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Case No: D31MA124

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9 DJ

Date: Monday 9 March 2020

Before: HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Between:

(1) GLOSSOP CARTONS AND PRINT LIMITED
(2) BRIAN SIDEBOTTOM, JACQUELINE CAMERON SIDEBOTTOM-EVERY & JILLIAN CAMERON WOODACRE (suing as individuals and as the RAYMOND JOSEPH PARTNERSHIP (a firm))

Claimants

-v-

(1) CONTACT (PRINT & PACKAGING) LIMITED
(2) PHILIP SMITH
(3) EMBARK PENSIONS TRUSTEES LIMITED (formerly called LIBERTY TRUSTEES LIMITED)

Defendants

Hearing dates: 3-5 March 2020

MR JOHN DAGNALL (instructed by **Davis Blank Furniss)** appeared on behalf of the Claimants
MR NEIL BERRAGAN (instructed by **Squire Patton Boggs**) appeared on behalf of the Defendants

APPROVED JUDGMENT

JUDGE HODGE QC:

1. This is my extemporary judgment following the resumed trial of this Part 7 claim. The purpose of the resumed hearing was to quantify the damages recoverable by the claimants against the defendants. The damages claim raises issues as to the true measure and the quantification of damages in a claim for fraudulent misrepresentation. In particular, it raises the question whether a fraudulent seller is liable for losses sustained as a result of commercial misjudgements 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. This judgment is a sequel to, and should be read in conjunction with, the reserved judgment I delivered on 11 September 2019 following an eight day trial before me in Manchester between 6-9 and 12-15 August 2019. At the original trial, Mr John Dagnall (of counsel) appeared for the claimant and Mr Richard Lander (also of counsel) appeared for the defendants. Mr Dagnall also appeared for the claimants at the resumed trial but, due to the fact that Mr Lander was recovering from a significant surgical procedure, Mr Neil Berragan (also of counsel) appeared for the defendants.

2. At paragraph 26 of my judgment I recorded that on the morning of day one of the trial, at the invitation of Mr Lander, and without opposition from Mr Dagnall who had declared his stance to be neutral on the issue, the court ruled that consideration of the expert evidence should be deferred to a future hearing, after the court had made its findings of fact on liability and causation. I ruled that at that stage that I should deal with issues of principle, and the correct approach to damages, so that the expert accountants would know what more was required of them, but that I should not deal with individual items of damage. I made it clear during closing speeches that I would regard any findings in my judgment on matters touched upon in the expert accountancy evidence as provisional only, and open to reconsideration in the light of that evidence and any further expert accountancy evidence that might be appropriate in the light of my findings.

3. At the end of my judgment, at paragraph 105, I set out my conclusions as follows: (1) The claim in fraudulent misrepresentation succeeds in relation to the electricity supply representation. For what it was worth, I recorded that Contact was also in breach of the warranties contained in clause 8 and paragraphs 9 and 11.2 of schedule 7 of and to the

Asset Purchase Agreement, but not of the warranty contained in paragraph 7.3 of schedule 7. (2) The claims in fraud and in negligent misrepresentation failed in relation to the electricity power representation. (3) The claim in fraudulent misrepresentation succeeded in relation to the flooding representation. (4) The claims in fraud and in negligent misrepresentation failed in relation to the fencing representation. There was no breach of the warranty contained in clause 8 and paragraph 11.3 of schedule 7 of and to the Asset Purchase Agreement. Even though if there was, I could not see that that had resulted in any recoverable loss or damage to Glossop. (5) Glossop was entitled to a contractual indemnity in respect of the settlement sum and associated legal costs paid to Miss Brammall, in relation to her equal pay claim. (6) The relevant valuation date was 11 December 2015. I should record that the expert accountants do not consider that it would have made any difference had the relevant valuation date been the date of completion of the various agreements.

4. In an addendum to my judgment, at paragraph 111, I also found that there had been a breach of clause 16.4 of the Lease Sale Agreement, between the second and third defendants (as sellers) and the second claimants, the Raymond Joseph Partnership (as purchasers) in relation to the electricity supply representation, and also the flooding representation, but not the electricity power representation. I recorded my provisional view that there was a material difference between the *description* of Unit 3 as represented and as it was. Whether there was also, or alternatively, a material difference in the *value* of Unit 3 seemed to me to be a matter for the further hearing directed to the issue of loss and damage.

5. I gave some guidance as to the assessment of loss and damage within section I of my judgment, at paragraphs 90 to 94. I began paragraph 90 by recording that in a claim for deceit, the decision of the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] UKHL 3 established that the defendant was bound to make full reparation for all the damage directly flowing from the transaction. I recorded that in closing Mr Dagnall had emphasised that it was the damage directly suffered by entering into the transaction that was recoverable, and not merely the damage flowing from the fraudulent electricity supply and flooding misrepresentations. In the context of the present case, I expressed myself to be satisfied that the transaction for

this purpose was the global package, comprising the purchase by Glossop of Contact's relevant business and assets, and the partnership's purchase of Units 3, 4 and 5. I noted that the normal method of calculating the loss caused by the deceit was the price paid less the true value of the subject matter of the transaction at the appropriate valuation date. In addition, I said that the claimants were entitled to recover consequential (including any relevant trading) losses caused by the transaction although they must have taken all reasonable steps to mitigate their loss once they had discovered the fraud.

6. At paragraph 13 of Mr Berragan's skeleton argument Mr Berragan pointed out that I have already made the following findings which are relevant to the assessment of quantum: (1) There were major problems faced by the business quite independently of the problems affecting Unit 3. Glossop simply failed to achieve the volume of orders for which it had been hoping, quite independently of the issues affecting Unit 3: see paragraph 96. (2) Even a 300 amp supply to Unit 3 would not have been sufficient for a proposed digital printing centre: see paragraph 97(1) (3) Glossop discovered that the electricity power supply to Unit 3 was inadequate for their purposes before 7 January 2016 and it was this which motivated its decision to install a new (and major) electricity supply to Unit 4: see paragraphs 40(5) and 97(2.). (4) It was not the fault of the defendants that it took so long for Glossop to obtain a new supply for Unit 4. A reliable guide to the minimum time required to source and install a 400 amp supply to Unit 3 would have been ten months: see paragraph 97(2). (5) Glossop had no need for a major supply to Unit 3 by the time the minor supply was cut off) because it had already decided to set up its digital printing suite in Unit 4, and its refusal to accept Mr Smith's offers to install a new minor supply to Unit 3 was unreasonable: see paragraph 97(3). (6) There was a failure to mitigate in respect of the drains: see paragraph 97(4). (7) The allegation that the claimants sought to mitigate their losses and/or suffered consequential losses by retaining the Old Mill is untrue. The claimants would not have disposed of the Old Mill until the issue of additional storage had been adequately addressed: see paragraph 97(8). (8) The business had fallen into decline long before Unit 3 was actually intended to be used as the claimants' digital printing centre. The problems affecting Unit 3 were not the real reason for any ongoing problems with one of Contact's existing customers, Authentic: see paragraph 97(9). (9) Although Jackie and Brian Sidebottom could not be cross-examined on this point, as it arose from the evidence of their own

witness, Mrs Scoltock, her evidence suggested that Jackie and Brian were simply not interested in finding a solution to the electricity supply issue affecting Unit 3: see paragraph 97(11). In that paragraph I referred to what I described as the "surprising" evidence from Mrs Scoltock, during her oral evidence, that the Scoltocks had always been quite happy for Mr Smith to install a new electricity supply from Haigh Avenue straight down the drive leading to Unit 3. (10) The existence of the fencing undertaking had not resulted in any recoverable loss or damage to the claimants: see paragraph 102(1). (11) The claimants knew that they were buying into a loss-making business which would require turning round and involve making staff redundant; these issues, including the risk of a loss of business, fall to be treated as having been appreciated by the claimants and factored into the purchase price: see paragraph 102(2). (12) If the claimants had taken reasonable steps to mitigate the flooding issues, repairs would have been completed prior to early June 2016, and Unit 3 could have been used for storage from around that time: see paragraph 102(4). Mr Berragan notes that Unit 3 was in fact used for storage up until 15 July 2016, when Authentic carried out their unannounced audit, referencing paragraph 49 of Brian's first witness statement. (13) Damages should be assessed on the basis that, if and to the extent that the claimants wished to secure a major power supply to Unit 3, in addition to the major supply they proceeded to secure for Unit 4, this would have been achieved by no later than the end of October 2016: see paragraph 102(5).

7. At paragraph 99 of my judgment I set out Mr Dagnall's submissions on the quantification of damage: In his closing, Mr Dagnall 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 understood 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. Mr Dagnall 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 taken 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 had entered 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 over payment. Essentially, it is said that in a case of fraudulent misrepresentation the claimants can recover the cost of their own bad bargain.

8. I summarised how Mr Dagnall had developed those submissions at paragraphs 100 and 101. In particular, Mr Dagnall submitted (as I recorded at paragraph 101(4)) that even if (as I found) 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 the Old Mill, and had been over-optimistic as to all of those matters, and also as to the potential profits even if there had been no problems, the claimants could still sue for the resultant over-payment of the acquisition price as difference in value and/or the resultant costs as consequential losses. It did not matter that these were not connected with the misrepresentations, or that they were the result of the claimants' own over-optimism or lack of subsequent trading success.

9. I began paragraph 102 of the original judgment by stating that in my judgment there was considerable force in those submissions; but I added that they must be qualified by a number of countervailing considerations, which I proceeded to set out at sub-paragraphs (1) through to (6). At paragraphs 103 and 104 I concluded as follows:

"103. The decision of the House of Lords in the *New Smith Securities* case establishes that a defendant who induces the claimant to enter into a transaction as the result of a fraudulent misrepresentation, is bound to make full reparation for all the damage directly flowing from that transaction. However, those damages must be assessed on the basis that the innocent claimant has acted reasonably to mitigate its loss on discovering the fraud. Nor should a claimant be entitled to recover in respect of potential losses which it had fully appreciated and factored into the purchase price. I have already pointed out that if the electricity supply representation had not been made, the claimants would have been prompted to investigate the electricity supply to Unit 3, potentially leading to the

discovery of the inadequacy of the existing power supply; and whilst it was impossible to say exactly what would have happened if the true state of affairs had been revealed, it was improbable in the extreme that matters would have proceeded in the same way as they did in fact proceed. This justifies an approach to the assessment of damages that compensates 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 defendant's fraud.

104. I do not consider that I can or should go further than this in addressing the issue of loss and damage."

10. Since preparing and handing down my reserved judgment I have had the benefit of further evidence and argument, and also of appreciating how the full acceptance of Mr Dagnall's submissions would operate in practice and translate into an award of damages under various heads. In the light of that further material, I do not consider that I am bound by any preliminary indications I may have given as to how the principles that I set out at paragraphs 90 and 103 of my judgment (to which I adhere) should operate in the circumstances of the present case.

11. The scope of the resumed trial was set out in my order of 11 September 2019 and in a further order made at a directions hearing on the afternoon of 21 February 2020, which also set out how the further hearing would proceed. Both counsel had produced detailed written skeleton arguments, which I had the opportunity of pre-reading the day before the trial resumed, together with the further (and fourth) witness statement of Mr Brian Sidebottom and the further expert evidence. This comprised: (1) The third expert report of Mr Christopher Milnes, the chartered building surveyor, dated 29 November 2019. (2) The addendum report of Mr Michael King, the property valuer, dated 16 December 2019. (I heard no oral evidence from either of these two joint experts.) (3) The further report of the claimants' expert accountant, Mr John Green, dated 17 December 2019. (4) The further report of Miss Beverly Ibbotson, the defendants' expert accountant, dated 24 January 2020; and (5) The accountancy experts' second joint statement, dated 3 February 2020. There was also a Scott Schedule itemising 11 heads of alleged loss, although numbers 7 and 10 were closely related.

12. The trial resumed on Tuesday 3 March 2020 and it took the following form: Following brief oral openings from counsel, Mr Brian Sidebottom gave evidence for about

an hour and ten minutes before the luncheon adjournment. Mr Green then gave evidence after the short adjournment for about two hours. Miss Ibbotson gave evidence the following morning for a similar period of time. Both experts then gave concurrent evidence before me on the afternoon of the second day of the resumed hearing for about three hours. The third day of the resumed trial, Mr Berragan addressed me in the morning for a little over two hours. I then adjourned early for lunch, and to read the written closing which Mr Dagnall had prepared overnight. Mr Dagnall addressed me by reference to that document, again for a little over two hours. Mr Berragan then replied for about half an hour, and Mr Dagnall had the last word, as befitted his role as counsel for the claimant.

13. During the course of his evidence Mr Brian Sidebottom made it clear that there had been no specific plans, specifications or costings for the creation of a digital printing suite in Unit 3, only rough ideas of what Glossop had been intending to do. The intention had always been to move forward in stages. The global figure that Brian and Jackie had had in mind was £50,000, but they had not costed any of the individual items. At paragraph 24 of his fourth witness statement, Mr Sidebottom said this:

"None of these plans are the result of clever or original thinking. The existing layout lent itself perfectly to our requirements and needs, and we felt it could be readily adapted to meet those needs at a cost that was not excessive or disproportionate. We envisaged carrying out the works in stages over time when we had funds available."

At the present point in time Mr Sidebottom could not say whether these ideas had fed into the final projections made by the claimants. The works would have been done section by section as funds had become available. Mr Sidebottom accepted that the execution of the works depended on the profits generated by the business and other expenditure that Glossop might incur. He accepted that the £ 50,000 had only been an estimate, and he recognised that building costs could exceed their estimate.

14. The figure of £ 50,000 had first been arrived at in May 2015. At that time Brian and Jackie had not seen the first floor of Unit 3 because that had been sublet and used as offices. How much Glossop would have been prepared to spend would have depended upon how much money the company had been making. Mr Sidebottom reiterated that Unit 4 had been completely unsuitable for digital machines because there was no office

space available. Mr Sidebottom accepted that Mr Milnes's costings had included items that Glossop had never planned to do. He could not understand why some of those items had been included. One example of that was item J on page 129: a full electrical installation, including new sockets, switches, isolators, etc at a cost of £ 22,801. Certain of Mr Milnes's costings were said by Mr Sidebottom to have come as a bit of a shock: for example, item B on page 127: the new steel canopy above the side footpath attached to the building at a cost of £ 10,400. Mr Sidebottom said that at that price they would certainly have looked for alternatives. Mr Sidebottom said that he would not have expected glazing the internal walls to have been as expensive as Mr Milnes had costed because Mr Milnes had included a lot more glazing than Glossop had planned, nor would there have been as much plaster boarding to the walls and ceilings. When he was taken to item H on page 127, a floating staircase from ground to first floor with steel balustrading at a cost of £ 7,500, Mr Sidebottom's comment was: "I'd have said that Jackie would have had to wait for her floating staircase". Mr Sidebottom said that he could not really comment on Mr Milnes's costings.

15. By the end of his cross-examination Mr Sidebottom said that he felt that he was being cornered because he had never produced a detailed list like Mr Milnes. He had been asked for a figure to include in his second witness statement and he had provided a figure. Quite a lot of the things that Mr Milnes had included had not been in Mr Sidebottom's witness statement and they were matters that Glossop had not been anticipating. He said that Glossop had formed their plans over what was to be done to the unit in May 2015, when the unit was then in a very good condition. He suggested that that was why there was such a difference between Mr Milnes's report and Mr Sidebottom's estimate. He would not accept that what Mr Milnes had produced went far beyond what Glossop had envisaged. Mr Sidebottom said it was the date of assessment that was the problem. He suggested that there had been a dramatic change between May and November 2015, when Glossop had taken possession of the unit. Mr Milnes was said to have valued a great many things. Mr Sidebottom accepted that even those items that Glossop had envisaged in May 2015 would have cost considerably more than £ 50,000. He said that that figure had just been a guess on the part of himself and Jackie. He said that he had been "shocked, very shocked" when he had been told Mr Milnes's costing in the order of

£ 222,000. He also reiterated, in re-examination, that the layout of Unit 4 as a digital suite was not what Glossop had envisaged in any shape or form.

16. I accept Mr Sidebottom's evidence that Mr Milnes's specification and costings went considerably further than the works that Jackie and Brian had been envisaging. I do not accept that this was due to any material change in the condition of Unit 3 between May 2015 and the date of possession. I find that Mr Milnes's costings, are not a true guide to what Brian and Jackie had had in mind for Unit 3; Mr Milnes was envisaging far more extensive and costly works. I find that this error feeds into, and operates to undermine, the conclusions of the expert accountants as to the costs of converting Unit 3 into a digital printing suite.

17. I accept that both expert accountants were appropriately qualified and were doing their best to assist the court. There was no challenge to their professional expertise, their competence or their integrity. I find that the opinions of the expert accountants are seriously undermined by their reliance on Mr Milnes's erroneous costings. Thus, Mr Green accepted that Mr Berragan's cross-examination of Brian Sidebottom had established that Mr Milnes's specification and costings had gone considerably beyond what Glossop had actually been contemplating for Unit 3, and that his figures needed some trimming. I accept Miss Ibbotson's assessment that had the claimants known the true cost of the works they were contemplating to convert Unit 3 into a digital printing centre, they would have reassessed whether they would do it or not. As she put it, any commercially run business would calculate the likely return on the expenditure because otherwise the capital would be used elsewhere. I also accept Miss Ibbotson's further point that if the works are improving the unit, then the value of that unit will increase. As she put it, one is adding value rather than subtracting it. I therefore do not accept that the price a hypothetical purchaser would have paid for the unit or the business would necessarily decrease on a pound for pound basis, as the experts had assumed.

18. I also find that the opinions of the experts are seriously undermined by the fact that they had not appreciated that there had been no delay in moving the conventional printing business from Glossop's existing premises at the Old Mill to Contact's premises at Stockport, and that they had seen no breakdown of the figures as between the digital and

the conventional printing operations. They had treated the business as a single whole. At paragraph 23 of his second witness statement, Brian Sidebottom had said this:

"We wished to ensure the combined businesses of Glossop Cartons and Contact was up and running before looking to set up the digital suite and move the two digital machines to Haigh Avenue. The reason for this is that the bulk of our production was done by conventional non-digital production machinery and as such this was the mainstay of the company."

Mr Dagnall points out that we do not know the breakdown in terms of profitability between the two strands of Glossop's business. However, it is Glossop which possessed that relevant information; and if Glossop wanted to contend for an increased profit margin on digital - as opposed to conventional - printing, it should have produced the evidence to substantiate that case. As Miss Ibbotson put it, the accountancy experts had not appreciated that conventional printing operations had been transferred to Stockport within a few weeks of completion, so the reality was completely different from the set of assumptions that they had made. Mr Green accepted that the costs of the Old Mill had been entirely special to Glossop, and that his figures had been based entirely on Glossop's own particular circumstances because that was all that he had had to work on. Miss Ibbotson accepted, in re-examination, that now that she knew the facts and the costs, the more reasonably mitigation had been for Glossop to have carried on with their plan to use Unit 3, rather than Unit 4, for the digital printing operations.

19. Before turning to the principal heads of loss, I will dispose of two incidental claims. The first is the Bramhall warranty claim. At paragraph 89 of my judgment I found that Glossop was entitled to a contractual indemnity in respect of the settlement sum and associated legal costs that had been paid to Miss Bramhall in relation to her equal pay claim. The relevant loss has been quantified in the sum of £ 21,277. Mr Berragan accepts that this is a simple, free-standing contract claim, and the amount is admitted. There should be judgment in this sum for Glossop against Contact.

20. The second incidental head of claim is the partnership's claim against the second and third defendants under clause 16.4 of the agreement for the sale of Unit 3 which I found was established at paragraph 111 of my judgment. The relevant measure of damage

is the difference in value between the value of Unit 3 as warranted or represented and its true value. On the evidence, I find that to be £ 32,700, comprising: (1) £ 1,262, the cost of a temporary minor supply to Unit 3; (2) £ 17,915, being the cost of a permanent minor supply to Unit 3; and (3) £13,623, representing the cost of the major works required to deal with the flooding issue affecting Unit 3. I adopt this higher figure rather than the average of £ 9,071, representing the average cost of the major and the more limited works, since I accept Mr Green's assessment that a hypothetical purchaser would carry out the major works because of the importance of resolving the flooding issues for once and for all in view of the high value of the digital printing machinery that was going to be installed in Unit 3. I find that the hypothetical purchaser would want to achieve certainty in relation to the resolution of the flooding issue. I accept Mr Dagnall's submission that whether or not it was unreasonable for Glossop to have refused Mr Smith's offer to provide a minor supply to Unit 3, the costs of securing that minor supply are recoverable in any event. Mr Milnes has quantified that cost at £ 17,915. Any money judgment should be drafted in terms that prevent this head of loss being recovered twice over, both by the partnership and by Glossop, in order to avoid the claimants from being over-compensated for their combined losses given that I have found this to have been a composite transaction.

21. Against that background, I turn to consider Glossop's principal claim for damages. In his written closing, Mr Dagnall submitted that in the case of fraud and breach of contract claims: (1) An entity can decide to rely on either its fraud claims or its contract claims That is its choice, and it can choose whichever produces the better result for it: see *Karim v Wemyss* [2016] EWCA Civ 27 per Lewison LJ at paragraphs 36 and following, and especially paragraph 40. (2) The fraud, including the tort measure, is the price paid less the true value plus consequential losses. The contract measure is the difference in value between the value as warranted or represented and the true value, (and so price is irrelevant). As Mr Dagnall pointed out, the fraud measure is one which assists a claimant who has made a bad bargain, even if that is his own fault. (3) A failure to mitigate, as has been found to have been the case here, does not prevent any damages recovery; rather it merely requires the loss to be calculated as if such mitigation had or would have occurred. In my judgment a failure to mitigate affects the calculation of the diminution in value and any consequential losses; it does not give rise to any additional

head of damage (as Mr Dagnall seemed at times to contend by his use of the term 'RM loss' for the costs of his reasonable mitigation claim).

22. Mr Dagnall submits that it is also the case that: (1) The aim is to ensure that the victim of the fraud is fully compensated for having entered into the transaction, and from which the following follows: (2) The fact that the relevant loss or lack of value is unconnected with the fraudulent misrepresentation is irrelevant as it is recoverable so long as it is connected with the transaction into which the victim was fraudulently induced. (3) The fact that the relevant loss or lack of value arises from something hidden which no one - and not even the most careful of purchasers - would or could have known about is irrelevant. The question is simply what is the "actual value" (i.e. its value if everything had been known) of what was acquired and its difference from the price paid, and thus the "actual value" is to be calculated on the basis of what a fully informed hypothetical Glossop (or purchaser) would have factored in. (4) The fact that the victim has, irrespective of the fraud, grossly overpaid for the relevant asset owing to the victim's own carelessness or over optimism in agreeing the price, or entering into the transaction, is irrelevant and no defence. The victim can still recover the entire loss arising from their over payment for the transaction (and there is no defence in those circumstances of break in causation or of contributory negligence).

23. Mr Dagnall 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).

24. Mr Dagnall 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 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 Mr Dagnall whether a claimant was entitled to be compensated for their own commercial misjudgements or over-optimism. Mr Dagnall's 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.

25. In his skeleton argument, Mr Berragan had submitted that unknown or unanticipated *defects* in the assets should be distinguished from mere *features* inherent in the assets, and they should also be distinguished from features or even defects in other assets, or alleged problems arising from decisions or events which were external to the transaction itself. Mr Berragan emphasised that the damage must flow directly from the transaction. Mr Dagnall submitted that there was no difference between *features* and *defects*. The question is: What was the true value of the asset. A feature of an asset contributes to its true value, whether it is a defect or not. The compensation measure is based on the true value of the Contact business and is not limited to defects. Mr Dagnall submits that those features and their consequences were built into the price of £ 300,000 which was paid for Contact's intangible assets. Those features, such, Mr Dagnall says, 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. The price was calculated on that basis and thus needed to incorporate that feature, if that is what it was. If the combination of the

two businesses were to be ignored, then the actual value of the Contact business was nil, since only a purchaser with the desire to combine the two businesses would have paid anything for the Contact business.

26. In his oral closing, Mr Dagnall cited from paragraphs 10 to 18 of Lord Hoffmann's speech in *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos. 2 & 4)* [2002] UKHL 43, reported at [2003] 1 AC 959, concluding that there is no common law or statutory defence of contributory negligence in cases of fraudulent misrepresentation. That is clearly the case when one is considering issues of liability; but when one turns to consider the question of the loss flowing from the entry into the transaction, in my judgment the issue is not one of contributory negligence but rather the question what damage flows directly from the transaction. At paragraph 103 of my earlier judgment I said that a defendant who induces the claimant to enter into a transaction as the result of a fraudulent misrepresentation is bound to make full reparation for all the damage directly flowing from that transaction. I said 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. I said that the rules relating to the quantification of damages for fraudulent misrepresentation should not operate to insulate a claimant 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.

27. In my judgment, a claimant cannot be expected to recover for factors which it had appreciated, and as to which it had made a commercial judgement, if that judgement turns out to be wrong. In my judgment, the question I posed at the beginning of this extemporary judgment: Is a fraudulent seller liable for losses sustained as a result of commercial misjudgements 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? receives a negative answer. Even in a claim for fraudulent misrepresentation, a claimant is not entitled to 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. Let us take the example of storage costs. Glossop took the view that there would be no need for external storage as a result of entering into the transaction. As

I recorded at paragraph 29 of my earlier judgment, at the end of his cross-examination of Mr Walker, whose evidence had addressed the issue of off-site storage costs for the defendants, Mr Dagnall had indicated that the claimants would accept that on the balance of probabilities, even without the electricity supply and the drainage and flooding problems, Glossop would still have had to incur additional storage costs, even though Mr Dagnall said that the contrary view had been a reasonable view for the claimants to have taken. Mr Dagnall now seeks to turn this commercial misjudgement to Glossop's advantage by submitting that it is entitled to recover the sum, in the order of £ 120,000, by way of additional storage charges, calculated at a rate of £ 60,000 per annum over two years.

28. In my judgment, 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; but, in any event, it is a factor which Glossop had considered and weighed up when entering into the transaction but had simply got wrong. Any financial consequences flowing from this erroneous commercial assessment cannot, in my judgment, properly be laid at the door of even a fraudulent defendant. In his oral reply, Mr Berragan took me to passages in the concurring speech of Lord Steyn in the case of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, at page 284 letter D, to page 285 letter D:

"There is in truth only one legal measure of assessing damages in an action for deceit; the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 360G, Lord Mustill said: 'There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee.' In an action for deceit the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases. It is not a substitute for the single legal measure: It is an application of it".

Lord Steyn went on to consider the three limiting principles which, even in a case of deceit, served to keep wrongdoers' liability within practical and sensible limits. Those three concepts were causation, remoteness and mitigation. In practice, the inquiries under

those headings were said to overlap; but they were distinct legal concepts. For present purposes, causation was said to be the most important. Lord Steyn continued:

"The major issue in the present case is whether there is a causal link between the fraud and the loss arising by reason of the pre-existing fraud perpetrated on Ferranti. How should this matter be approached? The development of a single satisfactory theory of causation has taxed great academic minds … But, as yet, it seems to me that no satisfactory theory capable of solving the infinite variety of practical problems has been found. Our case law yields few secure footholds. But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is that the 'but for' test, although it often yields the right answer, does not always do so. That has led judges to apply the pragmatic test, whether the condition in question was a substantial factor in producing the result. On other occasions judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection … There is no material difference between these two approaches. While acknowledging that this hardly amounts to an intellectually satisfying theory of causation, that is how I must approach the question of causation".

Lord Steyn then went on to discuss the second limiting principle of remoteness. He said that that requirement was in issue in the instant case:

"If there is a sufficient causal link it must still be shown that the entire loss suffered by Smith is a direct consequence of the fraudulently induced transaction".

Lord Steyn then went on to consider the third limiting principle, which was the duty to mitigate.

29. Here, in my judgment, there is no sufficient causal link between the fraudulent misrepresentations that there were no outstanding issues about the electricity supply serving, or the flooding affecting, Unit 3 and the need for external storage. Any loss suffered in that regard is not, in my judgment, the direct consequence of the entry into the relevant transaction. Glossop appreciated that there was an issue about storage and they believed that they could turn it to their advantage: They believed that good management could eliminate the need for external storage costs. The fact that they got that wrong is, in my judgment, due to factors which are not a direct result of the transaction; and is not something which sounds in damages, even in a claim for fraudulent misrepresentation.

30. Against that background, I turn to the schedule of losses. Item one: The costs of electricity supply to Unit 3. For the reasons I have already given, I find that the relevant costs are £ 1,262 and £ 17,915. The former figure is an actual cost which has been incurred. In my judgment it is recoverable as a head of consequential loss.

MR BERRAGAN: My Lord, I am very concerned about interrupting your Lordship's judgment, but that figure has not been incurred. Nobody has installed a full permanent minor supply to Unit 3.
JUDGE HODGE QC: Sorry, I thought the temporary minor supply had been.
MR BERRAGAN: The temporary one has been, yes.
JUDGE HODGE QC: Yes.
MR BERRAGAN: But no one has installed a full permanent one yet.
JUDGE HODGE QC: Yes, I was dealing with the figure of £ 1,262.
MR BERRAGAN: I am sorry, I thought your Lordship just said the 17 - no, my apologies, my Lord.
JUDGE HODGE QC: I said the former figure.
MR BERRAGAN: My apologies, my Lord; my apologies, my Lord.

JUDGE HODGE QC: The former figure of £ 1,262 has actually been incurred. In my judgment it is recoverable as a consequential loss. The figure of £ 17,915, however, has not been incurred. That figure, in principle, would have been factored into the purchase price for Unit 3. That was in fact paid not by Glossop but by the second claimants. But because they, as purchasers, had made a good bargain, paying only £ 200,000 for a unit which would have been worth £ 250,000 without the electricity supply problem, and the problem of flooding, there has been no loss. In practice, any reasonable purchaser would have incurred the small additional cost - less than £ 700 - of a major supply; but that greater sum would not have been recoverable by way of damages for fraudulent misrepresentation. So, in relation to item one, it seems to me that £ 1,262 is recoverable as an incurred consequential loss, but the figure of £ 17,915, which has not been incurred, would only have been factored into the purchase price for Unit 3 which was paid by the partnership, as purchaser, and is therefore not recoverable by Glossop. As I have already indicated, it is included within the award of damages for breach of warranty or representation in the Lease Sale Agreement for Unit 3.

31. Item two: The costs of providing a major electricity supply to Unit 4. The £ 6,028, which is the cost of a temporary generator, is recoverable as a consequential loss whilst the electricity supply was notionally installed in Unit 3. The figure of £ 28,363 for a

permanent major supply to Unit 4 is an agreed figure but it does not seem to me that that sum is recoverable because it was not reasonable mitigation to put a major supply into Unit 4 rather than Unit 3. The claimants should have addressed the problems affecting Unit 3. In my judgment, there is no need for any credit to be given for the risk that there was an issue over the ability to source a major supply to Unit 3. That is because of the evidence that was given by Mrs Scoltock (as recorded at paragraph 97 (11) of my earlier judgment, and previously referred to in this judgment). In view of that, it seems to me that no ransom value would have attached to any element of control that might have been enjoyed by Stockport Metropolitan Borough Council, which element of control is, on the evidence, uncertain in any event.

32. Item three is the costs of dealing with the flooding issue and the repairs. The cost that I have found to be relevant is the figure of £ 13,623 for the major works. Again, those costs have not yet been incurred. In principle, these would have been factored into the purchase price for Unit 3. That was paid by the partnership; but, again, it seems to me that this is irrecoverable, as damages for fraudulent misrepresentation, because the partnership had made a good bargain in acquiring Unit 3 for £ 200,000, even allowing for the additional costs of addressing the electricity supply and flooding issues.

33. Items four and five should be taken together. They are the additional transport and storage costs due to maintaining two sites and the additional costs of maintaining the Glossop depot. The actual figures for the use of external contractors and existing vehicles between sites, in the total sum of £ 14,853 are agreed, as are the costs for forklift trucks of £ 2,278, driver costs of £ 2,539, and staff/director costs of £ 21,303. There is a separate issue as to whether a further sum of £ 25,000 should be allowed, as Mr Green contends, for the additional costs of not mothballing the Old Mill premises for a period of six months. I accept that the evidence of Glossop was that they had intended to move out of the Old Mill completely by May 2016. These items relate to Glossop's alleged inability to do so for an additional period of six months had Glossop discharged its duty to act reasonably to mitigate its losses, in accordance with the way I dealt with the matter in my reserved judgment.

34. Mr Berragan submits that there are no findings in that judgment to support this claim. He also points to what he says are a number of problems with the experts' analysis of these items. The claimants did install a temporary generator to operate the Beam machine in Unit 4 before May 2016. The core of Glossop's business was in fact the conventional printing operation, Contact's business was entirely conventional printing and was housed entirely in Unit 5, and not in either Units 3 or 4. Glossop sold some of Contact's conventional machines and installed some new machines in Unit 5. It transferred its conventional printing business to Unit 5, and the timing and the scale of that transfer were not affected by the problems with Unit 3. Glossop did not transfer its two existing digital machines from the Old Mill to Unit 4 even in October 2016, once the new major supply had been installed to Unit 4. In fact, Glossop returned the Beam machine to the manufacturer and have never transferred their digital machines to Unit 4.

35. Mr Berragan submits that if - as to which there is no evidence - these additional costs relate purely to the digital operation, then those costs are being incurred even up to today. That is due not to the defects in Unit 3, but to commercial decisions made by the claimants following their purchase. It is said to be pure speculation to suppose that the claimants would have moved the two digital machines in May 2016 when they made no attempt to do so in October 2016 or thereafter. Mr Berragan submits that the claimants' alleged intention to install the digital suite in Unit 3 is a subjective element which cannot affect either the true market value of Unit 3 or the true market value of the Contact business. Mr Milnes confirmed that it made no difference to the market value of either Unit 3 or 4 which of each was to be used for either storage or production. The Contact business did not include digital printing, and the good will was valued on the basis of its turnover for conventional printing, and the opportunities of synergies and savings from the integration of the two businesses. The analysis of the experts is, in my judgment, flawed because they had not appreciated that the conventional printing business of Glossop had been transferred to Stockport with no delay.

36. On the evidence, it does not seem to me that the claim under these heads has been made out properly by the claimants. The reality is that Glossop has continued to use the Old Mill for its digital printing operations and for storage. In my judgment it cannot be said that these heads of loss flow directly from the entry into the relevant transaction. So

far as the claim for the premises costs are concerned, part of that claim relates to the rates that are said to have been paid during the six months between May and November of 2016; but any rates relief that may have been available as a result of the Old Mill being mothballed and emptied would have been available to Glossop at some stage in any event, once all activities were moved over to Stockport. I do not see that that represents an element of recoverable loss. The saving on insurance is, in my judgment, problematic. It may well be that insuring empty premises would have resulted in an increased, rather than a reduced, premium; but the reality is that the Old Mill has continued to be used and operated by Glossop, and I do not see that these items represent losses that have properly flowed from the entry into the transaction.

37. Item six is an alleged loss of turnover. The experts are in agreement that a loss of turnover for six months would be £ 14,685. Miss Ibbotson accepts that that is the figure that has been suffered. Mr Green says that in fact one should take a multiplier of two years, because the loss of profit is ongoing and should be quantified by reference to two years' purchase. The difficulty with this head of claim is that is predicated on the loss of turnover attributable to the digital printing side of the business but there is no evidence that the digital printing side of the business would have grown at the rate of 1.5% per annum. The loss of turnover seems to me to be entirely speculative, being founded upon a supposed six months' delay in completing the digital suite which, according to Mr Green, would have had a knock-on effect, with continued delay in growth over the succeeding 18 months

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38. Mr Berragan points out that this claim suffers from a number of fatal problems. First, it is based purely on speculation about the increase in turnover. Secondly, it cannot be said that the investment in new machinery was delayed as a result of any problems with Unit 3. The claimants have not proceeded with their plans to establish a new digital suite, having returned the Beam machine to the manufacturer. Instead of investing in new digital printing machinery, the claimants have spent £ 1.2 million in the recent purchase of Units 1 and 2. Moreover, Mr Berragan points to the fact that in paragraph 96 of my earlier judgment I had found that there were clearly major problems faced by the business, quite independently of the problems affecting Unit 3. I recorded that Glossop had effectively over-reached itself, under-estimating the difficulties involved in integrating the

two businesses. Glossop had simply failed to achieve the volume of orders for which it had been hoping, quite independently of any of the issues affecting Unit 3. Mr Berragan reminds me that at paragraph 97 (9) I rejected the suggestion that the business had gone downhill as a result of the problems with Unit 3. I recorded that the business had fallen into decline long before Unit 3 had actually been intended to be used as the claimants' digital printing centre, and that the problems affecting Unit 3 were not the real reason for any ongoing problems with the major customer, Authentic. The loss of turnover claim is predicated on the false assumption that there would be a smooth transition, benefiting both the Glossop and Contact businesses on an integrated basis. That assumption has proved to be false. It does not seem to me that that gives rise to any recoverable loss flowing from the entry into the transaction.

39. Item seven - the additional cost of the works required to Unit 4 - has to be viewed in conjunction with item ten - the additional cost of the works required to Unit 3 for its conversion for use as a digital printing suite or centre. The basis for this claim is that Glossop had anticipated the costs of converting Unit 3 to a digital suite would have been £ 50,000. According to Mr Milnes, the actual cost for converting Unit 3 would have been £ 222,131. To have converted Unit 4 to a digital printing suite would have cost a still further £ 68,703. So far as the claim in respect of Unit 4 is concerned, it seems to me that there is no proper basis for it at all. It was never ever the intention of Glossop to convert Unit 4 into a digital printing suite. The money has not actually been expended; and that sum could in no way have fed into the price that Glossop was prepared to pay for the acquisition of Contact's business because it was never contemplated that any works or conversion would be carried out to Unit 4 in the first place. I have already referred to Mr Brian Sidebottom's reiteration, in re-examination last week, that the layout of Unit 4 as a digital suite was not what Glossop had envisaged in any shape or form. Therefore, item seven cannot properly amount to a recoverable head of loss.

40. So far as item ten is concerned, it is now clear that Glossop would never have contemplated the level of expenditure postulated by Mr Milnes. Therefore the claim for the difference between Mr Milnes's costed figure of £ 222,131 and what was effectively the "guesstimate" of Brian and Jackie of £ 50,000, fails on the facts; but, in any event, it does not seem to me that it can properly be recovered for two principal reasons. First, this

was a matter that was entirely subjective to Glossop, as the *actual* purchaser, and would not have entered into the mind of a *hypothetical* purchaser or featured in any hypothetical negotiation between a willing seller and a willing purchaser on the open market. Secondly, and in any event, it was Glossop's evidence that this was something that would have had to be carried out in stages, and it was dependent upon the profits generated from the combined business after the integration of the Contact and Glossop businesses. Works would have been done section by section as funds were available. I fail to see how, on that basis, given that the monies were to come out of the profits of the integrated business, the "back of the envelope" costs estimate could have fed into the price that Glossop was prepared to pay for the intangible assets of the Contact business. In any event, I find that there is force in the points made by Miss Ibbotson, first, that any expenditure would have added value to the physical unit, and, secondly, that one would not incur such expenditure without having undertaken a proper costs benefit analysis. In my judgment, item ten, for different reasons than item seven, is simply not recoverable at all.

41. Item 11 is headed trading losses and ongoing costs. That is an historical description, carried over from a time when that category of losses was being pursued. What in fact has happened, as Mr Berragan points out, is that the claimants' case has migrated from one of loss of turnover to one for the recovery of £ 120,000 by way of additional storage charges, quantified at the rate of £ 60,000 per annum, for two years. It seems to me that this claim overlaps with the claim that was advanced (under item five) for the savings of £ 25,000 over six months that would have been achieved, according to Mr Green, by mothballing the Old Mill. It does not seem to me that those additional premises costs could properly be claimed in addition to the two years' additional storage charges of £ 120,000; but, in any event, for the reasons I have already given, it does not seem to me that anything is properly recoverable as damages for fraudulent misrepresentation for additional storage charges. They were the product of an over-generous assessment of the benefits to be gained by entering into this transaction. I do not consider that that feeds into a claim for damages for fraudulent misrepresentation. So I would allow nothing in relation to item 11.

42. That leaves item nine: the costs of the independent barrister. Those costs are agreed in the sum of £ 19,600. Mr Dagnall claims them either by way of an overpayment loss or as a consequential loss. It seems to me that if loss they are, they are properly to be characterised as a consequential loss, incurred by Glossop as a result of the entry into the transaction. The figure is not in dispute. The defence to the claim is founded by Mr Berragan upon clause 6.7 of the Asset Purchase Agreement, whereby the independent barrister's fees and expenses in connection with each and every referral made pursuant to the clause were to be borne as the independent barrister directed or, in the absence of such direction, by the buyer and the seller equally. Mr Berragan points out that the independent barrister considered the issue and declined to make any special order. In the light of clause 6.7 of the Asset Purchase Agreement Mr Berragan therefore submits that this claim must fail because it is irrecoverable as a matter of contract. He submits that the claimant cannot circumvent that by seeking to recover the cost as damages for the tort of deceit. He submits that the cost was not an unanticipated cost because the parties expressly made provision for unsubstantiated claims, including claims in deceit, to be referred for determination by an independent barrister for the specific purpose of justifying a set-off and the parties agreed that the independent barrister would determine whether or not to make any special order for costs.

43. Mr Dagnall resists that reasoning. He rejects the argument that these costs should be irrecoverable simply because the Asset Purchase Agreement gave the independent barrister a discretion to award costs if he so chose and he chose not to do so. Mr Dagnall submits that that does not prevent the sum from being a consequential loss. There was a need to obtain an interim freeze in the final payment under the Asset Purchase Agreement. That final payment had been induced by the fraudulent misrepresentations of the defendants. The aim of the compensation measure, Mr Dagnall says, is to restore Glossop to the position it would have been in had the transaction not taken place. Thus, it should be postulated that this expenditure was not incurred. Mr Dagnall submits that it would be quite wrong to use a term of the transaction to seek to prevent recovery when the complaint is that as a result of the defendants' fraudulent misrepresentations, Glossop was induced to enter into the transaction.

44. In my judgment that is correct. The measure of recoverable damage is the damage directly flowing from the transaction. That includes the sum of money that was paid to the independent barrister. It does seem to me that Glossop is entitled to recover that sum by way of damages for fraudulent misrepresentation.

45. I have now addressed, I hope, all of the items in the schedule of loss and that therefore concludes this extemporary judgment. It will be necessary for the parties to work out the resulting figure, bearing in mind also the admitted (subject to set-off) counterclaim for the outstanding instalment under the Asset Purchase Agreement from Glossop to Contact of £ 112,500.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.