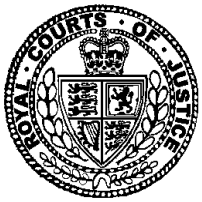

Neutral Citation Number: [2021] EWCA Civ 639

Appeal Nos: A3/2020/1143 & 1146
Case No: D31MA124

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)
HIS HONOUR JUDGE HODGE QC

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 07/05/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE BIRSS
and
LORD JUSTICE WARBY

BETWEEN:

(1) GLOSSOP CARTONS AND PRINT LIMITED
(2) BRIAN SIDEBOTTOM, JACQUELINE CAMERON SIDEBOTTOM-EVERY, AND JILLIAN CAMERON WOODACRE
(suing as individuals and as the Raymond Joseph Partnership (a firm))
Claimants/Appellants

and

(1) CONTACT (PRINT & PACKAGING) LIMITED
(2) PHILIP SMITH
(3) EMBARK PENSIONS TRUSTEES LIMITED
Defendants/Respondents

- -

Mr Thomas Grant QC and **Mr Ryan James Turner** (instructed by **Davis Blank Furniss**) appeared for the **Claimants**

Mr Neil Berragan (instructed by **Squire Patton Boggs (UK) LLP**) appeared for the **Defendants**

Hearing dates: 20 and 21 April 2021

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JUDGMENT

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Friday 7th May 2021."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. Lord Browne-Wilkinson explained at page 267A-D in *Smith New Court Securities Ltd v. Citibank NA* [1997] AC 254 ("*Smith New Court*") the basic rules applicable where claimants, as here, have been induced by fraudulent misrepresentations to buy property:

> "(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud".

2. One might have thought that the application of these principles would be relatively straightforward. This case concerns a sale of business assets which was admittedly induced by the fraudulent misrepresentations of the seller. In attempting to ascertain the market value of the business assets sold, the judge, encouraged by the parties, engaged in a complex exercise seemingly aimed at establishing what the claimants had subjectively "factored in" to their calculation of the purchase price. He undertook that exercise so that he could deduct from the purchase price any expenses that the claimants had not "factored in" to their price calculations in order to arrive at the market value of the assets acquired. The main question on this appeal is whether that exercise was an appropriate way to assess damages. The claimants say it was not, because the judge departed from the orthodox path identified by Lord Browne-Wilkinson, and the defendants say that the claimants encouraged the judge to do what he did, and are only complaining now because they do not like the figures that he arrived at.

3. If the judge's approach was wrong, the question also arises as to whether claimants seeking damages for fraudulent misrepresentation can be compensated for making a bad bargain, which they knew or ought to have known about before they entered into the transaction.

Essential factual background

4. The parties entered into the following three simultaneous transactions on 23 November 2015 (the "Agreements"):

i) The first defendant, Contact (Print & Packaging) Limited ("Contact"), sold business assets to the first claimant, Glossop Cartons and Print Limited ("Glossop") for £1,253,085.63 payable by instalments (with the final instalment of £112,500 becoming due on 30 December 2017) (the "Asset Purchase Agreement").

ii) Contact sold Units 4 and 5, Haigh Avenue, Stockport ("Units 4 and 5") to Raymond Joseph Partnership ("RJP"), made up of the second claimants, Brian Sidebottom, his wife Jacqueline Sidebottom-Every, and Jillian Woodacre, for £1.63 million. RJP then granted two underleases to Glossop.

iii) Mr Philip Smith ("Mr Smith") and Embark Pensions Trustees Ltd (the "Trustee"), the second and third defendants, sold Unit 3, Haigh Avenue, Stockport ("Unit 3") to RJP for £200,000 (the "Lease Sale Agreement"). RJP then granted an underlease to Glossop.

5. The Asset Purchase Agreement is the most important for the purposes of this appeal, because it is only the assets sold under that agreement that are said to have been less valuable than the price paid. Clause 4.1 of the Asset Purchase Agreement provided that the purchase price of £1,253,085.63 was the aggregate of £1,050,000 for assets, £173,085.63 for raw material stock and £30,000 for work in progress. The claimants' expert forensic accountant, Mr John Green ("Mr Green"), however, broke down the purchase price into £750,000 for plant and machinery, £203,000 for stock and work-in-progress, and £300,000 for goodwill. The defendants' expert, Ms Beverley Ibbotson ("Ms Ibbotson"), seems to have pretty well accepted that figure for goodwill. Mr Green derived from schedule 6 to the Asset Sale Agreement that £294,997 had been paid for "business contracts". It was well known to all parties before the transaction that Contact's business had been heavily loss-making for a number of years.

6. The judge held that two fraudulent misrepresentations had been made by Mr Smith prior to the Agreements, and that each of the claimants had been induced to enter into the Agreements by those misrepresentations. The representations related only to Unit 3.

i) The "electricity supply representation" was to the effect that the defendants had been asked by the owners of Units 1 and 2, Haigh Avenue, Stockport ("Units 1 and 2") to disconnect the supply from Units 1 and 2 to Unit 3 and were prepared to do so. In fact, the defendants had given an undertaking to disconnect the supply. The electricity supply representation included an implied representation that Unit 3 had a reliable right to a continuing supply of electricity. In fact, a third party had the right to cut off the supply to Unit 3.

ii) The "flooding representation" was to the effect that Unit 3 did not suffer from continuing drainage problems and would provide a safe and dry environment for the claimants' digital printing machines. In fact, Unit 3 did have drainage problems and was prone to flooding.

7. The judge found that the Agreements would not have been completed in the form they were but for these two representations, and that both claimants could maintain causes of action in respect of them. Other claims for fraudulent misrepresentation failed, but (a) Glossop was entitled to recover from Contact in respect of a contractual indemnity

in the Asset Purchase Agreement, and (b) RJP was held to be entitled to damages for breach of a warranty in the Lease Sale Agreement. The judge also held in his judgment on liability that the relevant valuation date was 11 December 2015, some 18 days after the Agreements, by which time the falsity of the representations had been discovered.

8. More specifically, the judge ultimately ordered that:

   i) Contact should pay Glossop £25,628 plus interest, made up of £6,028 for a temporary generator and £19,600 in respect of the costs of an independent barrister (the "Independent Barrister") instructed under clause 6.7 of the Asset Purchase Agreement.

   ii) Contact should pay £21,277 plus interest to Glossop under the contractual indemnity in clause 16.2 of the Asset Purchase Agreement in respect of the settlement paid to Contact's former general manager, Ms Samantha Brammall, for an equal pay claim which she had brought after being made redundant on 29 February 2016.

   iii) Mr Smith and the Trustee should pay £32,800 to RJP for breach of clause 16.4 of the Lease Sale Agreement,[1] as the difference between the value of Unit 3 as represented and its true value, made up of (a) £1,262 for a temporary generator for Unit 3, (b) £17,915 for a permanent major electricity supply to Unit 3, and (c) £13,623 for works to prevent flooding.

   iv) Glossop should pay £112,500 to Contact in respect of the final instalment due under the Asset Purchase Agreement.

   The order dated 9 March 2020 required the claimants to pay the net sum of £33,277.67 to the defendants. This seems to have been agreed between the parties as an appropriate netting off exercise arising from the awards the judge made.

9. The judge decided at [26]-[29] of his judgment on quantum that the question was "what damage flows directly from the transaction". A claimant, he said, should not be insulated from "potential commercial risks which it had appreciated and factored into its calculation of the purchase price because to do so would over-compensate the claimant for the consequences of the defendant's fraud". He took the example of the claimants claiming storage costs of £120,000, even though as it turned out, they would have had to incur them anyway even if the assets purchased had been as represented. They were not recoverable for that reason. The claimants had considered whether there would be storage costs "when entering into the transaction but had simply got [it] wrong". The financial consequences flowing from the claimants' erroneous commercial assessment could not be laid at the door of a fraudulent defendant. There was no sufficient causal link between the fraudulent misrepresentations and the need for storage. As will appear, this summary demonstrates what the claimants describe as the confusion created by the judge's judgment. The judge then went through 11 heads of loss claimed in a similar way, rejecting the majority of them.

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[1] Clause 16.4 provided that "If any … statement … in written replies which the seller's conveyancer has given to any written enquiries … is or was misleading … due to an error or omission the remedies available are as follows …".

10. The claimants raise 5 grounds of appeal, but they amount in reality to saying that the judge failed to make an award of damages for the direct loss caused by the fraudulent misrepresentations, namely the difference between the actual market value of the business assets sold under the Asset Sale Agreement and the price paid. That difference is said to be £300,000, which as I have explained was said to be the sum paid for goodwill, when the claimants contended the goodwill was actually worth nothing.

11. The other grounds of appeal criticise the judge for (i) refusing to award damages for the results of the claimants' commercial mis-judgment or for what they had factored into the purchase price, (ii) speculating about what the claimants would have done if the fraudulent misrepresentations had not been made or had been true, and limiting the damages on the basis of that speculation, and (iii) requiring a causal link between the fraudulent misrepresentations and the loss.

12. The defendants' answer to these points is to say that the judge's approach was an adoption of the way the claimants themselves had argued the case, by reference to the expert reports of Mr Green. It is to be noted, however, that the defendants' own expert, Ms Ibbotson, said in her final report at paragraph 2.11 that she understood that "in a claim for deceit, the Claimants are able to recover any unanticipated costs which they did not factor in to the purchase price … irrespective of whether the resultant overpayment was connected with the fraudulent misrepresentations". To be fair to Ms Ibbotson, she seems to have taken this formulation from [103] of the judge's liability judgment. She then followed Mr Green's approach in "assessing the diminution of value of Contact at the date of completion as being equal to the unanticipated costs incurred by [Glossop]", concluding on the basis of two different scenarios that the additional unanticipated costs recoverable amounted to £292,131 including £120,000 for the "potential additional storage costs".

13. Three main questions, therefore arise for determination on the claimants' appeal: (a) whether the judge was indeed mistaken in his approach to the assessment of the claimants' loss, (b) if so, is it open to the claimants to advance that argument at this stage, (c) if so, what should now be done?

14. In addition, the defendants cross-appeal the award of £32,800 under clause 16.4 of the Lease Sale Agreement on the grounds that (a) the claimants ought to have been required to elect between their contractual remedy and their remedy in deceit (see Lord Nicholls in *Personal Representatives of Tang Man Sit v. Capacious Investments Ltd* [1996] AC 514 at page 521), or that (b) RJP ought to have been required to give credit for the £50,000 they allegedly underpaid for Unit 3 (its market value was £250,000 as represented, whilst £200,000 was paid under the Lease Sale Agreement). The claimants rely in response on the fact that Glossop is a distinct entity from RJP, so both are entitled to remedies.

15. Finally, the defendants cross-appeal the award of damages for fraudulent misrepresentation in respect of the costs of the Independent Barrister,[2] because they say that the judge had no jurisdiction to alter the effect of clause 6.7(d) of the Asset Purchase Agreement providing that those costs should be borne either as directed by

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[2] The Independent Barrister had to decide under the Asset Purchase Agreement whether Glossop was entitled to withhold the final instalment of the purchase price, pending these proceedings.

the Independent Barrister or otherwise by the parties equally. The claimants submit that this loss flowed directly from the deceit.

16. Before dealing with the 3 issues raised by each of the appeal and cross-appeal, it is convenient to explain how the judge came to reach his main conclusions.

The judge's reasoning

The liability judgment

17. On day 7 of the 8-day trial on liability, the defendants admitted one of the two fraudulent misrepresentations for which the judge went on to find the defendants liable. [1]-[89] of the liability judgment deal with the facts, the witnesses, the alleged representations and the other claims. In doing so, the judge had recorded at [8] that: "Prior to the transactions …, Contact was ultimately owned and controlled by Mr Smith and it ran a printing and packaging business from Units 3, 4 and 5. In the latter years, that business had been massively loss-making".

18. At [46], the judge recorded the claimants' submission, which he accepted, that "if, as a result of a fraudulent misrepresentation, the claimant acquires a flawed asset, he can recover the full loss attributable to those flaws even though they are wholly unconnected to the fraudulent misrepresentation because those flaws feed into, and inform, the true value of the subject matter of the sale transaction as at the date of the relevant sale".

19. At [90], the judge stated the principles applicable to loss in terms that none of the parties now disputes:

> "In a claim for deceit, [*Smith New Court*] establishes that the defendant is bound to make full reparation for all the damage directly flowing from the transaction. … I am satisfied that "the transaction" for this purpose is the global package [i.e. the three Agreements] … The normal method of calculating the loss caused by the deceit is the price paid less the true value of the subject matter of the transaction at the appropriate valuation date. In addition, the claimants are entitled to recover consequential … losses caused by the transaction; although they must have taken all reasonable steps to mitigate their loss once they have discovered the fraud".

20. The judge then decided that the appropriate valuation date was 11 December 2015, although it has never been suggested that values would have been different at the transaction date.

21. At [99], the judge recorded the claimants' argument on loss as follows:-

> "In his closing, [counsel for the claimants] submitted that the key question is the actual value of the Contact business at the valuation date. Every problem from which the Contact business then suffered (whether or not it was latent within it) is said to be relevant to diminish that value unless the claimants had fully appreciated it and factored it into the purchase price. It did not matter in relation to any problem that: (1) Glossop had not understand what the problem was or whether or not Glossop's failure to understand it was

> Glossop's own fault; (2) the problem had no connection with the relevant representation; (3) the loss was not foreseeable; or (4) the loss would have been suffered even had the relevant representation been true. [Counsel for the Claimants] accepted that if Glossop had failed to mitigate (i.e. it had failed objectively to act reasonably in Glossop's own situation as a victim of fraud), then the loss was to be considered that which it would have been (on the above bases) had Glossop taking the steps of acting reasonably to mitigate its loss; but the burden of proof was on the defendants not only to identify those steps but also to prove that the loss would then have been less and also how much less it would have been had those steps been taken. It was said to be essential to consider the basis and assumptions on which the claimants went into the transaction as that was the basis which had informed the price that they had agreed to pay. If those bases or assumptions were wrong, then the claimants would have overpaid; but even if that were the result of their own carelessness or over-optimism, they would still have suffered damage equivalent to the amount of that faulty overpayment. Essentially, it is said that in a case of fraudulent misrepresentation, the claimants can recover the cost of their own bad bargain".

22. At [101(4)] of the liability judgment, the judge recorded the claimants' further submission as follows:

> "Even if (as I find) the claimants had failed fully to appreciate the problems with Contact and its losses, and the difficulties of integrating the two businesses and of being able to realise [sell] the Old Mill [Glossop's existing premises], and were over-optimistic as to all of those matters, and also as to the potential profits even if there had been no problems, the claimants can still sue for the resultant over-payment of the acquisition price (as difference in value) and/or the resultant costs (as consequential losses). It does not matter that these are not connected with the misrepresentations or that they were the result of the claimants' own over-optimism or lack of subsequent trading success".

23. At [103], the judge said that the direct losses for deceit had to be "assessed on the basis that the innocent claimant has acted reasonably to mitigate its loss upon discovering the fraud" and that "a claimant [should not] be entitled to recover in respect of potential losses which it had fully appreciated and factored into the purchase price". He concluded that paragraph by saying that, whilst it was impossible to say exactly what would have happened if the claimants had been told the truth, things would most probably not have happened as they did. That justified damages to compensate the claimants for the "fact that Unit 3 suffered from an inadequate power supply", "but it should not operate to insulate the claimants from potential commercial risks which they had appreciated and had factored into their calculation of the purchase price because to do so would over-compensate the claimants for the consequences of the defendants' fraud". This paragraph seems to be the start of some confusion.

The quantum judgment

24. The judge's quantum judgment was delivered *ex tempore* after a further 3-day trial and further experts' reports. The judge began by noting that the case raised "the question whether a fraudulent seller is liable for losses sustained as a result of commercial mis-

judgements on the part of the innocent purchaser which are wholly unrelated to the fraud of the seller save that they result from the entry into the relevant transaction". At [7] he said that the claimants had submitted that "[e]very problem from which the Contact business then suffered (whether or not it was latent within it) is said to be relevant to diminish [the actual value at the valuation date] unless the claimants had fully appreciated it and factored it into the purchase price".

25. At [21] of his quantum judgment, the judge recorded that the claimants' counsel had submitted that damages for fraud allowed a claimant to recover for a bad bargain, even if it was his own fault, without any defence of contributory negligence (as to which, see Lord Hoffmann in *Standard Chartered Bank v. Pakistan National Shipping Corporation (Nos. 2 & 4)* [2003] 1 AC 959 at [10]-[18] ("*Standard Chartered*")). The court had simply to determine the actual value of the assets purchased assuming everything had been known.

26. As it seems to me, the confusion that had begun in [103] of the liability judgment, was consolidated in [24] of the judge's quantum judgment. It is worth setting out that paragraph in full as follows:-

> "[Counsel for the claimants] submits that: (1) The underlying question is as to what loss Glossop has suffered by reason of having entered into the transaction. (2) Glossop paid £300,000 [for goodwill] following an open market negotiation but on and in the light of its purposes and various factual assumptions and beliefs which Glossop had factored into its decision to purchase at that price. Thus £300,000 represents actual market value but only if those factual assumptions and beliefs were true. (3) If and to the extent that those factual assumptions and beliefs were not true, and their falsity would result in post-purchase unexpected expenses or absence of profit, then the asset will have been worth less by those "unexpected" amounts (and a hypothetical purchaser would have paid less by such "unexpected" amounts); and thus there is an equivalent and equal overpayment by such "unexpected" amounts. In the course of argument I asked [Counsel for the claimants] whether a claimant was entitled to be compensated for their own commercial misjudgements or over-optimism. [Counsel for the claimants'] response was that the question was whether a particular loss or profit had been predicted or anticipated by Glossop. If the answer was yes, then it had been factored into the purchase price; but if not, it would fall to be deducted on a pound-for-pound basis".

27. At [25], the judge recorded the defendants' submissions on the same point as having been that (a) unknown or unanticipated *defects* in the assets should be distinguished from mere *features* inherent in the assets, (b) a feature of an asset contributes to its true value, whether it is a defect or not, and (c) the compensation measure is based on the true value of the Contact business and is not limited to defects. The judge also recorded that the claimants' answer was that (i) "those features and their consequences were built into the price of £300,000 which was paid for Contact's intangible assets", (ii) features such as the need or lack of need for external storage charges, arise from the combining of the two businesses, which combination was the only reason why anyone would have been prepared to pay a positive price for the loss-making Contact business, and (iii) the price was calculated on that basis and thus needed to incorporate that feature, if that is what it was.

28. From these and other submissions, and by reference to [103] of his liability judgment (see above), the judge concluded at [27]-[28], as I have already said, that a claimant in deceit could not recover for "losses which directly flow from the entry into the relevant transaction if they were the product of his own commercial misjudgement or over-optimism". The judge said that "this is not properly a loss which results from the entry into the transaction. Even if the misrepresentations had been true, this loss would still have been incurred". It was a factor which Glossop had considered and weighed up when entering into the transaction but had simply got wrong (see Lord Steyn in *Smith New Court* pages 284D-285D). Many of the consequential losses claimed were denied either on this basis or on the basis of a lack of proper mitigation.

29. This is a case where it is neither proportionate nor necessary to set out the judge's full reasoning. I have provided the essential elements of it. As both sides pointed out in argument, there are some inconsistencies in what the judge said.

First issue on the claimants' appeal: was the judge mistaken in his approach to the assessment of the claimants' loss?

30. When Mr Thomas Grant QC, leading counsel for the claimants (leading Mr Ryan James Turner), neither of whom appeared below, opened his appeal, he was at pains to explain, by reference to the experts' reports, the Scott Schedule produced by the parties below, and other materials, the exercise that the judge had been undertaking in assessing quantum. He did this because he was aware that that exercise was never fully explained in the judge's quantum judgment. I shall start by recording what Mr Grant explained to us.

31. Mr Grant submitted that it was understood that it would be difficult to work out the market value of the business assets that Glossop had purchased, because a loss-making business would not be readily saleable. It was acknowledged by the parties below that the judge should work out the market value of the assets transferred pursuant to the Asset Sale Agreement, in order to calculate the direct loss recoverable (price paid less market value of the assets). But none of the normal methods of business asset valuation were easily applicable.

32. Accordingly, the claimants suggested that the judge should start with the assumption that the price paid represented the market value and deduct a figure to reflect every flaw or defect that they had not factored into their calculation of that price, so as to reach the true market value. This is what was in the mind of counsel for the claimants and the judge at [103] of the liability judgment (see above), and [23]-[24] of the quantum judgment. I have already set out [24] above, but [23] set the scene as follows:-

> "[Counsel for the claimants] submits that in terms of overpayment of the purchase price, it is crucial to identify relevant matters which Glossop did or did not think at the time of its agreement of the Asset Purchase Agreement and thus factored into its agreement of the purchase price since if the purchase price was calculated by Glossop on the basis of there being a particular problem, then there can be no overpayment as a result of that problem having actually existed as it had actually been accurately taken into account (although there can still be some overpayment if the problem, or its consequences, were insufficiently quantified or taken into account). However, if the purchase price was calculated on the basis that a particular

> problem did not exist, or had not been considered, or on some other over-optimistic basis, and it turns out that the problem did exist or the basis was over-optimistic, then there will have been a recoverable overpayment (as the market, being the hypothetical informed reasonable purchaser, would have factored in the true situation to the price that it was prepared to pay, and thus the "actual value" of the asset)".

33. One can see from this paragraph, though it is nowhere explained in so many words, that the claimants were advocating the approach of determining the market value by deducting from the price the cost of every flaw or defect (or problem) that the claimants had not themselves factored into their calculation of that price (which the parties came to call the "discount method" in argument – I shall use the term "deduction method"). The judge seems to have agreed with the approach, but thought at [26]-[28] (referring back to [103] of his liability judgment) that certain crucial flaws or defects could not be deducted from the purchase price. Potential losses and commercial risks which the claimants had appreciated and factored into the purchase price could not be deducted; nor could "losses sustained as a result of commercial mis-judgements on the part of the innocent purchaser which are wholly unrelated to the fraud of the seller".

34. It should be noted that it seems at least possible that the claimants were advocating the deduction method for the calculation of direct loss for two reasons: (i) they had not, in the event, actually incurred many expenses as a result of their purchase and did not expect to be able to recover (as they did not do) much by way of consequential loss, and (ii) they knew that they had received value for all but £300,000 of the price paid under the Asset Sale Agreement, and wanted to claim more than that. In the result, Mr Green, their expert, suggested in his evidence that the appropriate deduction was either £593,908 or £496,842 (depending on whether it was assumed that a digital printing unit was to go in Unit 3 or Unit 4 – see [220] of his final report).

35. It is also to be noted that, as the quantum judgment records, whilst quibbling with the detail of the deduction method, the defendants did not submit to the judge that it was wrong in principle.

36. In my judgment, however, the deduction method is wrong in principle. Apart from being unduly complex, it inappropriately requires the court to consider what subjectively the claimants may or may not have "factored in" to their calculation of the purchase price. Such matters are quite irrelevant to the calculation of direct loss for fraudulent misrepresentation which in the normal case like this merely requires the court to ascertain on the evidence the actual value of the assets purchased at the relevant date and to deduct that figure from the price paid. I will return to how that exercise could and should have been undertaken here.

37. The judge fell into error in adopting the deduction method at all and, moreover, in the way that he applied it. His judgment is unclear as to whether he is, at any particular stage, considering deductions to be applied for the purposes of the deduction method on the one hand or consequential loss on the other hand. To take the example of storage costs (which were argued to be deductible as part of the deduction method, but not to be consequential loss), the judge at [26]-[28] rejects the claim for them on various grounds. Those grounds included that: (i) the storage costs did not flow directly from the transaction ([28]), (ii) there was no sufficient causal link between the fraudulent misrepresentations and the need for external storage ([29]), (iii) "they would still have

been incurred even if the misrepresentations had been true" ([28]), and (iv) they were the product of the claimants' own commercial mis-judgment ([27]-[28]). Grounds (i) and (ii) are not relevant to the calculation of direct loss (as opposed to consequential loss), once it is determined that the claimants entered into the transaction as a result of the fraudulent misrepresentations. Ground (iii) is an irrelevant factor (see *Smith New Court* at page 267D). Ground (iv) is wrong in principle. The claimant is entitled to the difference between the price paid and the market value, whatever miscalculations it may have made in entering into the transaction. To be clear, therefore, claimants seeking damages for fraudulent misrepresentation can be compensated for making a bad bargain, even if they knew or ought to have known about defects in what they were buying before they entered into the transaction.

38. A similar approach was rejected by the Court of Appeal in *OMV Petrom SA v. Glencore International AG* [2016] EWCA Civ 778; [2017] 3 All ER 157, where Clarke LJ explained at [81]-[83] that the assessment of the market value of oil at the relevant time for the purposes of calculating the direct loss should be made on the basis that uncertainty existed as to the outcome of the refining process of the particular oil. The fact that that uncertainty was later resolved favourably was irrelevant. The market value for the purposes of the calculation of direct loss is evaluated objectively and not by reference to what the claimant might or might not have thought about what it was buying at the time.

39. It is not relevant in this case to answer the question of what approach to valuation is to be adopted when the assets in question are peculiarly valuable to the purchaser in contrast to other buyers. It was that possibility that may have led Lord Browne-Wilkinson to say that the claimant must, in the direct loss exercise, give credit for "any benefits which [it] has received as a result of the transaction", rather than just the market value of what was purchased (though he said that such benefits would usually include that value). The claimant has not, however, received a "benefit from the transaction" just because it calculated the price it was prepared to pay on the basis that it might, for example, be able to arrange its affairs in such a way as to avoid storage costs that the vendor was incurring. In short, the purchaser's commercial judgments and mis-judgments are irrelevant to the evaluation of what direct loss it suffered. As has been often repeated, when damage is done maliciously or with full knowledge that the person doing it was doing wrong: "*you would say everything would be taken into view that would go most against the wilful wrongdoer*" (see Lord Blackburn in *Livingstone v. The Rawyards Coal Co* (1880) 5 App Cas 25 at page 39). In short, the benefits received by the buyer are to be determined objectively, not subjectively.

40. It is not absolutely clear whether the deduction method originated in [103] of the judge's liability judgment or as a combination of that and the factors described at [34] above. Either way it was over-convoluted and prone to error, relying as it did on an attempt to fillet out of the purchase price factors that the claimants had not accounted for as a method of arriving at what the assets were actually worth. Valuation is never a precise science. Had it not been for [103] of the liability judgment, the experts would most likely have limited themselves to what Mr Green described as his alternative "broad brush approach". That resulted in a valuation for the overpayment at £300,000 on the basis that £750,000 for plant and machinery and £203,000 for stock and work-in-progress were concrete assets out of a purchase price of £1,253,085.63, and it was hard to see how there could be any goodwill in a massively loss-making business.

41. In my judgment, that alternative approach could and should have been adopted by the judge to determine the direct loss in this case. It would, of course, have been open to him to make his own assessment, on the basis of both sides' expert evidence, of the market value of the assets purchased under the Asset Sale Agreement.

42. The claimants have not actually appealed the judge's rejection of most of their claims for consequential loss. In those circumstances, it is not necessary for me to go through the way the judge dealt with the items enumerated on the Scott Schedule. Subject to the points made on the cross-appeal, to which I shall come, it is accepted that the judge was right on matters of consequential loss. I should, however, make clear that he appears wrongly to have imported the concepts applicable to consequential loss into the direct loss exercise. The direct loss here was simply the difference between the price paid and the market value. Consequential losses had to flow directly from the transaction, be caused by it, and be unaffected by any failure by the claimants to mitigate.

43. So far as the claimants' specific grounds of appeal are concerned, I have already dealt with the deduction method. The judge was wrong to adopt it. The ground of appeal suggesting that he ought to have adopted that method and awarded damages for the results of the claimants' commercial mis-judgments or for what they had factored into the purchase price is not an approach I can accept. The claimants are obviously right to submit that the judge ought not, insofar as he did, to have speculated either about what the claimants would have done if the fraudulent misrepresentations had not been made[3] or had been true.[4] So far as consequential loss is concerned, the claimants did not, as I have said, question the judge's specific findings. It would, however, have been wrong to require a causal link between the fraudulent misrepresentations and the loss. A causal link between entering into the transaction and the consequential loss claimed is what has to be established.

44. I conclude, therefore, on this issue that the judge was indeed mistaken in his approach to the assessment of the claimants' loss.

<u>Second issue on the claimants' appeal: Is it now open to the claimants to suggest that the judge was mistaken in his approach to the assessment of loss?</u>

45. I can deal with this issue briefly. The defendants contend that no legal question is raised by the appeal, and that it would be unfair and inappropriate to allow the claimants to pursue it. The defendants argue that they did not have a proper opportunity to deal with the new points on quantum at the trials, and that new evidence is needed. I disagree.

46. First, the judge adopted an approach to the calculation of the claimants' loss that was legally flawed as I have explained. Secondly, that legal error had some of its origins in [103] of the liability judgment. It is true that the claimants took the approach forward,

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3 See Lord Steyn in *Smith New Court* at page 283F-G, where he said that: "it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred".

4 See Lord Browne-Wilkinson in *Smith New Court* at page 267D where it was said that one ought not to cross-check the result of the direct loss exercise by looking to see what the value of the asset acquired would have been if the misrepresentations had been true and then comparing that value to the contract price.

but they nevertheless always submitted that the judge should calculate the direct loss by deducting the market value of the assets from the purchase price. The judge in fact never did so. Thirdly, the defendants had every opportunity to urge the judge to adopt the correct methodology. Instead, their expert went along with the approach that the judge and Mr Green had set. Finally, I have no doubt that further evidence, whether expert or factual, would be disproportionate and unnecessary. Mr Green offered two possible approaches to direct loss, and Ms Ibbotson dealt with what he had said.

47. It is worth noting, in this connection, that something quite similar occurred in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 QB 158. There, the Court of Appeal held that the correct measure of loss could be awarded, despite the fact that the wrong measure had been proposed by the claimant's counsel at the trial. There, as here, there was no injustice to the defendant in such a course.

48. I will deal with the third issue on the claimants' appeal after I have dealt with the cross-appeal.

First issue on the defendants' cross-appeal: Did the second claimants have to elect between their claim for damages under the Lease Sale Agreement and their claim for damages for deceit?

49. I can deal with this ground shortly. The defendants argue that the second claimants had to elect between the claim for £32,800 under the Lease Sale Agreement and the claim for consequential losses in the same sum for deceit. It is true that they could not claim the same sums twice, but they have not done so. Instead, they have recovered the three losses identified at [8(iii)] above as damages for breach of clause 16.4 of the Lease Sale Agreement, but not as consequential damages for deceit. Accordingly, the principle of election does not arise, and this ground of cross-appeal must be dismissed.

Second issue on the defendants' cross-appeal: Should RJP have given credit for its underpayment for Unit 3?

50. The defendants argue that, if the judge was right about the award of £32,800 to RJP, he should, when calculating the damages for deceit have given the defendants credit for what they say was an underpayment of £50,000 for Unit 3. Indeed, it seems that the judge did say, when counsel interrupted his oral quantum judgment, that the purchasers under the Lease Sale Agreement "had made a good bargain, paying only £200,000 for [Unit 3] which would have been worth £250,000 without the electricity supply problem, and the problem of flooding".

51. Although the judge and the parties treated the three agreements as a composite transaction in that he held that the fraudulent misrepresentations had induced all three transactions, he did not treat the transactions as composite when assessing damages. He calculated the contractual damages due to RJP under the Lease Sale Agreement, and awarded deceit damages only in respect of the Asset Sale Agreement (£25,628, made up of £6,028 for a temporary generator and £19,600 for the Independent Barrister). He did not award deceit damages in respect of the Lease Sale Agreement because he had already awarded damages under clause 16.4 in respect of the difference between the value as represented and the true value. He expressly said at [20] that the £32,800 should not be recovered twice over.

52. The judge found that £32,800 was the difference between the value of Unit 3 "as represented" and its true value [20]. The £32,800 figure was the aggregate of three sums awarded in respect of a temporary and permanent electricity supply for Unit 3 and to deal with the flooding. The figure did not depend on the underlying value of Unit 3 as represented, and the judge did not say that it did. The fact that Unit 3 would actually have been worth £250,000 without the electricity supply and flooding problems, rather than the £200,000 RJP paid for it, makes no difference. On the judge's finding its true value will always have been £32,800 less than its value as represented since that is the sum necessary to make Unit 3 as represented.

53. The contractual damages under the Lease Sale Agreement were free-standing as were the deceit damages under the Asset Sale Agreement. The question then is whether the judge ought to have given the defendants credit for the £50,000 added value in Unit 3 in calculating the deceit damages under the Asset Sale Agreement. In my judgment, that would have been inappropriate. The two exercises were separate as I have explained. In the event, no deceit damages were awarded to RJP for having entered into the Lease Sale Agreement, but RJP recovered the correct figure under clause 16.4.

54. This ground of cross-appeal too must be dismissed.

Third issue on the defendants' cross appeal: did the judge have jurisdiction to award damages in respect of the costs of the Independent Barrister?

55. The defendants argue that the judge had no jurisdiction to override the parties' agreement in clause 6.7(d) of the Asset Purchase Agreement to the effect that "[t]he Independent Barrister's fees and expenses in connection with each and every referral made pursuant to this clause shall be borne as the Independent Barrister directs, or in the absence of such by the Buyer and Seller equally". The Independent Barrister himself declined to make a special award and said at [108] of his award that the default position should apply.

56. The defendants' argument amounts to saying that the proper interpretation of the clause governing the Independent Barrister's costs and expenses was that, even in the event of the court finding that the Asset Purchase Agreement had been induced by their own fraud, damages for deceit could not include the costs incurred under that clause – which were, of course, themselves awarded at a time when no finding of fraud had been made. In my judgment, clear words would have been necessary to have that effect. The defendants do not suggest that the contract referred expressly to damages for deceit. In such circumstances, the necessary words would need to be implied. I do not think that the court can or should make any such implication (see, for example, Moore-Bick LJ at [22]-[23] in *Stocznia Gdynia v. Gearbulk Holdings Ltd* [2010] QB 27).

57. Accordingly, I would reject this ground of cross-appeal.

Third issue on the claimants' appeal: what should now be done?

58. I come now to the outcome. The case has already occupied 12 court days at first instance and 2 court days on appeal. Every point has been taken on both sides. No point seems to have been regarded as either too small or too intricate to be ventilated at great length. The evidence and expert evidence were voluminous and time-consuming. It would, in these circumstances be wholly disproportionate and contrary to the overriding objective

for us to order a retrial unless there was literally no other possible just course. That is not, in my view, the situation.

59. As I have already indicated, the judge could have adopted the alternative approach advocated by Mr Green, which is now, albeit belatedly, commended to us by the claimants. He could simply have said that Glossop paid £300,000 for goodwill under the Asset Purchase Agreement for a heavily loss-making business. It may have been foolish to do so. It may, as the judge speculated, have been a result of commercial mis-judgments or over-optimism. Either way, as I have said already, what Glossop may or may not have thought about what it was paying, when it bought assets as an innocent purchaser under a contract induced by fraud, is nothing to the point. It is entitled to recover, by way of direct loss, the difference between the price it paid and the market value of the assets purchased at the relevant date. In my judgment, in the circumstances of this case, that difference is and was best represented by the £300,000 which Glossop paid for goodwill (seemingly mostly for business contracts) that had no real value.

60. That outcome, in my view, does no injustice to either party. Indeed, it would be inappropriate and unjust to order a retrial in these circumstances, where the parties have already incurred costs that are far beyond what the case can possibly have justified.

Conclusion

61. For the reasons I have tried to give briefly, I would allow the claimants' appeal and dismiss the defendants' cross-appeal. I would award Glossop damages of £300,000 in respect of its direct losses sustained as a result of the defendants' fraudulent misrepresentations. Those damages are in addition to the other financial awards that the judge made. The parties will no doubt be able to agree a suitable order. The costs orders that the judge made will also need to be reconsidered. If the costs consequences here and below cannot be agreed, we will determine them on paper.

62. Finally, I should mention that at least some of the problems in this case appear to me to have been exacerbated by the judge's decision to give an *ex tempore* quantum judgment in respect of the assessment of the claimants' loss. It can be seen from his judgment that he rather lost his way in a fashion that would not have been so likely to occur if he had taken time to consider his decision.

Lord Justice Birss:

63. I agree.

Lord Justice Warby:

64. I also agree.