upon by the Claimants as showing the product first being developed in 2003 (before EDE and Epos Guru existed) and as referring to ENL developing the software, starting from 2003. The point is made that no mention is made of the product in fact belonging to someone else, and the Claimants submit that this amounted to a representation that ENL had for a long time been developing the software itself.
 - b) Referred to “*we*”, and not somebody else, utilising “*different SDLC methodologies*”.
 - c) Referred to existing clients typically being updated manually, which the Claimants rely upon as recognising that clients who have already purchased their hardware have further versions of the Emperium Software installed upon it after purchase.
 - d) Noted that for new installations , either software installers or hardware images are provided. The Claimants rely upon this as showing that software was not simply supplied pre-installed on EPOS devices.
- iv) Document 5.01 – This document set out headcount for employees and contractors involved in development of the Emperium Software (including web applications) and refers to 8 of the developers as being “*contractor/outsourced*” and as being offshore, while the remaining 5 are referred to as employees based in London. It is the Claimants’ case that development is thus represented to be a task partially carried out in house, partially by contractors, on a collaborative basis, and thus such that IP ownership would devolve to ENL purely by virtue of employment. It said by the Claimants to be notable that on the “*Dev Interactions*” sheet it is stated that “*Offshore development teams have access only to required [sic] resources from a fixed location where perimeter and endpoint security is in place to prevent data leakage.*” It

is submitted on behalf of the Claimants that this makes it plain that the developers working under contract do not hold the rights in the software, and indeed have their access controlled by ENL. Code is stated to be held by a “*central Gitlab repository*” meaning, the Claimants say, that ENL has access to and control over the source code.

- v) Document 7.01 – This document lists versions of the Emperium Software currently in use and their release dates and support policies. It is relied upon by the Claimants as showing that ENL has agreed with its customers to provide support for versions of the Emperium Software, something the Claimants say that ENL could only do if it owned the rights to that software or held some right to require its supplier to provide the input necessary for the support. The point is made that no agreement or licence with any supplier was disclosed showing that ENL had that right.
- vi) Document 4.01 / 7.4.1 – This document lists “*development tools*” used by ENL in respect of the Emperium Software, including, for example:
 - a) Visual Studio – an IDE (integrated development environment) used for developing source code; and
 - b) GitLab – which is stated (correctly it is submitted) to be version control software used to manage versions of source code.

It is submitted that only a developer of software would have these tools.

- 211. It is the Claimants’ case that all of the above documents demonstrate both singly and taken together that ENL itself developed, updated, customised, released and supported the Emperium Software as its own, and that whilst subcontractors were used to carry out some of the development work, their access to the software was strictly controlled by ENL. It is said that this factual position is consistent only with ENL owning and controlling the IP, and that the provision of the relevant documentation amounted to a representation to that effect.
- 212. So far as the General Responses to General Requests are concerned, the key matters relied upon are as set out in paragraph 25 of the Amended Particulars of Claim. For present purposes, particular reliance is placed upon:
 - i) Request 1.3 – This related to “*Intellectual Property*” and contained 25 sub-requests. The responses to all of these were “*n/a*”, except in relation to a request for domain names and social media profiles which was responded to by saying: “*we have a domain for the company, enovations.co.uk and the domain emperiumpos.com is for the software product with specs and training material. Sales are facilitated through eposdirect.co.uk.*” The Claimants contend that “*n/a*” could not mean that ENL did not own or use under licence much intellectual property other than the domain names. It is pointed out that, for instance, ENL plainly used unregistered trade names, business names and product names which were owned by ENL, or at the very least used under licence by it, and yet the responses to requests relating thereto (1.3.5 and 1.3.6)

are answered “n/a”. Similarly, as regards the IP, that consists of copyright in software which was undoubtedly used by ENL (to offer for sale, sell and distribute, either physically or by digital download, copies of the Emperium Software amounts to use of the copyright and requires either ownership or a licence). However, the responses on this (1.3.9 and 1.3.10) were, again, “n/a”. The Claimants seek to make the “simple point” that the “n/a” simply indicates a lack of an answer, not a positive assertion that there were no rights owned or used, particularly in the light of the Technical Responses. As Mr Mitchell KC put it in the course of submissions, if Mr and Mrs Jethwa are correct with regard to the ownership of the IP, the true answer to the request would have been that whilst ENL does receive payments for the use of the Emperium Software from customers, it does not own the IP in the software, or have any third-party licence in respect thereof.

- ii) Request 2.1.4 – This asked for “*Details of any product/service development plans (for existing or new propositions).*”. The response given was “*emperium cloud dashboard for self service and controls. Payments deep integrations and analytics*”. These developments were developments to the existing Emperium Software, and, the Claimants submit consistent only with ENL owning the IP in the software.
- iii) Request 2.2.1 – This asked for: “*A copy of the Target's standard conditions for the provision of products and/or services, together with an indication of how and when these conditions are brought to the attention of the Target's customers, and details of when this documentation was last revised.*” The EULA and Terms and Conditions of Sale attached thereto were provided in response. The Claimants refer to the fact that paragraph 21 of Mr and Mrs Jethwa’s Defence admits that all customers of ENL had “*to sign a EULA to use [ENL’s] product*”. The Claimants say that this is an admission that it was indeed ENL’s product.
- iv) Request 2.3.1 – This asked for a list of the top suppliers in the last 12 months, asking for details of what they supplied. A list of 9 suppliers was provided. None of the list was stated to be a supplier of software or software development services. EDE was listed as the top supplier but was stated to be a provider of “*outsourced support services & importing hardware*”.
- v) Request 2.3.2 - This asked for: “*A list of any suppliers to the Target, excluding the top 5, which are considered by the Target to be critical to the Target's continued ability to trade as normal*”. The response was “*Target's products or services are not dependant on any particular supplier.*” Given that ENL traded as a supplier of the Emperium Software (sometimes installed on hardware, sometimes not), it is the Claimants’ case that Mr Jethwa represented through these combined responses that ENL was not supplied with the Emperium Software by any third-party supplier, a position said to be readily explicable in the light of the numerous references to the Emperium Software being ENL’s own product. The Claimants submit that paragraph 21 of the Defence

totally ignores this point, merely saying that the tills sold by ENL were manufactured by a third-party manufacturer who received the IP from EDE and loaded the IP onto the machines before they left the factory. The Claimants say that the fact that the manufacturer may have loaded the software onto the machines it supplied does not make it the supplier of the software and in any case none of the manufacturers listed are stated to be suppliers of the software. Further, the machines were then imported by EDE for provision to ENL.

- vi) Request 2.3.4 – This asked for “*Details of any material sub-contracting or outsourcing arrangements, identifying in particular those upon which the Target is dependent for maintenance of production or supply.*” The response was “*Target has arrangement with Epos Direct Europe LTD to supply hardware and to provide back office support services.*” It is the Claimants’ case that Mr Jethwa thereby represented that ENL was not being supplied with, or licensed to distribute software, by EDE (or any other third party). The OSA had not been drawn up at that time, suggesting, the Claimants say, that the relationship between ENL and EDE must have been informal up to that point.
 - vii) Request 2.3.7 – This asked for “*Details of any third party for whom the Target acts as a distributor, agent or franchisee.*” The response was “*n/a*”.
213. The first version of the OSA was drawn up after the above due diligence responses were provided in order to set out a formal relationship with EDE which would apply following the completion of the SPA. This first version of the OSA was, as referred to above, drafted as between ENL and EDE without any involvement of CPA. There is the issue referred to above regarding whether the revised version of the OSA, containing CPA’s revisions, was ever signed. I proceed on the basis that only the first version found its way into the Data Room notwithstanding that Mr Jethwa had indicated in an email dated 18 August 2020 that he was content with the suggested revisions.
214. What the Claimants do say is that the OSA in both versions shows that software development work was to be carried out by EDE for ENL, without giving any indication that EDE was going to be supplying the Emperium Software to ENL, or licensing the IP underlying that software and that, to the contrary, the OSA suggests that ENL was responsible for providing software applications to EDE.
215. The Claimants submit that, the disclosure of the OSA with the services provided for thereby, coupled with the absence of any disclosure in the due diligence process or other reference to any agreement or licence with any supplier, including EDE, in respect of the use of the Emperium Software, amounted to a representation that EDE’s sole role as a supplier was as provided for by the terms of the OSA.
216. The Claimants’ overriding submission is that the pre-SPA documents can only mean that the IP was and is owned by ENL given that in all the pre-SPA documents there is not, it is said, a single document which states or even

suggests that the Emperium Software is not ENL's or that ENL does not own the IP or that EDE does.

217. So far as the correct legal approach to a claim for deceit/fraudulent misrepresentation is concerned, the Claimants place reliance on the helpful summary of the relevant principles recently provided in *Bell v Singh* [2022] EWHC 3272 (Ch) at [152]-[158] per Nigel Cooper KC, sitting as a Deputy Judge of the High Court. In essence:
- i) One needs to show a false representation of fact, made with the intention that it be relied on, and which is in fact relied upon and causes loss;
 - ii) The representor has to make the false representation knowing or believing it to be false, or being reckless as to whether it is true or false;
 - iii) A representation can be made by implication, but the implication must be clear from the words or conduct relied upon. In any event, it is necessary to identify the representation with care and how it is said to have been made.
218. Applying these principles to the present case, it is submitted by the Claimants that the representations referred to in paragraph 207 above were made by Mr Jethwa in the circumstances referred to in paragraph 208 et seq above, in particular by the communications therein referred to in the context of the disclosed EULA and OSA. It is submitted that the representations were clearly made with the intention of being relied upon and were relied upon by CPA in entering into the SPA. As to reliance, the key point is that it is said that it made no commercial sense for CPA to agree to acquire the share capital of ENL with its existing business based upon an ongoing contractual relationship with its customers as provided for by the EULA and the Terms and Conditions attached thereto if ENL did not will have a sufficient right to grant annual software licences as provided for by the terms of the EULAs. It is the Claimants' case that loss was suffered acting in reliance upon the misrepresentations in entering into the SPA, and thereby acquiring a company worth less than the price paid (if indeed ENL did not own the IP in the software).
219. Further, it is the Claimants' case that, if it is the case that ENL does not own the IP in the Emperium Software on the basis that, as contended by Mr and Mrs Jethwa, the IP is owned by EDE, then Mr Jethwa must have been aware of the falsity of the representations made, or at the very least reckless as to their truth or falsity. The simple point is that Mr Jethwa caused responses to be provided to the Technical and General Requests formulated on the basis that ENL did own the relevant IP, and wholly inconsistent with it being owned by EDE, as he must have known. Further, it is submitted that the point must have been brought into focus by the fact that the OSA entered into specifically to regulate the relationship between ENL and EDE.
220. To the extent that it is suggested by Mr and Mrs Jethwa that CPA was informed that NDL did not own the relevant IP, and that EDE did, it is the Claimants' case that:

- i) Mr and Mrs Jethwa have failed to provide proper particulars of the allegation notwithstanding a Request for Further Information requesting them to do so;
- ii) Any such suggestion is inconsistent with contemporaneous documentation, in particular an email dated 24 September 2019 from Mr Jethwa to Brandon Faulkner of CPA, copied into Mr Rowe, that makes reference to “*recurring contracts with monetary values*” as well as referring to “*capex sales being the initial sales value to include software licence, hardware etc..*” It is submitted that this is entirely inconsistent with Mr and Mrs Jethwa’s case that all that CPA was essentially acquiring was a list of customers;
- iii) Particularly given the basis upon which ENL dealt with its customers, namely on the terms of the EULA and attached Terms and Conditions providing for the grant of a licence in respect of the use of the software involving the payment of an annual licence fee that made up a significant part of ENL’s income, it would have made no commercial sense for CPA to have proceeded had it been made aware at any relevant time that ENL did not own the relevant IP; and
- iv) Consequently, any suggestion that CPA was informed otherwise than that ENL own the relevant IP is lacking in substance and reality.

221. The Claimant’s observe that Clause 16.2 provides no answer to the claim on the basis that the agreement as to non-reliance thereby provided for does not extend to representations made by any Transaction Document (as defined), or to fraudulent misrepresentations.

Mr and Mrs Jethwa’s Defence

222. Mr and Mrs Jethwa dispute that there has been any operative misrepresentation, and in particular any misrepresentation made fraudulently.

223. Firstly, it is Mr and Mr Jethwa’s case that CPA was told that ownership of the IP in the Emperium belonged to EDE and not to ENL. Thus:

- i) In paragraph 15 of the Defence, it is pleaded that: “... *the first contact was made by Brandon Faulkner of [CPA], who was specifically told that it was [EDE] and not [ENL] who own the IP and provided support for the software.*”
- ii) In paragraph 17 of the Defence, it is alleged that: “*on 17 September 2019 Messrs Rowe and Gualtieri were specifically presented by [Mr Jethwa] with knowledge of the fact of the supply by [EDE] of the IP to the manufacturers of those machines, and that these machines with pre-loaded IP were then sold on by [ENL] to [ENL’s] customers. The Defendants aver that Messrs Rowe and Gualtieri were interested only in the profits of [ENL] and a substantial number of customers, and not the IP or the machines sold by [ENL], nor who owned the IP.*”

- iii) These allegations are repeated in paragraph 18 of Mr Jethwa's witness statement dated 6 December 2022, but with no greater particularity than as pleaded. In this witness statement Mr Jethwa says that the question of ownership of the IP in the Emperium Software only arose sometime after the SPA, when in summer 2021, it was asserted by Mr Gualtieri on behalf of CPA that it belonged to ENL in circumstances which Mr Jethwa describes as probably being a "*pre-emptive strike*" made in circumstances in which Mr Jethwa was claiming to be owed significant sums in respect of earn-out consideration. On behalf of Mr and Mrs Jethwa, reliance is placed upon the fact that Mr Jethwa immediately responded by his email dated 3 September 2021 email to rebut in strong terms any suggestion that anybody other than EDE owned the IP.
224. I understand Mr and Mrs Jethwa's case to be that in the light of the above, there can be no question of there having been any operative misrepresentation that induced CPA to enter into the SPA believing that ENL owned the relevant IP, and no question of Mr Jethwa having made any knowingly false representation.
225. As to the alleged misrepresentations themselves, Mr Harris submits on behalf of Mr and Mrs Jethwa that they are: "*based on contorted and elliptical constructions of the answers which Mr Jethwa gave rather than an allegation of any positive misstatement.*"
226. As to the Technical Requests, it is pleaded in paragraph 20 of the Defence that the questions posed were questions concerned with marketing, and there is a similar plea in respect of the General Requests. I understand this to tie in with Mr and Mrs Jethwa's more general point, and their case that ENL did not need to own the IP or have any rights thereover in order to sell tills, because the tills were supplied by the manufacturer with the software already installed. On this basis, the various responses given to the Technical Requests and General Requests require to be viewed in this context.
227. Consistent with this line of argument, as mentioned in the context of the breach of warranty claim, it is Mr and Mrs Jethwa's case that the function of the EULA was simply to restrict cloning or misuse of the IP by customers.
228. Mr and Mrs Jethwa's say that their case is supported by Schedule 4 to the SPA, which refers to "*None*" in respect of "*Registered Intellectual Property Rights*", "*Trademarks*", "*Unregistered Intellectual Property Rights*" and "*Third Party Intellectual Property Rights and IP Licences*". It is submitted that had the SPA been entered into on the basis that ENL owned the relevant IP, and had CPA understood that to be the case, then the IP in the Emperium Software would have been identified and spelt out in Schedule 4 given the importance thereof suggested by CPA. It is Mr and Mrs Jethwa's case that the documentation disclosed in the course of the due diligence process requires to be considered in this context.
229. Mr and Mrs Jethwa say that the revised version of the OSA, containing the revisions suggested by CPA, appeared to transfer ownership of the IP to CPA. Mr and Mrs Jethwa rely upon this as a "*clear indication*" that CPA well knew that it was not going to receive the IP, but, as put by Mr Harris: "*by a deft and*

underhand moved, they were still going to try and get the IP, and get it without paying for it.”

230. The further point is taken by Mr and Mrs Jethwa that, bearing in mind that Mr Jethwa was to continue to be employed by ENL, it made no sense for Mr Jethwa to lie or deliberately make false representations regarding the IP given that, to quote from Mr Harris’ Skeleton Argument: *“It would be obvious to most people in Mr Jethwa’s position that if you lied to [CPA], [CPA] would have the means to exact retribution immediately so long as Mr Jethwa remained in their vicinity.”*
231. On the basis of the above, Mr and Mrs Jethwa submit that they must have at least a real prospect of successfully defending the claim in deceit, and that their Defence does disclose reasonable grounds for defending this claim, such that this aspect of the Fifth Application should be dismissed.

Determination of the deceit/fraudulent misrepresentation claim

232. The first question that arises for consideration is, as I see it, as to whether the various communications referred to in paragraph 208 et seq above, or some of them, were capable of giving rise to operative misrepresentations in the terms referred to in paragraph 207 above, or whether they should otherwise be construed. I consider that this involves an initial consideration as to whether Mr and Mrs Jethwa have a real prospect of successfully showing at trial that Mr Jethwa had made clear to representatives of CPA in an operative way that EDE owned the relevant software, and of showing that CPA’s real interest was in, essentially, acquiring a customer list to which it might sell tills with embedded software without the need to grant licences to customers in respect of the use thereof, perhaps hoping thereby to introduce customers to the CC Payment Processing System.
233. On analysis, I do not consider that Mr and Mrs Jethwa do stand any real prospect of so demonstrating for the following reasons:
- i) I agree with the Claimants that the references to the alleged conversation with Brandon Faulkner referred to in paragraph 15 of the Defence, and the alleged further conversation, apparently with Messrs Rowe and Gualtieri on 17 September 2017 referred to in paragraph 17 of the Defence, are each pleaded in the vaguest of terms, and I consider it telling that the Further Information served by the relevant Defendants on 16 August 2022 displays an unwillingness and/or inability to provide further particularity, as does Mr Jethwa’s witness statement dated 6 December 2022.
 - ii) Further, I consider that the existence of any contemporaneous belief on the part of CPA that the relevant IP belongs to EDE without ENL even having any right to grant licences in respect thereof, is undermined by Brendan Faulkner’s email dated 24 September 2019 referred to above.
 - iii) In addition, I consider it significant that even if anything might have been said by Mr Jethwa in or about September 2019 with regard to

ownership of, or entitlement to use the IP in the Emperium Software, negotiations broke off shortly thereafter, to be resurrected in May 2020. I struggle to see that any comments made in September 2019 with regard to the ownership of the IP, even if they were made, had any operative effect once the negotiations resumed in May 2020, in particular in the light of the way in which those negotiations, and disclosures during the course thereof, developed.

- iv) Of particular significance in this respect is, in my judgment, the disclosure of the EULA and the Terms and Conditions attached thereto, the fact that this provided for an annual licence fee referable to the grant by ENL of a licence to the customer to use the relevant software, and the fact a significant income stream of ENL was the receipt of this licence fee income as demonstrated shown by accounts that I have referred to above. As to the scope of the EULAs, for the reasons already given in relation to the breach of Warranties claim, I reject Mr and Mrs Jethwa's submission that the EULA was simply to restrict cloning or misuse of the IP. For the reasons that I gave above in considering the breach of warranty claim, the EULA does, I consider, provide for very much more, including providing for the payment by customers of the annual licence fees in respect of the use of the Emperium Software.
- v) I consider that is then highly significant that CPA then made the Technical Requests and the General Requests referred to above that did, as I read them, seek to engage with issues relating to the IP in the Emperium Software on the basis consistent only with ENL owning the same. One does have to ask why CPA would have made these requests if it had been told, and led to believe that EDE owned the IP in the Emperium Software. Surely, in those circumstances, CPA would either not have made enquiries that it did (on the basis that ENL did not need to grant licences in order to supply the tills), or it would have been anxious to understand the basis upon which ENL purported to grant licences to customers so as to produce a significant part of its income, particularly given that no licences were produced and ENL's role as a provider was represented to be limited to that of "*outsourced support services & importing hardware*". Or further significance in this latter respect is that the OSA said nothing about EDE owning the relevant software, or licensing it to ENL.
- vi) In these circumstances, I consider that it is simply not credible that CPA was informed in any operative way that EDE owned the IP, and that ENL did not, and I consider that any suggestion to the contrary is lacking in reality, as is, as I see it, any suggestion that CPA simply considered itself as buying a list of customers in circumstances in which it did not need to grant licences in order to supply the tills. I consider that further support for this conclusion follows from Mr Harris's concession in the course of submissions that, on the basis that EDE owned the IP in the Emperium Software, the licence agreements granted by the EULAs were and are defective and could not be enforced by ENL if the point were

taken because the IP belonged to somebody else. In this event ENL would, of course, be deprived of a significant income stream.

234. If, as I consider plainly was the case, and could be seen to be the case, CPA made to the Technical Requests and the General Requests on the footing that ENL owned the IP in the Emperium Software and was granted licences in respect thereof in the ordinary course of its business so as to generate significant licence fee income, then if Mr Jethwa was aware and believed that EDE owned the relevant IP, then I consider that the relevant responses must have amounted to operative representations in the terms referred to in paragraph 207 above, because of the considerations identified in paragraph 208 above, as further expanded upon in the subsequent paragraphs above. I do not accept that the Claimant's case in deceit is based upon a contorted or elliptical construction of the answers which Mr Jethwa gave allegation of any positive misstatement as contended by Mr Harris. I consider that the answers given did, in the particular circumstances, and in light of the request made, amount to the making of the representations alleged.
235. If ENL did not own the relevant IP, then the representations referred to in paragraph 207 above were, as I see it, plainly false, and I find it difficult to see that, in those circumstances, Mr Jethwa cannot have been aware of the falsity of the representations being made, which I consider that Mr Jethwa must have known would operate so as to lull CPA into a false sense of security.
236. As to Mr Jethwa's state of knowledge as to the falsity of the representations, I did have an initial concern that it might reasonably be said by Mr and Mrs Jethwa that Mr Jethwa did not give any thought as such to the truth of the representations, or perhaps appreciated that the terms of the responses given amounted to representations to the effect that ENL owned the software. However, the issues in question were, as I see it, fundamental to the commercial purpose behind the SPA and the way that ENL contracted with its customers, and Mr Jethwa must have given thought at the time to the relationship as between EDE and ENL in formulating the terms of the OSA. In the circumstances, and on the hypothesis that EDP did own the relevant IP, and that ENL did not, I consider that Mr Jethwa must be taken to have been aware of the falsity of the relevant representations.
237. I am satisfied that the relevant misrepresentations were relied upon by CPA and did induce it to enter into the SPA, particularly given that the very purpose of the Technical Requests and General Requests was to enable CPA to satisfy itself in respect of the various matters dealt with thereby before committing itself to the SPA, and the commercial importance of the licence fee income.
238. I do not consider that Schedule 4 to the SPA assists Mr and Mrs Jethwa bearing in mind that the latter did not purport to be an exclusive list of the IP rights that ENL was entitled to. As referred to above, "*Target Intellectual Property Rights*" were defined as meaning all IP owned, used, controlled or held for use by ENL, "*including*" the IP listed in Schedule 4. This is in contrast to the definition of "*Third Party Intellectual Property Rights*" which were defined solely by reference to what was listed in Schedule 4, i.e., nothing. Thus, I do not consider there to be any inconsistency between the terms of Schedule 4 and

ENL owning the IP in the Emperium Software. Indeed, it might be said that Schedule 4 positively supports ENL owning the IP in that if it was owned by any third party, then, given the commercial importance of granting licences pursuant to the EULAs, thereby generating an income stream, one might reasonably have expected third party rights in favour of ENL to have been specified in Schedule 4 if ENL did not own the software.

239. Further, I do not consider that the submissions made on behalf of Mr and Mrs Jethwa in respect of revisions to the OSA suggested by CPA materially assist them. I consider the more significant point to be that both versions of the OSA are, as I see it, consistent with ENL owning the relevant IP rather than EDE doing so, bearing in mind, amongst other things, that that neither version purported to provide for the licensing of any rights by EDE to ENL, and both versions provided for the provision of services by EDE to ENL including specifically software development.
240. In addition, I do not consider that anything materially turns on the submission that there was no sense in Mr Jethwa making knowingly false representations with regard to the ownership of the IP bearing in mind that he was to continue to be employed by ENL after completion of the SPA. On the hypothesis that ENL did not own the relevant software, it might be said that this would depend on what Mr Jethwa thought that he would get away with bearing in mind the effect that a confession that ENL did not own the software might have had on whether CPA was prepared to enter into the SPA, or the price that it was prepared to pay.
241. In the circumstances, whilst recognising that the Court should act with caution before making a finding of deceit or fraudulent misrepresentation on an application for summary judgment or an application to strike out, on the hypothesis that ENL did not, and therefore does not own the relevant IP, I am satisfied that there is no real prospect of Mr and Mrs Jethwa successfully defending the deceit/fraudulent misrepresentation against them. Whilst Mr Jethwa might actually have been responsible for the making of the representations, he clearly did so as agent on behalf of Mrs Jethwa, who lent her name to the Disclosure Letter. In the circumstances, in accordance with the principles discussed in considering the First and Second Applications, I consider that Mrs Jethwa must be regarded as liable together with Mr Jethwa.
242. As with the breach of warranty claim, I have some difficulty with the concept ordering summary judgment on what might be false hypothesis if the Claimant were to succeed in their claim in respect of ownership of the IP in the Experion Software. Whilst I would, again, wish to hear further submissions on the point, as presently advised I consider that the more appropriate course would be to strike out the relevant parts of the Defence as disclosing no reasonable grounds for a defence. I have had some reservations with regard to this course of action bearing in mind that it is generally necessary to consider a strikeout application on the footing that the allegations contained in the statement of case sought to be struck out are true – see paragraph 30(i) above. However, I consider that strikeout would be appropriate bearing in mind the lack of particularity in paragraphs 15 and 17 of the Defence, and my conclusion that even if something was said by Mr Jethwa in September 2019 as therein alleged, it fanciful to

suggest that it had any operative effect, at least after negotiations we commenced in May 2020 given what transpired during the course of the negotiations thereafter.

243. Whilst not an issue that arises at this stage, I would observe that in the case of fraudulent misrepresentation/deceit, the appropriate measure of damages would be such as to put CPA in the position that it would have been in had the representations not been made in accordance with the usual tortious measure of damages. In these circumstances, on the Claimants' case, had the representations not been made, CPA would not have entered into the SPA, and so the measure of damages would, prima facie, be the difference between the price paid, and the actual value of the shares acquired pursuant thereto.

Overall conclusion

244. For the reasons set out above, my overall conclusion in respect of the five applications before me is as follows:

- i) As to the First and Second Applications, I consider that Palmyra's application to strike out the claim (now only in deceit as against it) should be dismissed, and that the Claimants should be given permission to re-amend their Particulars of Claim in the terms sought;
- ii) As to the Third and Fourth Applications, I consider that Mr Jethwa's counterclaim against CPA seeking to recover EBITA Earn-Out Consideration, Online Revenue Earn-Out Consideration, and POS Revenue Earn-Out Consideration should be struck out, as should the counterclaim seeking damages for procuring breach of contract and conspiracy against Mr Gualtieri and Mr Rowe. I consider that Mr Jethwa's application to re-amend the Defence and Counterclaim in the QB Proceedings should be dismissed. I would wish to hear further submissions as to whether it is appropriate to grant summary judgment in favour of the Claimants against Mr Jethwa in respect of the QB Counterclaim.
- iii) So far as the Fifth Application is concerned:
 - a) I consider that Mr and Mrs Jethwa have demonstrated that they stand a real prospect of successfully defending the claim to recover the Directors Loan brought against them;
 - b) I consider that, on the hypothesis that ENL did not own the IP in the Emperium Software, the Claimant's would be entitled to summary judgment on the breach of warranty and deceit/fraudulent misrepresentation claims on the basis that Mr and Mrs Jethwa have no real prospect of successfully defending the same. However, bearing in mind that this hypothesis may prove to be a false one should the Claimant's established that ENL did own the IP in the relevant software, I consider there to be some conceptual difficulty in ordering that there be judgment for the Claimants with damages to be assessed at this stage, and

I would wish to hear further submissions on the point before doing so. As presently advised, I consider that the appropriate course would be to strike out the relevant parts of the Defence dealing with these claims.

245. This Judgment will be handed down remotely by email to the parties or their legal representatives, and release to the National Archives. No attendance will be required. There will need to be a further hearing dealing with consequential matters arising from this Judgment, which I would hope can listed in the near future. I will adjourn consideration of any applications for permission to appeal to this consequential hearing and extend the time for filing an appellants' notice with the Court of Appeal until 21 days after the latter.