Neutral Citation Number: [2023] EWHC 1538 (Ch)

Case Nos: CR-2019-004187, CR-2019-008077
CR-2020-002329, CR-2020-002340

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY & COMPANIES LIST (ChD)

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1 NL

Date: 26/06/2023

Before:

MR JUSTICE ADAM JOHNSON

- -

Between :

CR-2019-004187 **CR-2019-008077**	**KRISHNA HOLDCO LIMITED**	**Petitioner/ Claimant**
	- and -	
	(1) GOWRIE HOLDINGS LIMITED **(2) SAMIT GOVINDJI HATHI** **(3) GOVINDJI THAKERSHI HATHI** **(4) ALPA HATHI** **(5) PORTSIDE NORTH LIMITED** **(6) LAXMICO GROUP FINANCE LIMITED** **(7) SYRI LIMITED** **(8) LAXMI BNS HOLDINGS LIMITED**	**Respondents/ Defendants**
CR-2020-002329	**GOWRIE LAXMICO LIMITED**	**Claimant**
	- and -	
	KEYCIRCLE LIMITED	**Defendant**

CR-2020-002340 **KEYCIRCLE LIMITED** **Claimant**

- and -

(1) LONDON PILSNER LIMITED **Defendants**
(2) LAXMI BNS HOLDINGS LIMITED

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Hearing dates: 10, 12, 18, 19, 20, 21, 24, 26, 27, 28, 31 October and 1, 7, 8, 21, 22, 23, 24, 25 November 2022

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Approved Judgment

This judgment was handed down remotely at 10am on Monday 26 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CONTENTS

Mr Justice Adam Johnson:

I. Introduction & Overview

The Structure of this Judgment

1. These are very complicated proceedings. I need to try and simplify. I think it best to start with a statement of the overall picture (Section II below). There is a lengthy and tortuous history. I will seek to distil it and make it digestible. I will then (Section III) summarise the issues I have to decide. I will then make some observations about the trial and the witnesses (Section IV), and having done so go on to resolve the points remaining in dispute between the parties (Sections V to VIII). Finally, I will summarise my overall conclusions (Section IX).

The Proceedings

2. The main relief sought is under an unfair prejudice Petition. The Petitioner is Krishna Holdco Limited ("*Krishna*"), which (now at any rate) is a 50% shareholder in a joint venture company, Laxmi BNS Holdings Limited ("*LBNS*"). The other 50% shareholder is Gowrie Holdings Limited ("*GHL*").

3. GHL has now conceded that it does not want to have Krishna as a joint shareholder in LBNS, and is willing (subject to the Court's approval) to consent to an Order that it buy Krishna's shares. There is still though a remaining, and substantial, dispute about certain factors relevant to the value of Krishna's shareholding, and a dispute about the terms on which any sale should happen.

4. Sitting alongside the unfair prejudice Petition is a Part 7 Claim between the same parties. This traverses the same ground as the Petition, but seeks different relief, and in particular seeks orders for the rescission of two agreements entered into in 2013 and 2016 respectively (the "*2013 Agreement*" and the "*2016 Agreement*") on grounds of fraudulent misrepresentation.

5. At trial, GHL eventually conceded that the 2016 Agreement should be rescinded, although it did not accept there had been any fraud. The status of the 2013 Agreement, however, remains a major point of contention.

6. In addition to the Petition and the Part 7 Claim, there are also two other, subsidiary sets of proceedings, referred to as the "*Trade Debt Claim*" and the "*Loan Claim*" – or together, the "*Keycircle Proceedings*". I will explain the Keycircle Proceedings in more detail below (see at [117] and [128]).

II. Background

Origin of the Dispute: the 2010 Merger

7. The parties' dispute has its origins in a merger of their two pharmaceutical businesses in 2010.

8. On the side of the Petitioner/Claimant, Krishna, the main protagonists were and are Arun Patel ("*Arun*") and Mahesh Patel ("*Mahesh*"). Arun and Mahesh are not related

but are business partners. Mahesh was assisted in managing his affairs by a long-standing associate and confidant, Ash Amin.

9. Together, Arun and Mahesh were owners at the time of a company called Colorama Pharmaceuticals Limited ("*Colorama*"). Colorama had a parallel imports business – i.e., importing pharmaceutical products from abroad and then labelling and selling them. It also produced pharmaceutical products known as *specials*, i.e. products designed to meet a patient's particular needs. It also had some other, non-pharmaceutical investments, referred to as "*non-core*" interests.

10. On the side of the Respondents/Defendants, the main protagonists were Samit Hathi ("*Samit*") and other members of the Hathi family, who were the owners of a business called Gowrie Healthcare. The main holding company of the Gowrie Healthcare Group was GHL. Samit's father is Govindji Hathi ("*Govindji*"); his mother is Nirmala Hathi ("*Nirmala*"); and his wife is Alpa Hathi ("*Alpa*").

11. By late 2009, Colorama was experiencing difficulties. Its bankers, Barclays, were unhappy. At Barclays instigation, a new CFO was appointed. This was Vim Vithaldas ("*Vim*"). Vim was to go on to become CFO of LBNS for a period after the merger.

12. Arun also called on a business associate of his to help. This was Bhagwant Rattan, known as "*Baggy*." The documents show Baggy in contact with Samit, as well as Arun.

13. In the event, Colorama's difficulties could not be addressed and in December 2009 Barclays gave notice that they were terminating the facility on which Colorama relied.

14. This left Colorama with limited options. In the event, the option chosen was a merger of the pharmaceutical interests of Colorama with those of Gowrie Healthcare. Both sides saw potential for benefits. One was the possibility of the merged entity pursuing research into the development and manufacture of pharmaceutical products called *clinicals* – these are a step on from *specials*, and provide a means of obtaining exclusive market share. This can be very profitable.

15. In the event, the businesses were merged in March 2010 to form LBNS. The merger was complicated, however, because of Colorama's poor financial state.

The Merger Structure

16. The merger structure was carried into effect by means of a complex suite of documents (the "*2010 Transaction Documents*"), including a Shareholders Agreement ("*SHA*") and new Articles for the proposed joint venture company, LBNS, all of which were executed on or about 15 March 2010.

17. Under the agreed structure, Colorama became a subsidiary company of Krishna (which was newly formed for the purpose by Arun and Mahesh). Colorama then transferred its pharmaceutical assets to its parent Krishna under an agreement known as the "*Hive-Up Agreement*" (the "*non-core*" assets were left behind in Colorama). Krishna sold these same assets to the joint venture company LBNS under a back-to-back arrangement known as the "*Colorama Business Purchase Agreement*", or "*Colorama BPA*".

18. LBNS was to pay market value for Colorama's pharmaceutical assets by means of both "*Cash Consideration*" and "*Deferred Consideration*". The Cash Consideration was payable upon completion, and was to be used to redeem Colorama's existing loan facility from Barclays. The Deferred Consideration was to be paid over two years, and to be fixed by reference to a "*Completion Account*", which was to set an agreed overall value for the pharmaceutical assets. While agreement on the Completion Account was pending, there was provision for interim payments to be made on account of the Deferred Consideration. The idea was that the Deferred Consideration would largely if not entirely be used to pay Colorama's creditors other than Barclays. In fact, under the Colorama BPA, Krishna was required to make payment direct to such creditors when it received any Deferred Consideration from LBNS, rather than making payments to Colorama (see cl. 4.2).

19. Under another part of the structure, a property known as Colorama House or "*the Perivale Property*" was to be transferred to LBNS. This was the main premises from which Colorama had operated. The Perivale Property will develop some significance later, in the context of the 2013 Agreement, so I will come back to it.

20. Finally on the side of Arun and Mahesh, Krishna was to acquire a 50% shareholding (the "*B Shares*") in LBNS, which would leave Arun and Mahesh as part owners of the new joint venture. Arun and Mahesh were both to become directors of LBNS.

21. On the side of GHL, the structure was a share sale rather than an asset sale. GHL transferred to LBNS its shareholdings in two subsidiaries, Gowrie Limited (which later changed its name to Gowrie Laxmico Limited, and so I will refer to it as "*GLL*"), and Laxmico Limited ("*Laxmico*"). Laxmico was a non-trading subsidiary, and was to be used to house the pharmaceutical assets transferred by Colorama. GLL however was a trading subsidiary with a substantial positive net asset value (NAV) of approximately £11.6m.

22. In return, GHL was also to receive a 50% shareholding in LBNS (via newly created "*A Shares*"). Samit and Govindji were to become directors of LBNS.

The problem with the Structure: and the Solution

23. There was a problem, however. Under this structure the payments of Cash Consideration and Deferred Consideration by LBNS were effectively prioritised. That had to be the case, because the Barclays facility had to be redeemed, and Colorama's other creditors had to be managed, many of whom were already pressing for payment. Cash was always going to be tight in the new business.

24. The problem was that this left GHL, which had injected a valuable asset (GLL) into the new joint venture, with only limited prospects of receiving any shareholder distributions, probably for a period of two years and possibly for longer.

25. As compensation, it was agreed that GHL would receive a form of interest on the value of its initial contribution, to run at a rate of 10% for the first two years of the life of the joint venture, rising to 12% thereafter.

26. The amount on which such interest would accumulate was referred to as the "*Equalisation Amount*", to be calculated under another document forming part of the

overall suite, the "*Equalisation Agreement*". There was provision for an "*Original Equalisation Amount*" (made up mainly of the NAV of GLL), but this could be subject to deductions and, in one situation, additions. That one situation was provided for in cl. 2.3 of the Equalisation Agreement: it applied if LBNS made payments to any creditors of Colorama upon request from either Krishna or Colorama, but without any legal obligation to do so under the Colorama BPA.

27. Interest on the Equalisation Amount was payable under LBNS's Articles, specifically Article 32. It was referred to not as interest but instead as a "*Priority Dividend*". The Priority Dividend was to be paid to GHL according to an agreed schedule, but only if there were sufficient distributable reserves available (the phrase used in the Articles is "*Distributable Profits*"). If there were not, and if the Priority Dividend could not be paid, then unpaid amounts were to be added to the Equalisation Amount and would therefore compound.

28. What is obvious is that these provisions would be a material encumbrance on the value of Krishna's B Shares in LBNS, so long as any Equalisation Amount was outstanding. That is one of the major issues remaining in these proceedings, because GHL says there is still an Equalisation Amount outstanding, and Krishna says there is not.

29. Resolving this important question will involve looking at some other aspects of the factual background.

Colorama's Stock Position

30. One is that, as the parties' experts in the current action were agreed, Colorama was in fact insolvent at the time of the merger.

31. A critical factor in this outcome was its stock position.

32. Under the Colorama BPA (cl. 7), Krishna had given a number of warranties to LBNS (contained in Schedule 5 to the Colorama BPA). These included warranties that Colorama's management accounts were accurate (Sch. 5 para. 4.3); that there had been no material adverse change in the trading position of Colorama since 30 November 2009 (Sch. 5 para. 5.1.2); and that there had been no unusual change in stock levels since 30 November 2009 (Sch. 5 para. 5.1.4). The warranties were qualified by reference to a disclosure letter, which stated that Colorama's stock levels had fallen by about 30% since November 2009. That should have put them at approximately £16m.

33. In fact, a stock-take exercise conducted in the period immediately prior to the merger revealed a much lower figure. Initial results were circulated on Saturday 13 March 2010 to a number of recipients including Arun and Samit. The valuation given was only £8.62m. A more detailed physical stock-take was started at around the same time, but not completed until about two weeks after the merger – this identified about £350,000 worth of additional stock. But still, this was well short of the warranted £16m.

Colorama's Insolvency and the *Debt Purchase Programme*

34. Another part of the background is that, in the period after the merger, some critical parts of the agreed machinery under the 2010 Transaction Documents came to be abandoned.

35. By this I mean that instead of paying the Deferred Consideration as the 2010 Transaction Documents required (see above at [18]), LBNS instead entered into alternative arrangements referred to as the "*debt purchase programme*", under which it committed to make payments directly to a large number of Colorama's creditors, and in return took assignments of their claims against Colorama. (Many of the payments were in fact made by the subsidiary company, Laxmico; but at any rate, they came from within the LBNS Group and have been referred to by the parties as made by LBNS).

36. This change of approach had its origin in the crisis which arose immediately after the merger. The problem was that the Deferred Consideration was never going to be enough to pay Colorama's creditors in full. The stock-take figure from 13 March 2010 put the matter beyond doubt, if there had been any real doubt about it beforehand.

37. Discussions were held on 18 and 19 March. Although some initial payments were made by LBNS in the manner contemplated by the Transaction Documents (roughly £1.8m to a number of Colorama's creditors on 18 March, and £1.2m to a large creditor owned by a Mr Ketan Mehta called Necessity Supplies Limited or "*NSL*"), it was clear there was a serious problem in dealing with creditors and that a different solution was required.

38. The solution was to place Colorama into administration. Administrators were duly appointed on 24 March 2010, namely Mr Andrew Andronikou and Mr Peter Kubik of UHY Hacker Young. It seems that Mr Andronikou took the lead. He was often referred to simply as "*Andy*."

39. This was the backdrop to the *debt purchase programme*. This was underway as early as 26 March 2010. We know that because the first drafts of the debt purchase letters with Colorama's creditors were created on that date.

40. By about the end of May 2010, LBNS (via Laxmico) had entered into arrangements with Colorama's creditors which committed it to make payments over a two-year period totalling roughly £23.8m. Since LBNS also took assignments of the creditors' claims against Colorama, the arrangements also made it the largest creditor in Colorama's ongoing administration.

41. Originally, a CVA was contemplated but by late May or early June 2010, that idea was coming into question and consideration was being given to Colorama entering creditors' voluntary liquidation. An email exchange between Samit and Baggy at the time helps shed some light on at least Samit's motivations. He asked Baggy in an email dated 3 June 2010, *"… but with a liquidation they can challenge the asset sale*" – "*they*" presumably being a reference to Colorama's creditors. Baggy responded, "*I don't think anyone will challenge. You have the votes*." Samit though was still worried: "*I would be happier if Andy explained as I thought we were going for 75% to make sure we went for a CVA not a liquidation.*"

42. On 13 July 2010, Colorama was placed into Creditors' Voluntary Liquidation. Mr Andronikou and Mr Kubik of UHY Hacker Young were appointed as Joint Liquidators.

43. Colorama's liquidation notwithstanding, the intention at least initially seems to have been that LBNS would continue to make payments of Deferred Consideration. Thus, in early June 2010, a schedule for the payment of Deferred Consideration was agreed

between LBNS and UHY, consisting of 21 instalments of £870,408 to be paid over time.

44. In the event, however, the payment arrangement with UHY was soon abandoned. Although some initial payments were made covering the period April to July 2010 (totalling approximately £1.5m), payments stopped in August 2010 and were not resumed. Instead, LBNS concentrated on servicing the £23.8m payments it had committed to make to Colorama's creditors under the *debt purchase programme*.

The Rewind Suite

45. At about the same time, the parties decided to adopt the pretence, by reference to certain sham, backdated documents (the "*Rewind Suite*") that Krishna should no longer be regarded as owner of any shareholding in LBNS. At least part of the inspiration was a concern that Colorama's creditors might seek to obtain control of the B Shares.

46. Between May and early July 2010, a series of documents were drafted and then signed but backdated to March 2010, so that they appeared to be contemporaneous with the 2010 Transaction Documents. These backdated documents included most importantly an "*Option Deed and Agreement*" and a "*Rewind Agreement*". Their effect was to give the impression (falsely) that it was always part of the agreed merger structure that if the net asset value of Colorama's assets fell below the figure of £7.5m in the year prior to the merger, then the issue of the B Shares to Krishna would be unwound and the B Shares would instead vest in GHL.

47. The effect of Colorama's stock shortfall was that its net assets *had* fallen below the £7.5m figure in the year prior to the merger, and so overall the impression created was that the very contingency envisaged by the parties had come about, leaving GHL as the sole shareholder in LBNS.

48. That was a pretence because, as is common ground, there was a secret agreement between Krishna and GHL that GHL should hold the B Shares on trust for Krishna. That pretence was maintained for a number of years, in fact until 2018, and so persisted during the whole period of the events Krishna now complains about.

49. There is an issue I will need to come back to about how the B shareholding was reflected in LBNS's register of members in the period immediately after the merger (see at [147]-[161] below).

50. Be that as it may, what is certainly clear is that on 21 June 2010, documents were filed at Companies House confirming Arun and Mahesh's resignations as directors of LBNS with effect from 26 March. These were filed by Samit, it seems without Arun or Mahesh being specifically aware of it at the time, although Arun's evidence was that he and Mahesh had agreed in conversations with Samit that they should relinquish their directorships. In any event, neither of them made any complaint and can be taken to have been content with the outcome. Consistent with the Rewind Suite, they wanted to take a back seat and not have any obvious involvement in the management of LBNS. Thereafter Mahesh was not involved at all in LBNS's management. Arun took up a role as Sales Consultant from late 2012 onwards. Although that was formally his main role, I accept he must have also been in contact with Samit about matters of importance to him and Mahesh given their ongoing, but hidden, interest as shareholders in LBNS.

51. That left Samit and Govindji as the directors of LBNS, with Samit occupying the post of CEO and Govindji the post of Chair. That remained the position for some while, until Samit and Govindji were joined on the Board in 2018 by Samit's wife, Alpa. Samit was very much the one in the driving seat.

The Additional Funding

52. By late 2010, the accumulated pressures on LBNS caused it to need more cash. Samit looked around for further funding. A number of parties contributed. These included the Hathi family, who made available roughly £1m between October 2010 and April 2011; a business associate, Anuj Shah, who made available roughly £3.5m in the period October-November 2010, via his vehicle Jumbogate Limited; Ketan Mehta, the owner of NSL, who made available a sum of £1m in December 2010 via his company Ironcorp Limited; and also Arun himself, who with his brother Girish made some £650,000 available via a company of theirs called Keycircle Limited ("*Keycircle*").

53. It is common ground that none of this additional funding was properly recorded in LBNS's books and records. Rather than being recorded as loans, the advances were instead used to show £5.5m of bad debts as having been paid rather than written off – essentially an exercise in window-dressing.

"*Goodwill*"

54. I need to come back to the significance of the £23.8m LBNS had committed to pay to Colorama's creditors under the *debt purchase programme*.

55. That £23.8m figure is critical in the context of this case. When that amount was added to the Cash Consideration already paid on completion to Barclays, together with other payments including those at [37] above, the result was that LBNS paid out a total amount *well in excess* of the agreed market value of Colorama's pharmaceutical assets.

56. That overall position was reflected in Completion Accounts in March and September 2011.

57. The September 2011 Completion Account is in the form of a letter, from LBNS to Krishna, dated 15 September 2011. It is signed by Samit and by Arun. The calculation is set out on p. 2. This put the value of Colorama's assets at roughly £46.1m. The easiest thing is to set out the components in a table, as follows:

Item	**Value**
Goodwill	£1.00
Fixed Assets	£2,057,808.00
Stock	£7,692,064.00
Business Contracts	£1.00
Intellectual property Rights	£1.00
Book Debts	£30,604,003.00
Properties (from Lanalux Ltd)	£5,800,420.00
Total Value of Assets Acquired	**£46,154,298.00**
Less: Initial Consideration Paid	£28,134,954.00
Less: Further Payments made	£3,316,511

	£14,702.833.00
Less: Assigned Liabilities of Colorama Pharmaceuticals	£23,805,412.00
Less: Amount payable pursuant to Settlement Agreement with Joint Liquidators of Colorama Pharmaceuticals	£1,400,000
Deferred Consideration Due	**£Nil**

58. The excess paid out over and above the value of Colorama's pharmaceutical assets, including the payments made to Colorama's creditors, was in the region of £11m (the 2013 Agreement gives a figure of £11.6m). It is this excess which was then added to the Original Equalisation Amount, and reflected in the later 2013 and 2016 Agreements. The 2013 and 2016 Agreements thus reflected a sort of running account GHL and Krishna were keeping between themselves, even though, to the outside world, they were both adopting the pretence that Krishna was no longer a shareholder in LBNS.

59. The excess amount I have referred to came to be referred to as "*goodwill*". This characterisation seems to relate to the fact that some way had to be found for dealing with the excess in accounting terms, which did not leave a huge hole in LBNS's profit and loss account (by reason of it paying out roughly £11m but apparently receiving nothing in return). The solution adopted in the financial statements was to treat the excess as a payment in respect of "*goodwill*" by GLL, which would then represent an asset which would need to be written down (amortised) over time.

60. Krishna's position in the present action is that this methodology of adding the excess to the Original Equalisation Amount was illegitimate. In fact, it goes further and argues that none of the payments to Colorama's creditors under the *debt purchase programme* should ever have been added to the Original Equalisation Amount, because none of them fell within the scope of the narrow authorisation given in the Equalisation Agreement for *additions* to the Original Equalisation Amount – i.e., it says that none of them was made *at the request* of either Krishna or Colorama, as required under cl. 2.3 of the Equalisation Agreement.

Investigations by Colorama's Liquidators

61. The decision to suspend payments of the Deferred Consideration inevitably led to some friction with Colorama's remaining creditors. There was also suspicion about whether Colorama's stock position had been properly accounted for.

62. UHY engaged legal advisers, Balsara & Co., and they conducted inquiries, including a number of interviews. Arun attended an interview in July 2010, during which he referred to the Rewind Suite and (as he accepted at trial) lied by representing that GHL alone was the legal and beneficial owner of the issued shares in LBNS. Later, in September 2010, he provided Balsara with copies of the Rewind Suite documents, which he falsely said he had had to obtain from "*the trustees*".

63. In any event, it seems he was not believed (or not completely so), because on 26 October 2010, Balsara & Co sent Arun a letter before action which made no reference to the Rewind Suite and on the contrary appeared to assume that Krishna was still entitled to the B Shares.

64. Later, in January 2011, Mahesh also attended an interview with Balsara. He also referenced the Rewind Suite and said it formed part of the structure of the 2010 merger; but then when asked whether he considered himself a shareholder in LBNS, he said, "*… yeah, I do. I hope I am still a shareholder*."

Other Issues: pre-2013

65. Krishna's case in these proceedings has extended well beyond the question of the Equalisation Amount. Its case has also been that, from about 2012 onwards, while everyone was pretending that Krishna was not a shareholder in LBNS, GHL (meaning effectively Samit) adopted a practice of systematically stripping value out of LBNS, in a manner which benefited the Hathi family and materially disadvantaged Arun and Mahesh.

66. As I will mention, certain of Krishna's allegations are now conceded, but many others remain to be dealt with.

67. Certain of the practices complained about began before the 2013 Agreement, but continued after it. In this category, Krishna alleges that:

    i) a practice developed of LBNS paying excessive remuneration to Hathi family members who in one way or another worked for LBNS;

    ii) an Indian company called Alferez, which under the merger structure should have been transferred to LBNS, was instead acquired by a Hathi family company called Gowrie Healthcare Pvt. Limited ("*Gowrie Pvt.*"), owned by Samit and his father; and

    iii) LBNS advanced a number of loans to entities associated with the Hathi family, without proper commercial justification for doing so.

68. None of these matters are fully conceded: all are live in one way or another and call for some form of decision.

Payments to "*Baggy.Andy*"

69. I will need to deal with the background to the 2013 Agreement in more detail below, but I will here flag one point, which is an apparent arrangement involving Arun and Samit under which payments were to be made to "*Baggy.Andy*" – the latter it seems being Mr Andronikou.

70. The documentary references are somewhat fragmentary, but appear to start with an email from Arun dated 7 May 2013, which said as follows in the "*Subject*" line:

> "*Baggy met Andy in the evening. Not too happy about the back to back. Will need to meet him on the weekend as creditors are*

> *getting edgy and have appointed new lawyer as opposed to Ashok.*"

71. "*Ashok*" here was a reference to the solicitor from Balsara & Co., who had been instructed previously.

72. Samit responded, also on 7 May, to say he did not understand the concern, and Arun replied on 8 May to say: "*Basically he is upset for having dragged the payment.*" Samit responded: "*we'll sort this weekend*"

73. Shortly after this, on 22 May 2013, Samit sent Arun a spreadsheet he described as a "*simplistic cashflow model*". In his covering email he said:

> "*Confirms to me that cash is very tight this year due to UHY, Andy and monies needed for working capital*."

74. Among other items, the attached spreadsheet showed anticipated payments to "*Baggy.Andy*" during 2013, which totalled some £130,000.

75. These payments were all eventually made, as payments to International Law Consultants, a law firm in Colombia owned by Baggy's wife, but in the end they appear to have stretched into 2016.

76. To be more precise, International Law Consultants itself raised two invoices in May 2013 (for £10,000 each). After that, the arrangement involved International Law Consultants invoicing Arun's company Keycircle, and then Keycircle in turn invoicing LBNS.

77. There are Keycircle invoices dated August 2013 (£30,000), May 2015 (£100,000, about £27,000 being a payment to Baggy/Andy), and finally June 2016 (£100,000, but again with £50,000 being a payment to Baggy/Andy). None of them referenced International Law Consultants. Instead, they purported to be for payment of "*Loyalty Bonuses*" (in August 2013 and May 2015), and in respect of "*Telesales – Communication Methods*" (in June 2016).

78. It seems to me clear that the expedient of inserting Keycircle in the payment chain, and the misleading descriptions in the Keycircle invoices, were designed to disguise – to anyone looking at LBNS's books and records – the true nature of the payments made, and the identities of the ultimate payees.

79. I think this conclusion is reinforced by two further sets of email exchanges.

80. First, on 9 September 2013, Arun wrote to Samit and Jahangir Kaba ("*Jahangir*" - at the time the Financial Controller of LBNS), asking about raising invoices to cover "*Baggy's (£30K)*". (This suggests the date on the first of the Keycircle invoices may also be unreliable: see above at [77] - it is dated 10 August 2013, but may have been backdated if only created in September). At any rate, Arun asked: "*Do you want me to put them as management charges or any other description*." This was obviously referring to the possibility of Keycircle raising an invoice for delivery to LBNS, which would disguise payments ultimately due to Baggy by referring to them as "*management charges*", or something else (in the event, "*Loyalty bonuses*"). Samit sent a rather

tetchy response the same day, suggesting unease on the part of Jahangir to what was proposed:

> "*Hi Arunbhai*
>
> *We webt (sic.) through the spreadsheet before you left and agreed the timetable.*
>
> *I am also not sure why you have included Jahangir in this as I have explained it is very sensitive with him on these things*."

81. There is then a further email exchange between Samit and Arun in August 2014, which shows the two of them discussing arrangements to make a further payment to International Law Consultants. (Again, the date does not correspond to any of the Keycircle invoices, but that may also be because the dates on the invoices are themselves unreliable). At any rate, on 21 August 2014, Arun wrote to Samit to say, "*I had Baggy on phone chasing payment for Andy*." Samit responded, "*Can you get Baggy to invoice the amount to Keycircle and then you invoice to us and I will make sure paid*." He then said, in a separate email: "*I have agreed with uncles so we can pay him the whole lot and close the matter*." The reference to "*uncles*" seems to have been a reference to Samit's uncle Bharat, who will appear in other parts of this story (see e.g., [102] and [113] below)

82. Ultimately under this system, the funds to pay Baggy and Andy came from LBNS. LBNS though added all the amounts paid out to the running Equalisation Amount, so they were treated as being for the account of Krishna. As is apparent from the description given above, the documents show Arun participating in this process.

The 2013 Agreement

83. Returning to the chronology, certain of Krishna's complaints relate more directly to the 2013 Agreement itself, and more particularly, to aspects of that Agreement which in one way or another benefited the Hathi family, and which Krishna alleges were procured by fraud. Again, these matters remain very much in issue.

84. The 2013 Agreement is dated 27 June 2013. It is expressed to be an agreement between Krishna, GHL, LBNS and Arun and Mahesh.

85. What is said is that in order to persuade Arun and Mahesh to enter into the 2013 Agreement, Samit lied about the following:

    i) The source of additional loan finance of £4.5m which Samit represented had all come from the Hathi family, when that was untrue. (This allegation relates to the funding exercise in late 2010 and early 2011, mentioned briefly above at [52]).

    ii) LBNS's financial position, which Samit said was poor, with the result that LBNS continued to be unable to make any distributions, when in fact payments could have been made by 2013 and the Equalisation Amount thus reduced.

    iii) The method adopted for calculation of the Equalisation Amount, which Samit represented was in accordance with the original Equalisation Agreement, when

in fact it was not, essentially because of the addition to the Original Equalisation Amount of the £23.8m paid by LBNS to Colorama's creditors.

86. On the basis of these alleged misrepresentations, Krishna alleges that the 2013 Agreement achieved a number of outcomes which were highly favourable to the Hathi family, and which they continued to exploit into the future. These included, in particular:

i) An agreement that GHL would be entitled to a sum of £5.5m, payable as a "*Super Priority Dividend*", which would rank in priority even to the Priority Dividend, and the first £4.5m of which (when paid) would *not* lead to any reduction in the Equalisation Amount.

ii) An agreement that the Perivale Property (see above at [19]), which had been transferred to LBNS as part of the merger in 2010, would be transferred by LBNS to GHL, and then leased back by GHL for an annual rent of some £350,000.

iii) An agreement that because LBNS was not in a position to fund development of a *clinicals* business, or at any rate could not both do that and pay distributions to its shareholders and thus pay down the accumulating Equalisation Amount, GHL would be given free rein to develop its *own* clinicals business instead. Specifically, the 2013 Agreement provided that GHL would be free to engage in its own "*pharmaceutical research and development or branding activity*". In consequence a GHL subsidiary outside the LBNS group known as SYRI *did* engage in R&D work which later resulted in a profitable *clinicals* business.

iv) Finally, an agreement that the correct Equalisation Amount outstanding as at 1 April 2013 was some £35,276,000, which included the "*goodwill*" amount described above at [54]-[60] (i.e., the excess paid by LBNS above and beyond the market value of Colorama).

87. The calculation of the Equalisation Amount in the 2013 Agreement is set out in Schedule 1 to that Agreement. It is as follows (I have tabulated the figures in the Schedule):

ITEM	**DESCRIPTION**	**AMOUNT (£)**
(1)	Gowrie Limited NAV	11,600,000
(2)	Gowrie Accruals	*1,200,000*
(3)	Stamp Duty for Unit 23	246,000
(4)	Goodwill	*11,600,000*
(5)	NSL sums paid	1,200,000
(6)	Unpaid Priority	9,430,000
	TOTAL	**35,276,000**

88. There is no dispute between the parties about the inclusion of items (1), (3) and (5)-(6) in any calculation of the Equalisation Amount, but there is dispute about items (2) and (4) ("*Gowrie Accruals*" and "*Goodwill*"), as I will explain below. The main point of

dispute is about item (4), since embedded within the goodwill calculation are the payments to Colorama's creditors made by LBNS under the *debt purchase programme*.

Settlements with Colorama's Liquidators

89. I have referred above (see at [81]) to an email exchange between Samit and Arun on 21 August 2014, concerning the routing of payments to Baggy and Andy via Keycircle. The day after, 22 August 2014, two Settlement Agreements were entered into with the Joint Liquidators of LBNS.

90. The first was between (in effect) the GHL side (LBNS, GHL, GLL and Laxmico Limited), and the Joint Liquidators of Colorama. The broad scheme of it was that (1) the GHL parties agreed to waive any claims they might have in the Colorama liquidation (for example, arising from the stock shortfall at the time of the merger, or claims as a creditor of Colorama based on the assignments taken under the *debt purchase programme*); and in return (2) Colorama agreed to waive any claims it might have, including in particular any claim against LBNS for recovery of unpaid Deferred Consideration under the 2010 Transaction Documents. In terms of payments, LBNS agreed to pay the Joint Liquidators £1.5m. Of this, £100,000 was contingent on the Liquidators being able to transfer to LBNS title to certain properties. In the end they could not do so, and so £1.4m was paid (the same sum apparently anticipated in the September 2011 Completion Account some three years earlier: see above at [57]).

91. The second settlement agreement was between Krishna and Arun on the one side, and the Joint Liquidators of Colorama on the other. This again effected a full and final settlement of all claims, including the claims intimated in the letter before action sent to Arun in October 2010 (above at [63]). Amongst other provisions, it contained a warranty by Krishna that Krishna itself had made a number of payments to creditors of Colorama, thus giving the impression that Krishna had its own potential claims in Colorama's liquidation which it was seeking to compromise. In fact, this was untrue: LBNS had made those payments (or was intending to), not Krishna.

92. I pause to make the point that while these agreements dealt with the positions as between GHL/LBNS and Colorama on the one hand (the first agreement), and Krishna and Colorama on the other (the second agreement), there was no settlement of the position *as between GHL/LBNS and Krishna*. The position as between those parties had been settled by the earlier 2013 Agreement (see above at [86]). I mention this point now because it is relied on by the Respondents as part of their argument for resisting rescission of the 2013 Agreement. I will come back to it below (see at [283]-[294]).

The Perivale Property and Rent

93. Returning for now to the overall chronology, and picking up on the effects of the 2013 Agreement, in the event the Perivale Property *was* transferred, not to GHL but to another Hathi family company, Portside North Limited. Portside North Limited entered into a lease back to LBNS's subsidiary Laxmico on 14 November 2014, but for an annual rent not of £350,000 per annum, but instead £600,000 per annum. Later, by an addendum dated 22 August 2017, but stated to be effective as from 1 April 2016, the rent increased to £960,000 per annum. Samit accepted in his written evidence that he did not inform Arun or Mahesh of these excess rental payments.

SYRI's Clinicals Business

94. In light of the concession in the 2013 Agreement, R&D work was carried out on behalf of SYRI with a view to the development of a new *clinicals* business. This work was in fact paid for by LBNS, but with the R&D expenditure being deducted from the outstanding Equalisation Amount, the logic being that the R&D expenditure would thus in practice be treated as having been incurred by GHL. That was thought consistent with GHL/SYRI taking the benefit of the R&D once it produced results.

95. As to that, by March 2015 SYRI had been granted certain licences by the Medicines and Healthcare Products Regulatory Authority ("*MHRA*") permitting the manufacture of new *clinicals* products.

96. By a Deed of Assignment dated 31 March 2015 (but taking effect as from 1 April 2014), SYRI assigned the benefit of these licences to GHL. By a separate Licence Agreement of the same date (and also taking effect as from 1 April 2014), GHL granted LBNS a licence to manufacture and sell the *clinicals* products covered by the MHRA Licences. LBNS *did* thereafter manufacture and sell the *clinicals* products and was paid a fee, and paid a licence royalty to GHL (the split between the two is not entirely clear, but what is clear is that LBNS retained only a small percentage of the value of overall sales).

97. The upshot of these elaborate arrangements taken together is that it was GHL alone who mostly benefited from the successful *clinicals* business, not LBNS; and Krishna's position is that that was unlawful, because its agreement to allow it to happen expressed in the 2013 Agreement was procured by fraud, and it did not otherwise agree or provide its assent on a properly informed basis.

The SYRI Loan Waiver

98. Certain other relevant events also occurred in March 2015, around the end of LBNS's 2014-2015 financial year.

99. The first is that by March 2015, LBNS had advanced a loan to SYRI which owed an outstanding amount of some £590,525.89. The loan was reflected in LBNS's accounts. Samit accepted in his Witness Statement for trial that in March 2015, he took the decision to write that loan off. His evidence contained no suggestion that Arun and Mahesh were told about the existence of the loan or about the decision to write it off. There was no good commercial reason for doing so.

The Trademark Royalties

100. The second point concerns certain trademarks, which had been owned by Colorama but sold to LBNS under the terms of the 2010 merger. The marks included the "*B&S*" mark and the "*Thame Laboratories*" mark. In short, by two Deeds of Assignment dated 31 March 2015, but again with retrospective effect from 1 April 2014, LBNS transferred the marks to a company called Laxmico Group Finance Limited ("*LGF*"), another wholly-owned GHL subsidiary but outside the LBNS Group, for nil consideration. The same marks were then licensed back to GLL and Laxmico pursuant to Trademark Licence Agreements of the same date. Those Agreements provided for the payment of royalties to LGF (i.e. to the Hathi family) at a rate of 2% of the "*Net Sales Price*" of "*Products*" sold under the trademarks.

101. The upshot was that companies in the LBNS Group ended up paying licence royalties for the use of trademarks which the Group had previously owned, and which had been transferred to the new owner (a Hathi family company) for free.

The Payment to Leyland

102. Thus matters continued until 2016. In May 2016, a discrete event occurred which I should mention, because Arun's case is that his later discovery of it in 2017 was what prompted him to become suspicious that the Hathi family were unlawfully extracting value from LBNS. The discrete event was that GLL made a payment totalling £612,000 (£510,000 plus VAT of £102,000) to a company called Leyland (MK) Limited ("*Leyland*"), owned by Samit's uncle Bharat. The payment was made against an invoice raised by Leyland dated 12 May 2016, addressed to GLL. The invoice purported to be in respect of a "*fixed fee in relation to identifying buying opportunities of high margin PI products*." In fact, as Samit accepted in his cross-examination, the invoice was a sham, because no such services had been rendered or fee earned. Neither Arun nor Mahesh knew about the payment at the time.

The 2016 Agreement

103. What came next was the 2016 Agreement, which was concluded between August and October 2016. Again, it records the parties as being Krishna, GHL, LBNS and Arun and Mahesh.

104. By this time, there had still been no meaningful distributions to shareholders by LBNS, and so the Equalisation Amount was increasing, with no immediate prospect of it being materially reduced. On the face of it, at any rate, these factors suggested there was a need to take stock, and for the position between the parties to be put on a different footing. Taking the 2016 Agreement at face value, that is what it sought to achieve. Again, of course, this was during the period when Krishna's shareholding in LBNS was being disguised from the outside world.

105. The main points under the 2016 Agreement were:

i) Recital (F) referred to a desire to terminate the original 2010 SHA, the Equalisation Agreement and the 2013 Agreement.

ii) GHL was referenced as legal owner of both the A and B Shares, but it acknowledged (cl 2.1) holding the B Shares on trust for Krishna.

iii) Krishna's interests as beneficial shareholder were much curtailed. It agreed (cl. 3.2) not to exercise any voting rights, and also agreed (cl 4.2) that only GHL would have the right to appoint directors to the LBNS Board.

iv) Cl. 5 dealt with the possibility of sale. In short, Krishna agreed not to sell or create any encumbrance over its interest in the B Shares. GHL was given an unfettered power to sell both the A and B shares if the sale price was over £60m; below £60m, it agreed to sell only with Krishna's consent.

v) Cl. 8 dealt with repayment of the amounts Arun paid via Keycircle as part of Samit's fundraising exercise in late 2010/early 2011 (see above at [52]), and of

amounts Samit maintained had been paid by the Hathi family (see further at [113] and [230]-[258] below), in both cases including accumulated interest. Cl. 8 is headed, "*Arun Patel Debt and Samit Hathi Debt*", and relevantly for present purposes provided as follows:

> "*8.1. It is acknowledged by the parties that the Company [i.e., LBNS] is indebted to Arun Patel in the sum of £793,753 and that such sum shall not accrue interest (**Arun Patel Debt**).*
>
> *8.2. It is acknowledged by the parties that the Company is indebted to Samit Hathi in the sum of £7,029,961 and that such sum shall not accrue interest (**Samit Hathi Debt**).*
>
> *8.3. The parties hereby agree that the Arun Patel Debt and the Samit Hathi Debt shall be repaid by the Company when the Board (in its absolute discretion) considers the Company is in a position to do so*."

vi) Cll. 9 and 10 contain some rather obscure provisions concerning "*Profits*" and "*Dividends*" respectively. These are somewhat difficult to reconcile, but the intention appears to have been to abandon completely the previous regime under which the Priority Dividend would accumulate on the unpaid Equalisation Amount from time to time, and to replace it with a much more straightforward regime under which (as far as dividends were concerned at any rate), each side would receive £400,000 from available profits as long as such profits exceeded £3.3m in any given financial year; but once those initial dividends were paid, GHL would receive anything left over.

vii) The Equalisation Amount was not forgotten, however. Under cl. 9.5, the parties agreed a structure for the payment of the "*capital and assets*" of LBNS in the event of a winding-up or other return of capital (which plainly included a sale). First priority in this payments waterfall was payment of £41,464,419 to GHL in respect of the Equalisation Amount, which was effectively to be frozen at that figure. Second priority was payment to GHL of a sum of £6,100,950 in respect of something called "*the Waymade Amount*." This was a reference back to an arrangement in November 2014, under which LBNS had acquired a competitor company, Waymade Plc.

106. The overall effect was to liberate Krishna from the straitjacket of the Equalisation Agreement, and the burden of the ever-increasing Equalisation Amount; but in a manner which obviously left it with very limited rights as beneficial owner of the B Shares – in effect, it ceded all day-to-day control of LBNS to GHL and its nominee directors; it relinquished any power to sell and conferred broad powers of sale on GHL; it agreed to a very attenuated right to receive dividends and to share in profits; and it agreed that GHL would have a priority call on any proceeds of sale (to the extent of at least £47.5m or perhaps more) or in a winding-up.

107. I should also mention that the calculation of the Equalisation Amount in the 2016 Agreement did *not* include a number of items which GHL now accepts *should* (even on its case) have been included in the calculation as deductions, because in one way or

another they were payments made by LBNS for the benefit of GHL and the Hathi family. These are:

i) The excess rent, above and beyond the £350,000 pa agreed in the 2013 Agreement, paid by Laxmico Limited to Portside North in respect of the Perivale Property (above at [93]).

ii) The amount of the loan to SYRI which Samit chose to waive in March 2015 (above at [99]).

iii) The amounts paid by GLL and Laxmico to LGF as royalties under the Trademark Licence Agreements entered into in March 2015 (above at [100]-[101]).

iv) The payment made to Leyland in May 2016 (above at [102]).

108. GHL's pleaded case before trial was that at least some of these items were accounted for in a general £5m "*sweep up*" figure, which formed part of the calculation underlying the Equalisation Amount in the 2016 Agreement (referred to as the "*2016 Equalisation Workings*"). More specifically, it was pleaded that items (ii) and (iv) (the SYRI loan waiver and the Leyland payment) had been accounted for in that way. In his written evidence, Samit said that the £5m "*sweep up*" was also intended to take account of item (iii) – i.e., the trademark royalties - although by 2016 these stood at roughly £9m, and so were far in excess of £5m even taken on their own. Samit in his oral evidence then said that the failure to include each of items (i) to (iv) as deductions from the Equalisation Amount was a mistake. I will need to come back to this point later.

Colorama is dissolved: the Present Litigation

109. Before drawing the threads together, I will complete the outline chronology briefly.

110. Arun's case is that he first came to suspect Samit of wrongdoing at some point in July or August 2017, when he overheard a conversation which led him to look into the Leyland payment (mentioned above at [102]).

111. The growing concern is illustrated in a series of WhatsApp messages Arun exchanged with his son Vishal in November 2017. Vishal wanted to go to a solicitor and was against the idea of Arun confronting Samit ("*If you ask him he will try and sweet talk you, panic and do his best to cover it up …*"). Arun though was against involving a solicitor. In one message he said:

> *"For present you can't use a solicitor because the deal we have done because of Colorama liquidation questionable. We can transfer shares to our names sometime next year. Once I question it means it is serious."*

112. In the event, Arun's view prevailed. He confronted Samit and discussions followed. One of the focal points for these discussions was the need for an independent review of the Equalisation Amount, and in January 2018, Samit presented each of Arun and Mahesh with a set of equalisation workings referred to by the parties as the "*2017 Equalisation Workings*".

113. He also provided copies of statements on Laxmico's bank account with RBS, covering the period of the 2010/2011 fundraising exercise described above at [52]. These appeared to show separate credits of £1m, £2m and £1.5m (totalling £4.5m) being received from his Uncle Bharat's company, London Pilsner, in the period October to December 2010. In fact, as we now know, these bank statements were forgeries: Samit had altered them to make it appear that London Pilsner was the source of the payments mentioned, whereas in truth they were the funds from Anuj Shah (via his company Jumbogate), and from Ketan Mehta (via his company, Ironcorp). This was only revealed later, in circumstances I will describe shortly.

114. During all this time of course, the parties had persisted in the fiction (as far as the outside world was concerned) that the Rewind Suite had left Krishna with no interest in LBNS's B Shares. In early 2018, however, the liquidation of Colorama was finally closed. The Liquidators' final report shows unpaid creditors of £11.4m, and realisations of £4.5m, resulting in total dividends of 27.56p in the pound. (These figures excluded the creditors whose claims had been purchased by LBNS under the *debt purchase programme*, and of course LBNS's own claims against Colorama had been settled by the first of the settlement agreements entered into with Colorama's liquidators in 2014 – see above at [90]). Shortly after the final report Colorama was dissolved.

115. This emboldened Arun and Mahesh. In an email to Samit sent on 24 May 2018, Mahesh said so in terms. He said:

> *"You will be pleased to hear that Colorama Pharmaceuticals has now been dissolved. This means that we can now be more open about the ownership of the Laxmi BNS business [i.e., LBNS]. Also both Arun and I can now play a more open position in management."*

116. In August 2018, Krishna issued a Part 8 Claim in what became known as the "*Trust Proceedings*." Krishna claimed ownership of the B Shares. The Trust Proceedings were eventually compromised, LBNS having agreed to record Krishna as owner of the B Shares as from October 2018. Thus, it is now able to claim relief in the present proceedings as a shareholder in LBNS. Some other points of interest emerge from the Trust Proceedings, relating principally to the parties' treatment in those proceedings of the Rewind Suite. I will need come back to these later (see at [147]-[161]).

117. On 5 December 2018, as the parties' relationship deteriorated further, GLL issued the Trade Debt Claim against Keycircle, initially in the London Circuit Commercial Court. This is effectively a claim for payment for goods delivered. Shortly after, in February 2019, presumably in retaliation, Keycircle responded with its own claim against LBNS – this is the Loan Claim. The Loan Claim is a claim for repayment of the sums advanced via Keycircle in late 2010, as part of the fundraising exercise I have mentioned a number of times already (see e.g., above at [52]). To begin with Keycircle claimed repayment from LBNS, but by later amendment said its primary position was that GLL was the party liable to make repayment, and correspondingly advanced a counterclaim against GLL in the Trade Debt Claim. The Trade Debt Claim and the Loan Claim thus run together, and as I have already mentioned, have come to be known collectively as the *Keycircle Proceedings*.

118. The present Petition and Part 7 Claims were issued later, in June 2019.

119. One point about this deserves mention. This is that the original, unamended Petition contained the allegation that Samit had misled Arun and Mahesh at the time of the 2013 Agreement by saying that the Hathi family had lent LBNS some £4.5m, when in fact they had not. When it came to serving a Defence, Burges Salmon, who at the time were acting for the individual Respondents including Samit, produced by way of Initial Disclosure copies of the doctored bank statements I have referred to above (see at [113]), which gave the impression that funding in the amount of £4.5m had been provided by London Pilsner (i.e., by Uncle Bharat's company, and thus by the Hathi family).

120. In the Keycircle Proceedings, however, a separate firm of solicitors acting for GLL and LBNS/London Pilsner – who had been given the original, unaltered bank statements – produced a copy statement from December 2010, which showed that in fact it was Ketan Mehta's Ironcorp Limited, not London Pilsner, which had paid £1m to LBNS in December 2010.

121. This obviously prompted inquiries, given that what appeared to be the same bank statement produced by Burges Salmon in the Petition action gave different information. Faced with this, Samit admitted that he had altered a number of bank statements to show the changes I have already mentioned. Again, I will need to come back to this point later.

III. Summary: The Main Matters in Issue

122. Pausing there to draw the threads together, the position reached in connection with the Petition and the related Part 7 Claim is that there should be an order for GHL to acquire Krishna's shareholding (subject to the Court approving that course), but decisions are required on a number of matters likely to have a material impact on the value of those shares.

123. As I have already mentioned, GHL has now also accepted that the 2016 Agreement should be set aside. It has not accepted that there was any fraud. In his Closing Submissions, Mr Anderson KC accepted there was negligence in the failure properly to calculate the then outstanding Equalisation Amount. In any event, the apparent result of these concessions is that the 2013 Agreement (which was set aside by the 2016 Agreement) is effectively resurrected, subject to the question of its own possible rescission. The 2010 Transaction Documents, which were also terminated by means of the 2016 Agreement (see [105] above), are also resurrected.

124. The parties are also now agreed that a number of other matters which Krishna complained of as extractions of value from LBNS (the excess Perivale rent, the waived SYRI loan, the trademark royalty payments and the Leyland payment – see above at [107]) *should* be taken into account in any share valuation exercise (i.e., they should be deducted from the Equalisation Amount or GHL should give credit for them in some other appropriate way).

125. Other matters remain in dispute, however, principally whether the 2013 Agreement should also be set aside. Krishna says it should, and that if it is, then that has at least two other important consequences.

i) One is that the figure for the Equalisation Amount agreed in 2013 (£35m) should fall away. That would have a major impact on value, because it would remove what is presently a major blot on the B Shares.

ii) A further important effect would be the removal of the permission given in the 2013 Agreement for the pursuit of a separate *clinicals* business by GHL (in practice, carried on by SYRI). In that event, it is said that the benefits of the *clinicals* business should be treated as having accrued to LBNS, so they are available for the joint venture partners to share. That, too, will have a major effect on the value of Krishna's B Shares.

126. There are also some subsidiary points, which if determined against GHL will also need to be brought into account in calculating value. The main ones (referenced already above at [67]) are:

i) whether members of the Hathi family were in fact paid excess remuneration;

ii) whether Alferez should in fact have been acquired by LBNS, not Gowrie Pvt; and

iii) how the loans made to Hathi family members should be treated for valuation purposes.

127. In addition to all that, there are also some smaller, miscellaneous items of expenditure made from time to time by LBNS, which the parties disagree about and which need to be attributed to one side or another for the purposes of any valuation.

128. Finally, I should mention the Keycircle Proceedings, i.e. the Trade Debt Claim and the Loan Claim:

i) As far as the Trade Debt Claim is concerned, Arun conceded during the trial that GLL's standard terms and conditions applied to the relevant supplies and it follows that interest is due under those contract terms at the rate they specify. The parties have agreed interest calculations including an ongoing daily rate and such matters can be reflected in the Order arising from this Judgment. There remains Keycircle's counterclaim against GLL, but that raises the question whether it is GLL or LBNS which is Keycircle's debtor, and so can be looked at in considering the Loan Claim.

ii) The Loan Claim relates back to the additional funding (£650,000) made available via Keycircle in late 2010 (see above at [52]). A number of points arise here, including what amount is presently outstanding (including interest), what the repayment terms are, and the question of who the proper parties are. Part of LBNS's case is that these issues are all resolved by cl. 8 of the 2016 Agreement (mentioned above at [105(v)]), the provisions of which mean that any debt is owed *by* LBNS (not GLL) *to* Arun (not Keycircle), that interest is *not* accruing, and that the debt is *not* presently repayable. LBNS, which was separately represented, maintained that position in Mr Harrison's final submissions, notwithstanding the concession made by Mr Anderson on behalf of GHL that the 2016 Agreement should be rescinded. Keycircle meanwhile argues that the loan amount *is* presently due and owing, is repayable by GLL

(not LBNS), and is repayable *to* Keycircle (not Arun) – with the effect that Keycircle is entitled to set off the loan amount against whatever sums are due in respect of the Trade Debt Claim, so that in fact GLL is owed nothing. These points thus all remain in issue and I will need to resolve them.

IV. The Trial and the Witnesses

129. The trial of this case was a difficult one for four inter-related reasons. First, the factual complexity given the intricate nature of many of the allegations, stretching back over a number of years. Second, the complexity was compounded by the huge volumes of documentary material in the Trial Bundle. That is not an unusual phenomenon, and the Court and the parties were greatly assisted by the documents being available in searchable electronic form. All the same, this seemed to me to generate some problems of its own, because it gave rise to a practice of jumping between individual documents on particular issues which tended to support one side's view of how that issue should be resolved. This was useful in one sense, but what it did not leave much scope for was a clear presentation of the overarching picture, so that one could get a sense of where individual matters of complaint fell within the overall story and how different events might (or might not) relate to each other. The third factor was the absence from the trial of a number of witnesses who, given the issues, would no doubt have had useful evidence to give. These were principally Vim (LBNS's CFO after the merger); Govindji and Alpa (Samit's father and wife); Bharat (Samit's uncle); and of course Baggy (Arun's friend and Samit's contact, and one of the instigators of the Rewind Suite). Their absence left some serious gaps which, where necessary, I have had to fill by drawing appropriate inferences. The fourth and final factor, which I will develop below, was that I did not feel that either of the principal witnesses – i.e., either Arun or Samit – was completely candid or straightforward in giving their evidence. Samit's evidence in particular was often confused and obfuscatory. None of this has made the exercise of trying to unpick the truth at all straightforward.

Krishna and Keycircle's Factual Witnesses

130. Arun and Mahesh gave evidence for Krishna. Girish, Arun's brother, gave evidence for Keycircle in the Keycircle Proceedings.

Arun

131. I am afraid I did not find Arun a wholly reliable witness. His evidence on two points in particular was highly guarded. The result was that he gave only a partial account of his involvement in the relevant events. The two topics were (1) Colorama's stock position at the time of the merger, and (2) his involvement in the creation of the Rewind Suite.

132. As to (1), I have referred to this already above (see at [30]-[33]), and will say more about it below (at [183]-[185]). The point for present purposes is that although there was plainly a shortfall as against the warranted stock figure, which Krishna has now effectively acknowledged (see below at [183]), Arun was incapable of accepting that fact straightforwardly. That was despite the fact that the figure for stock had effectively been settled by the 2011 Completion Account, which reflected an agreed figure for stock of roughly £7.7m.

133. Arun's evidence was highly defensive. For example, as I have mentioned above at [33], he was provided with a stock update on the morning of 13 March 2010, which showed a figure of £8.62m. This must have been an obvious matter of concern, but Arun's account of it, which appeared to be different in his written evidence and in cross-examination, was confused and evasive. The point is illustrated by the following passage. Mr Anderson KC was asking about the spreadsheet containing the new stock figures circulated on 13 March:

> "*Q. Now everyone agrees, however, that it wasn't discussed at the meetings which were taking place over that weekend. But you did pick up that the figure was low, didn't you?*
>
> *A. Well at the time, I didn't pick it up – that it was low.*
>
> *Q. You didn't?*
>
> *A. No.*
>
> *Q. Well, just to remind yourself. Have a look at paragraph 11 of your statement … . You say you can't specifically remember, but you think you would have looked at the stock sheet on 13 March.*
>
> *A. Yes.*
>
> *Q. And that you would have been slightly shocked to see the stock value so low. Have you changed your mind about that, or do you want to think again?*
>
> *A. Yes. What I meant is that I wouldn't have thought that it is overly low.*
>
> *Q. You said a moment ago that you didn't pick up that the figure was so low, but now you think that you did pick it up but you wouldn't have been surprised?*
>
> *A. I wouldn't have been alarmed by the figure being at 8.6m*."

134. The trouble with this evidence is that Arun appears to say three different things in the course of just a short passage: first, that he did not pick up that the figure was low; second – the evidence in his witness statement – that he did pick it up and was slightly shocked; and third, the evidence in his continued cross-examination that he did pick it up, but would not have been alarmed. Even allowing for the passage of time, I am afraid this bears all the hallmarks of a witness who is unsure of his ground because he does not wish to give evidence on an important topic which appears unhelpful to his case, and who is therefore trying to hedge his bets rather than giving his evidence straightforwardly.

135. Turning to issue (2), my view of it is that Arun was again very cautious on the topic of the Rewind Suite, and I was not at all confident – although he accepted it was a sham – that he was entirely candid about his role in it or gave a complete account of its development.

136. By way of example, one important player in the story of the Rewind Suite was Arun's friend, Baggy. He was involved in organising a meeting with a lawyer, Philip Cohen, on 31 May 2010, at which what became the Rewind Suite was discussed. Baggy did not give evidence, but Arun obtained certain emails from him which were disclosed. What is surprising is that although Baggy was closely involved in preparations for the meeting with Mr Cohen, and is likely to have been in direct contact with Arun about it since it was a meeting of critical importance to Arun, no emails (or indeed other documents) were produced showing communications between Baggy and Arun alone.

137. During cross-examination, Arun's evidence was rather confused on this topic. At one point he said he had asked Baggy only for emails sent to him (Arun) and Samit together; but then at another point he said he had asked Baggy for whatever emails he had regarding the case. When asked later whether he ever met Baggy without Samit being present, which seems very likely given the nature of their relationship and Baggy's role in trying to assist him, Arun said he didn't remember. This strikes me as implausible. Arun did confirm that he had not asked Baggy for any email exchanges he (Baggy) had with Mr Andronikou. I am sure that was a truthful response, but it only serves to confirm another important gap in the documentary record surrounding the Rewind Suite, and thus makes the job of understanding the overall story that much more difficult.

138. GHL had another specific complaint about Arun's personal email records. It took extensive efforts to obtain access to Arun's former Gmail account. When it was finally accessed, it was found to contain a suspicious gap, at around the time the Rewind Suite was under discussion. More specifically, it is known from other sources (i.e., disclosure provided by Mahesh's adviser Ash Amin) that on 5 July 2010, Arun forwarded to Mahesh from his Gmail account a series of draft documents forming part of the Rewind Suite. An examination of Arun's now retrieved Gmail account, however, contains no reference to this 5 July email, which he certainly did send (as we know from Ash Amin's disclosure). This prompted a submission by Mr Anderson KC that the 5 July email was deleted by Arun. I think that is correct. It must have been deleted. What I am unclear about though is when that happened. I am not persuaded it was during the course of the present litigation, or even at a point when litigation first came to be contemplated – say in 2018. Even so, and assuming the deletion took place at a much earlier stage, it seems to me to show a desire by Arun to cover his tracks in connection with the Rewind Suite. That explanation seems to me consistent with the other available evidence showing Arun's sensitivity and concern about the Rewind Suite, including in particular his WhatsApp exchanges with his son which I have mentioned at [111] above. All of that reinforces my overall impression that Arun's evidence at trial in relation to the Rewind Suite was guarded and incomplete.

139. To be fair to Arun, his behaviour may have been motivated in part by a desire to protect others, or may have been the product of his own long experience dealing with Samit, and a resultant concern that any concession made in his evidence might be manipulated and exploited. All the same, my opinion is that I have to treat Arun's evidence with real caution, and rely on it only where it seems consistent with the inherent probabilities or the contemporaneous documents. In some instances I have decided that I must reject it: see below at [184] and [341].

Mahesh

140. Mahesh's evidence was more limited in scope, because he left the running largely to Arun. Little turns on his evidence, although I should record that, as with Arun, I found his evidence in connection with the Rewind Suite highly guarded and defensive. His written evidence was that he could remember little of the time period surrounding creation of the Rewind Suite, and as Mr Anderson KC pointed out, there is a somewhat uncomfortable gap in the documentary record between 24 May and 5 July 2010, during which nothing to or from Mahesh is discernible. Both the lack of recollection, and the lack of documentary evidence, seem surprising given what was going on during this period – i.e., implementation of a rear-guard action involving Krishna relinquishing legal ownership of the B Shares and entering into a new and secret arrangement with GHL, in light of the state of LBNS post-merger. Mahesh is an experienced and successful businessman. One would expect him to be seriously concerned about such matters and to have wanted to follow closely what was going on. I am afraid that again Mahesh's evidence in connection with the Rewind Suite gave me little confidence that the Court was being given the full picture.

Girish

141. Arun's brother Girish gave evidence in connection with the loan made available via Keycircle. I consider that Girish was an honest witness who did his best to assist the Court. He was not involved in any of the matters of major dispute, however. His evidence in connection with the loan was useful background, but as I explain further below at [399]-[405], the remaining questions in the Keycircle Proceedings are mostly questions of legal characterisation, and Girish's evidence was not determinative of any of them.

GHL's Factual Evidence

142. Samit was the only witness who gave evidence for GHL. Vim served a witness statement for trial but in the end was not called.

143. Samit struck me as an intelligent and capable individual who is very business oriented and has a keen eye for detail. Unfortunately, I also found him an entirely unreliable witness, who was not at all afraid to try and use his intelligence and natural oral fluency in order to confuse and mislead.

144. I will point out here two instances of his failing to provide reliable and candid evidence to the Court. Another important example, concerning the evidence he gave on the topic of the forged bank statements he provided to Arun in late 2017, is dealt with below at [230]-[258]. For now, the two examples are as follows.

145. First, coming back to the points made above at [108], I consider that Samit gave misleading evidence when in dealing with the various amounts wrongly left out of the 2016 Equalisation Workings, he claimed that was the result of a mistake. The excluded matters (above at [107]) were the payment to Leyland, the waived loan to SYRI, the substantial trademark royalties which had accumulated by then, and the excess rent on the Perivale Property. While the omission of one item might have been explicable on the basis of error, the omission of such a number is not, and is much more likely to have been the result of a deliberate decision and concealment.

146. I likewise reject as misleading Samit's attempted reliance on the inclusion of some of these items in an alleged "*sweep up*" figure in the 2016 Equalisation Workings. This was said to include the trademark royalty payments. This confused explanation was also implausible (as well as inconsistent with the idea that the relevant items were overlooked entirely by mistake), because the alleged sweep-up figure was given as £5m, and by 2016 the trademark royalties alone were in excess of £9m. In any event, no such sweep-up figure is readily discernible in the relevant calculations.

147. Turning then to the second example of Samit providing unreliable evidence, this concerns the Trust Proceedings, and specifically Samit's continued reliance in those proceedings on the Rewind Suite as a genuine part of the 2010 merger. This takes a little explanation.

148. To start with, the truth of it is that neither side approached the issue of the Rewind Suite straightforwardly in the Trust Proceedings, and so the relevant documentation presents a confused picture.

149. The Trust Proceedings took the form of a Part 8 claim by Krishna. Krishna's Amended Particulars of Claim ("*APoC*") made no reference to the Rewind Suite. Instead, as regards the source of the trust arrangement relied on as justifying a claim to be registered as holder of the B Shares, it was said that Samit had persuaded Arun and Mahesh in about May 2010 that it would be better if they had no official connection with LBNS, and between them they had agreed that GHL would hold the B Shares on trust for Krishna. The APoC also asserted that, although Arun and Mahesh did not realise it at the time, Krishna had never been registered by LBNS as owner of the B Shares, as it should have been under the 2010 Transaction Documents.

150. In October 2018, after the Trust Proceedings had started, GHL transferred the B Shares to Krishna, and produced a copy of its Register of Members showing the transfer.

151. Krishna however persisted. Its point was it was entitled to be shown on the Register as legal owner of the B Shares not only from October 2018 onwards, but also between March and May 2010.

152. This prompted a lengthy Witness Statement by Samit dated 25 October 2018. In it, Samit agreed with the idea that Krishna had never been registered as owner of the B Shares in LBNS's Register of Members. But Samit said this was not a matter of concern: he said that Arun and Mahesh had known all along that Krishna had never been registered as owner of the B Shares. Samit also referred to, and relied on, the Rewind Suite. But he did not refer to it being a sham arrangement, which he now accepts it was. Instead, he gave the impression it was part of the commercial bargain the parties had struck at the time of the merger. Thus, at para. 17 he said:

> "*As closing approached, I was becoming increasing concerned about the solvency of Colorama. Accordingly, as part of the completion documentation, we entered into a 'rewind agreement' and an 'option deed and agreement'. The intention of this was that in the event that the assets coming from Colorama were not at least £7.5m, Krishna would forfeit the B Shares in Laxmi BNS*."

153. Relying on this and other matters, Samit said that if Krishna persisted in its case, then the matter was not suitable to be resolved as a Part 8 Claim and should be transferred to the Part 7 multi-track.

154. In correspondence, Krishna's solicitors took issue with Samit's characterisation of the Rewind Suite: they said that the relevant documents were backdated and were shams. Samit has now accepted that, but on 15 February 2019 in the Trust Proceedings he denied it in a Second Witness Statement. At paragraph 4 he said expressly (referring to the "*Rewind Agreement*" and the "*Declaration of Trust*"):

> " *… I completely deny that either of those documents was a sham or materially backdated*."

155. In the event, on 21 February 2019, the matter was compromised by means of a Consent Order: LBNS consented to rectify its register of members to show Krishna as the holder of the B Shares from 15 March 2010 until 31 May 2010.

156. Later, in the course of the present action, Krishna obtained third party disclosure from UHY Hacker Young – Colorama's former Joint Liquidators. In their records was a copy of the share register of LBNS from March 2010: but unlike the one produced by Samit in the Trust Proceedings, this *did* show Krishna as the registered owner of the B Shares as at 15 March 2010.

157. None of this reflects well on Samit. First, he was willing to deploy the Rewind Suite in his Witness Statement before the Court of 28 October 2018, knowing it was a sham. That was evidence put forward deliberately in order to create a false impression. When challenged on the status of the Rewind Suite in correspondence, he persisted in relying on it in his later witness statement of 15 February 2019. That was also misleading, and deliberately so.

158. Second, there is the fact that the copy of the LBNS share register produced by GHL in October 2018 is different to that later obtained from UHY, in that the former version does not show Krishna as a registered member of LBNS as at March 2010, but the UHY version does. When asked about this in cross-examination, Samit had the following exchange with Mr Quirk KC:

> "*Q. Following the first stage of the trust proceedings, the share register was then altered to show that Krishna was the owner from October 2018, wasn't it?*
>
> *A. So, we actually started a new share register because we didn't have this. We didn't even know where the share register was.*
>
> *Q. It's a legal requirement to have a share register isn't it?*
>
> *A. I don't know, but if it is, then there it is.*
>
> *Q. So is your evidence that you didn't have a share register at any point prior to 2018? Is that your evidence?*
>
> *A. Yes, as – we don't have a – I don't think we did have.*"

159. Mr Quirk's submission was that Samit lied when he said LBNS did not have a share register: it did, because it was required by law to have one, and a copy of it was produced by UHY.

160. I am not sure I would express my criticism of Samit in quite those terms, because it seems to me quite plausible that by 2018, not having had to be concerned about its share register since 2010, LBNS's records could not be found. I therefore think it likely that Samit was telling the truth when he said he could not locate the share register. In other ways, however, the exchange illustrates well Samit's tendency to give only part of the picture, and most often only the part that suits him. By this I mean that when what was apparently a copy of a newly created share register document was produced by GHL in October 2018, it was not explained that it was in fact a new creation, and on its face the document produced gave the impression it was an updated version of a record which had been in existence since 2010, and which gave an accurate picture of all movements in the shareholdings since then. That was not true, as we now know from the version produced by UHY. What was and is objectionable about this, it seems to me, is that the 2018 document was presented by GHL as an authentic and accurate record, without qualification, and without any reservation being expressed that it might not in fact be completely accurate because it had only recently been created. This again gives one no confidence in Samit's evidence more generally, because it suggests a cavalier approach which is more concerned with achieving a desired outcome than presenting a straightforward picture of the facts.

161. In my opinion, these matters entirely justify the conclusion that Samit is an unreliable witness whose evidence cannot be trusted, and must be tested carefully against the documentary record and the inherent probabilities before it is accepted. That is not to say that I reject his evidence on all points, but on some, including some critical points, I do reject it.

The Expert Evidence

162. Ms Kate Hart of Quantuma gave expert evidence on accounting matters for Krishna, and Mr Jeffrey Davidson gave evidence for GHL. Ms Hart was a careful and considered witness. Mr Quirk KC's spirited cross-examination revealed a number of shortcomings with the evidence of Mr Davidson. In the end, however, it seems to me that little turns on such points given the nature of the issues left to be resolved in this case, which are very largely factual. On the key question of the financial state of Colorama at the time of the 2010 merger, the experts were in any event agreed – they both considered Colorama was likely both balance sheet and cash flow insolvent.

V. The 2013 Agreement

163. The issues here are whether the 2013 Agreement should be rescinded for fraudulent misrepresentation, and if so, what the consequences of that should be. I will start by considering whether any or all of the alleged misrepresentations are made out, and then separately consider the question of rescission and the effects of rescission.

The Misrepresentations

What are the Alleged Misrepresentations?

164. The pleaded representations relied on are as follows (I take them in the order addressed in Krishna's Written Closing Submissions):

i) First, a representation by Samit that " *... the Hathi family had lent LBNS (and/or its subsidiaries) £4.5milion which needed to be repaid*."

ii) Second, a representation that it was not possible for LBNS to make any payments to reduce the Equalisation Amount (referred to as "*Equalisation Payments*"), and therefore, the Hathi family had to be compensated by other means including the transfer of the Perivale Property.

iii) Third, a representation that:

> "*The figure for the Equalisation Amount of £35,276,000 in Clause 3.1 of the 2013 Document represented a true and fair assessment of the Equalisation Amount at that date*."

Summary Conclusions on the Misrepresentations

165. To some extent the alleged misrepresentations are inter-related, or at any rate they run together, because they all emerge from the same basic story. This is really about the turbulence which arose almost immediately after the Colorama/GHL merger in 2010, when Colorama was placed into liquidation, followed in fairly short order by its liquidation a few months later, in July 2010. This broad history explains the arrangements put in place for making payments to Colorama's creditors (the *debt purchase programme*); it provides the backdrop to the funding pressures on LBNS which caused it to require further cash injections in late 2010 and early 2011; and it helps explain the continuing difficulties faced by LBNS up to 2013.

166. Bearing in mind this background, I have reached the conclusion that the second and third of the alleged misrepresentations are *not* made out (i.e., those relating to the financial position of Colorama and to the accuracy of the Equalisation Amount), but that the first one is (i.e., that relating to the source of the £4.5m funding having been the Hathi family alone). I come to those conclusions for the following reasons.

Equalisation Amount

167. I think it best to take things out of order and to start with the matter of the Equalisation Amount. The main criticism here is that although Samit gave the impression this had been calculated in accordance with the Equalisation Agreement, it had not, essentially because of the inclusion in the calculation of payments made to Colorama's creditors under the *debt purchase programme*. It is said that the payments made under the *debt purchase programme* were not *requested*, and a request was necessary for any creditor payments to be added to the Original Equalisation Amount.

168. As noted above at [60], that is said to follow from cl. 2.3 of the Equalisation Agreement, which provides as follows (my emphasis added):

> "***Additions***
>
> *There will be added … to the Equalisation Amount the amount paid to any creditors of CPL which the Company [LBNS] discharges at the request of Krishna or CPL without any legal obligation to do so pursuant to the Colorama BPA. Such increase being effective from the date of such payment.*"

169. As Mr Anderson KC pointed out in submissions, the clause does not require any request to be in writing, or even explicit: thus, a request can be inferred from words or conduct. I agree. Neither does the clause require a series of individual requests corresponding to individual payments: a compendious request will do.

170. The other obvious point concerns the commercial purpose of the clause. Here, I think the words "… *without any legal obligation to do so pursuant to the Colorama BPA"* are significant. The key payment obligation of LBNS under the Colorama BPA was to pay the Deferred Consideration, which under cl. 4 was to be used to pay Colorama's creditors (see above at [18]). What cl. 2.3 contemplated was that there could be *additions* to the Original Equalisation Amount if payments were made over and above the amount of any Deferred Consideration, if requested either by Colorama or Krishna. Such amounts would then attract the Priority Dividend.

171. In short, my opinion here is that there *was* a request of that type by Arun (and therefore by Krishna, of which he was a director).

172. As a straightforward matter of language, making a request involves asking for something to happen. Here, I think Arun effectively asked for the outcome which emerged from the *debt purchase programme* - i.e., the making of payments by LBNS in excess of any possible Deferred Consideration - because he knowingly and actively participated in the scheme which was designed to bring it about.

173. That is so because the *debt purchase programme* was instituted as one of the responses to Colorama's insolvent state and ensuing administration, which obviously meant the remaining market value of Colorama's pharmaceutical assets (after Barclays had been paid off) was not going to be enough to pay the remaining creditors by way of the remaining Deferred Consideration. To put it another way, the very crisis the *debt purchase programme* was designed to deal with was the anticipated shortfall in Deferred Consideration. The solution had to involve making up the shortfall somehow and mollifying Colorama's creditors, and one way or another that obviously meant paying amounts in excess of the Deferred Consideration. Arun must have appreciated that. He wanted it to happen, because he recognised he was in a hole and that the *debt purchase programme* was part of the route out of it. Moreover, he helped make it happen.

174. I think these conclusions are clear from the evidence and from Arun's behaviour looked at in context.

175. To start with, I think that both merger partners were perfectly well aware, before the merger took place, of the risk – indeed strong likelihood – of the Deferred Consideration not being sufficient to discharge all Colorama's creditors.

176. Dealing first with Samit, already by 25 January 2010 he was emailing Baggy to say (my emphasis), "*Plse make it clear to [Arun] that we are in a negative net assets position and that all our cash for next two years is going to be used to pay off Ketan …*". That was a reference to Ketan Mehta and his company, NSL. On 17 February, after a problem had arisen because it emerged that Colorama had a swap agreement with Barclays which would cost £1.45m to close out, Baggy was already advising Samit to *"[t]hink about putting Colorama into admin*." On 22 February 2010, Samit was in contact with Baggy again, asking for Mr Andronikou's details ("*Give me a call – need to speak to your hacker young man on fair market value for transaction*"). By 7 March 2010, Samit was in a position to email Arun and say that their original deal had changed because, "*[t]he equity base at Colorama has been wiped out and is negative …".* He said he had made "*strong enquiries if we can pre pack this business …* " (he did not say of whom), but considered that *"[t]he problem on pre-pack is that even if Barclays are on side, which is highly unlikely, once they see the stock difference then the game is up*." This latter point is significant, since it shows an appreciation even before the stock-take on 12-13 March that there was a shortfall in the level of Colorama's stock.

177. It is true that, under the merger structure, Colorama was to be left with its non-core assets, but it seems very unlikely that they were thought to have any real value. In an early email of 10 January 2010 to Samit and Baggy, Vim had referred to the possibility of "*hiving off toxic assets*", and that seems to be what was done by the merger structure on the Colorama side taking the form of an asset sale rather than a sale of the shareholdings in Colorama. At any rate, the terminology did not suggest confidence in the value of the non-core assets which were to remain with Colorama.

178. To deal here with a related point, one of Arun's discrete allegations was that Samit promised prior to the merger that his family would provide cash funding to support LBNS. The implication was that this would be enough to keep Colorama's creditors happy and avoid any insolvency process. I reject this allegation. I find it entirely implausible that, given what he knew about Colorama's fragile state, Samit would have given such an open-ended commitment. Whatever else may be said about him, Samit is a savvy and commercially minded individual. I do not think he would have committed his family in that way, or even pretended to do so. It would have been too foolish and risky as well as unnecessary: Samit did not need to induce Arun into the merger by making an open-ended promise of funding, because Arun had nowhere else to go.

179. Turning then to Arun, I think that similarly there was an awareness on his part that there would very likely be a shortfall in the Deferred Consideration, such that it would be insufficient to deal with all of Colorama's creditors.

180. An email exchange with Samit on 10 and 11 March 2010 makes the point clear. They had received comments on a draft of the Equalisation Agreement from GHL's advisers, Davenport Lyons, including a query on the "*Additions*" clause – i.e., what was to become cl. 2.3. The issue was that it was doubtful that any payments made by LBNS under that clause would be tax deductible, and so Davenport Lyons queried whether there should be a provision for grossing up. This prompted Arun to email Samit on 10 March 2010 to say (my emphasis), "*We have to discuss grossing up of the payment of creditors left behind besides Necessity [i.e., NSL] …*". Samit responded the following day (again, my emphasis):

> "*No problems.*
>
> *For the extra we can do in the same way as necessity, so pay from dividends (better for you as no interest on equalisation agreement) or in the equalisation agreement (better for me as i get interest).*
>
> *My suggestion for you would be to go for the necessity option but we can agree between us that if we come under creditor pressure then we can switch to the second way – either way we do it as a handshake between us."*

181. Arun then forwarded Samit's email to Mahesh, and said:

> *"Samit sent this out early morning. In principal (sic.) he has agreed either way. We will probably go 2nd option where he can have interest but goes from company. We will have to find a way. We will discuss in morning."*

182. I think it clear that when Arun referred to *"… the creditors left behind*", and when Samit referred to *"… the extra*", they must have been referring to the likelihood of some creditors having to be paid from amounts exceeding the value of the Deferred Consideration. Arun's preference in such cases, as he made clear to Mahesh, was for *LBNS* to fund such payments (rather than paying from dividends received by Krishna in due course), and for the amounts paid out to be added to the Original Equalisation Amount – possibly informally *("… as a handshake between us*").

183. Although the question of Colorama's stock level appeared at times to be controversial, the final position reached at trial reflected a large measure of agreement, at least as regards the headline figure. GHL's position was that the correct stock figure was that eventually agreed and included in the September 2011 Completion Account: £7,692,064. Krishna's final position was that it was happy to take a stock value of £8.6m. Either way, the actual stock figure was well below the amount warranted by Colorama and by Krishna, which was about £16m (see above at [33]), and it must have been obvious at the time that this would create a problem for the payment of Colorama's creditors given the knock-on effect on the calculation of Colorama's market value, and therefore the amount payable by way of Deferred Consideration.

184. Samit in his written evidence for trial said that he took no notice of the stock figure circulated on 13 March 2010, but I find that evidence implausible and I reject it. The figure was obviously an important one, and Samit is an astute commercial operator with a keen eye for detail. I think he must have been aware of it, and I think Arun must have been too, because he was copied on the same email dated 13 March (above at [33]) and must have known that the stock figure was a critical element in the overall asset/liability mix.

185. Both parties went ahead anyway. They had their own plans for how *"… the creditors left behind*" might be managed and thought they could do so; or perhaps more likely, in Arun's case, thought he had no choice but to proceed and (as he had put it to Mahesh – see above at [181]) would simply have to "*find a way*" to make things work. Arun was likely in denial at this stage as to what he was facing, meaning he was aware of it

but did not want to confront the reality of it and was hoping that somehow the problem would go away.

186. By the time of the discussions on 18 and 19 March 2010 (see above at [37]), it must have been clear to everyone that there would be a major problem in dealing with Colorama's creditors. Email exchanges in the period 21 to 23 March suggest a weary resignation on Samit's part to the idea of Colorama entering administration, consistent with the idea that it was not a surprise. Arun meanwhile was forced to confront reality.

187. In an email to Baggy on 21 March 2010 Samit said, "*One way of [sic.] another there is going to be an administrator in colorama within the near future so it is better to have our own guy*." That was to be Mr Andronikou. In Samit's later email to Baggy of 23 March he was able to report that, "*Arunbhai phoned me earlier. I think Andy explained the position to him and he finally seems to believe it*", and shortly after that Baggy responded to say, "*I spoke to him. he will go along with administration.*"

188. Baggy's later email the same day gave the impression that he had seen the bad news coming from some way off, but Arun and Mahesh had not been willing to accept what was staring them in the face:

> "*Samit*
>
> *The penny will drop soon.*
>
> *This would have been so much easier if they had listened to me in the first place*."

189. Colorama's administration followed on 24 March 2010.

190. I think this background is important to the question whether there was a *request* by Krishna for the payment of Colorama's creditors, because it provides the immediate backdrop to the *debt purchase programme*.

191. This was already developing momentum by 26 March 2010. As noted above at [39], that was when the first drafts of the standard *debt purchase programme* letters were prepared. Arun was aware of this, because he saved a copy of a letter addressed to one creditor (Riteaim) on his personal computer, shortly after it was created on LBNS's server.

192. The process of signing up creditors to the *debt purchase programme* continued during April and May 2010. Arun plainly knew what was happening, because on 9 April he himself signed a debt purchase letter on behalf of the Indian company Alferez, which was a creditor of Colorama. Arun also attended or organised meetings with other creditors, namely Bristol Laboratories, Wockhardt Limited, Jumbogate and Ketan Mehta's company, NSL. In cross-examination Arun also had the following exchange with Mr Anderson KC:

> "*Q. But what I am asking you is whether you were working as a team with Samit and the FD [i.e, Vim] to come to decisions as to which creditors should be paid?*
>
> *A. Yes, I was working in the team providing the information.*

> *Q. Helping them to make the decisions.*
>
> *A. If it helped Samit to make the decision, yes, I provided the information.*"

193. By 24 May 2010, roughly £22m of debts had been purchased. Samit sent a reporting email that day to both Arun and Mahesh, although Samit's evidence (which on this point was not challenged) was that Arun was the one who asked him to send the email, and Arun stood over him as he composed it and had input into what he wrote. The email said:

> "*1. Colorama going into administration had a massive knock on effect to suppliers as most suppliers stopped sending us any stock …*
>
> *2. This caused huge cash issues …*
>
> *3. We started on a debt buyback programme to ensure that we secured supplies. This meant that we had to repurchase our supplier's debts in exchange for supplied [sic.]. The total quantum of this was about £22m to date which means that Laxmi BNS has to fund the shortfall which equates to about £10m.*
>
> *3.[sic.] This has mostly been resolved although there are a few creditors who are trying to pose a legal challenge to the transaction. If you both own shares in newco then this is a real possibility and as the transaction cannot be unwound they can only realistically go after your shareholding.*
>
> … ."

194. The reference to creditors going after Krishna's shareholding is a link to the Rewind Suite, preparations for which were already under way by this stage (see above at [45]-[46]). I think Arun's participation in this, and his later involvement in making the "*Andy.Baggy*" payments (see above at [69]-[82]) are significant in the present context, because they are all part of the same continuum of activity which followed Colorama's administration, and which was designed to try and manage its impact and limit the resultant risks. It is entirely consistent with that overall picture to think that Arun *requested* the payments which came to be made under the *debt purchase programme*. He considered them a necessary part of the overall survival plan.

195. I should say that Mr Anderson KC cautioned against making any definitive findings about the "*Baggy.Andy*" payments, given the potential implications for parties who were not before the Court. I understand that concern, but find it impossible to ignore them, because they show a degree of collusion between Samit and Arun in what appears to have been an effort to secure a favourable outcome for both in Colorama's liquidation. The point is relevant because the payments to Colorama's creditors form part of the same overall response to the fallout following the 2010 merger.

196. What is also clear is that Arun and Mahesh were aware more or less from the outset that the original mechanism for the payment of Deferred Consideration under the 2010

Transaction Documents was being overtaken, and instead replaced by a structure under which the payments to Colorama's creditors would first be offset against the remaining market value of Colorama's pharmaceutical assets and then any *excess* added to the Equalisation Amount.

197. That approach was shown, for example, in a spreadsheet sent by Vim to Arun and Mahesh on 4 September 2010. This spreadsheet set out a detailed breakdown of which debts owed by Colorama had been purchased, and in a summary calculation took them into account in calculating an outstanding Equalisation Amount of £22.915m. Later email exchanges between Arun and Samit, and between Arun and Mahesh, at the time of LBNS's attempts to raise additional funds in December 2010, are consistent with the Equalisation Amount being in the region of £22m (because they contemplate a possible issue of new shares to Samit resulting in a reduction in the Equalisation Amount of some £12m, but with about £10m still remaining). When another attempt was made to persuade Mahesh to invest further in July 2011, Samit's letter of 22 July 2011 referred expressly to LBNS having " *... a £23m liability to the A shareholders plus accrued interest.*" That can only have come about because of the *debt purchase programme*, and the addition of the excess or "*Goodwill*" amount to the Original Equalisation Amount. As already mentioned above, the same methodology was applied in calculating the figures in the September 2011 Completion Account, which assessed the "*Deferred Consideration Due*" as nil, because of the offsetting effect of the payments made to Colorama's creditors which were in excess of the remaining market value of Colorama's pharmaceutical assets.

198. There were further exchanges in the period immediately preceding the 2013 Agreement. Although there was some dispute about it, I am satisfied that these included exchanges about the size and status of the Equalisation Amount. It is natural enough that they would have done. This would obviously have been a topic of keen interest for Arun and Mahesh, because the existence of the Equalisation Amount operated as an encumbrance on the value of their (secret) shareholding interests. In any event, it is common ground that on 10 March 2010, Samit sent Ash Amin a full set of "*equalisation calculations*", which in a spreadsheet showed a computation very similar to that at [87] above, contained in the 2013 Agreement. I think it clear that Arun must have interrogated the 10 March spreadsheet information at least to some extent, because on 18 March Samit sent him a breakdown by email which he described as "*accruals information.*" I think it a fair inference that this was in response to an inquiry by Arun.

199. Despite all this, at no point prior to the 2013 Agreement did Arun or Mahesh ever raise any objection to the treatment of the payments to Colorama's creditors, and the resultant addition of the excess "*Goodwill*" figure to the outstanding Equalisation Amount. I think that can only have been because Arun well understood at the time that the figures reflected an outcome he had wanted and had helped to bring about, as a response to the desperate situation in March 2010 following the merger. Since he desired that outcome, and helped to facilitate it, I think it right to say that he (and therefore Krishna) *requested* it.

200. The idea that he might *not* have done so, as he accepted in cross-examination, occurred to him only much later, after the dispute between the parties developed in 2017, and he took legal advice resulting eventually in the present Petition. But I think Mr Anderson KC was right to criticise the argument that there was no request as something of a lawyer's construct, understandably advanced in order to try and achieve a highly

desirable position for Krishna (because of its potential impact on the value of the B Shares), but ultimately unpersuasive because it is wholly divorced from the commercial purpose of the *debt purchase programme* which Arun subscribed to and supported.

201. For all those reasons, I reject any notion that the calculation of the outstanding Equalisation Amount in the 2013 Agreement was misleading because of the inclusion of the payments made to Colorama's creditors.

202. Finally, I should mention briefly two further submissions by Krishna relevant to this first alleged misrepresentation. These were that the calculation of the Equalisation Amount underpinning the 2013 Agreement was wrong (and was known by Samit to be wrong) because of two further points, namely: (i) the inclusion as additions of payments made in respect of professional fees totalling about £2m, and (ii) the inclusion of a figure for "*Gowrie Accruals*" in the amount of £1.2m. Both are reflected in the calculation in the Table at [87] above, although (i) is embedded in the overall figure for "*Goodwill*".

203. Neither point was developed in detail, however, and in short I am not satisfied that Samit advanced the figures complained of dishonestly. He may not have had full conviction in them, but his evidence was that by 2013, given the messy fallout from the merger, both he and Arun were in an environment where a degree of flexibility was called for, and which there was room for some negotiation. He said the figures were put forward not dishonestly but as part of a negotiation, and that Arun had the chance to consider and interrogate them for himself before agreeing. I accept that evidence, which seems to me consistent with the inherent probabilities, and consistent also with other available evidence, including the fact that Arun did raise questions in connection with the accruals figure. In light of such matters, I am not persuaded that Samit in these respects acted dishonestly, or that even if he was dishonest, Arun relied on what he was told.

LBNS Performance/Not Possible to Make Equalisation Payments

204. I next turn to the alleged misrepresentation at [164(ii)] above.

205. Krishna's pleaded case in fact relied on two separate misrepresentations:

i) at para. 147(1) of the Petition, a representation by Samit that "*LBNS was performing badly*", said to have been made both orally and in Samit's email of 22 May 2013 in which he told Arun that "*cash is tight*" this year (see above at [73] – this is the same email which referred to payments to UHY, and attached the spreadsheet referencing the "*Baggy.Andy*" payments); and

ii) a further oral representation that " *… it was accordingly not possible for LBNS to make Equalisation Payments and, therefore, the Hathi family had to be compensated by other means including the transfer of the Perivale Property*".

206. These representations effectively run together, and in the Petitioner's Written Closing submissions were dealt with under the composite heading "*LBNS' finances and its ability to pay the Equalisation Amount*." The gist of the case advanced was that Samit had falsely given Arun the impression in 2013 that LBNS was performing poorly, and had not been and still was not in any position to make payments to shareholders which

would serve to reduce the outstanding Equalisation Amount. It is said that by this expedient, Samit persuaded Arun to agree to other methods of reducing the Equalisation Amount and allowing the Hathi family to recoup something for their investment – most importantly, the transfer of the Perivale Property from LBNS, and the agreement to allow SYRI to carry on its own specials/clinicals business, with the R&D costs to be funded by deductions from the Equalisation Amount.

207. A number of points were relied on as establishing the falsity of Samit's representation.

208. One concerns the practice of LBNS making loans available to entities associated with the Hathi family. I have mentioned this above (see at [67]) as one of the matters Krishna complained about as an example of unfairly prejudicial conduct, but it also feeds into the present allegation of misrepresentation. By March 2013, Samit had caused LBNS to advance a total of about £950,000 to the following Hathi family companies:

i) GHL - £349,771;

ii) Portside North Limited - £582,950;

iii) Bessfame Limited - £47,865.

209. A further point concerns the allegedly excessive remuneration paid to Hathi family members, also mentioned above at [67].

210. The argument made relying on these points is that if LBNS was able to fund loans to the Hathi family companies and payments of allegedly excessive remuneration to Hathi family members, then it must also have been in a position to pay dividends in a manner which would have allowed the outstanding Equalisation Amount to be reduced.

211. Krishna also pointed to the fact that LBNS's published accounts showed substantial reserves for 2010-2011 (£11,083,165), for 2011-12 (£12,460,073), and for 2012-2013 (£13,064,422). It argued that these figures showed LBNS was well able to make distributions to shareholders had it chosen to do so.

212. Allied to this, Krishna criticised what it said was the unnecessarily aggressive amortisation policy adopted by the LBNS Group in 2013, which involved a decision to accelerate the period of time over which the value of the goodwill acquired as a result of the merger would be written-down: the period was reduced from 7 to 4 years, and gave rise to a write-down of £3.7m in the 2012-2013 year of account. As I understand it, this was the same goodwill which arose as a result of the payments made by LBNS in excess of the value of Colorama's tangible assets acquired under the merger (see above at [54]-[60]). At any rate, the amortisation of goodwill had the effect of reducing GLL's distributable profits and thus those of the Group. Had the policy not been adopted, then the picture presented by the accounts would have been even more positive.

213. Following his cross-examination of Samit, Mr Quirk for Krishna also placed reliance on what he said was the manipulation by Samit of information about LBNS's financial state, contained in spreadsheets sent by Samit to Arun and Mahesh in the period before the 2013 Agreement was entered into.

214. Two particular matters are relevant. In summary:

i) On 27 March 2013, LBNS provided profit figures to RBS, covering the period April 2012 to February 2013. These showed a figure for gross profit over that period of £19.036m, and EBITDA of £6.405m.

ii) Just a few days later, however, on 4 April, as part of a series of ongoing exchanges between Samit on the one hand, and Mahesh on the other, Samit provided a set of detailed management accounts for the LBNS Group showing different figures. They showed a figure for total gross profit for the period April 2012 to February 2013 of £17.835m, and EBITDA over the same period of £5.204m – a reduction of roughly £1.2m. According to its metadata, this version – as sent to Ash Amin – was last modified by Samit on 2 April 2013.

iii) What is striking is the reason for the difference: the reduction of £1.2m in the spreadsheet sent to Ash Amin was achieved by increasing the figures making up the cost of sales in columns D-L, rows 54-55 (a total of 18 cells) by £66,650 each (18x £66,650 = £1.2m).

iv) Something similar happened in April and May 2013.

v) On 24 April, LBNS sent management accounts for the period to the end of March 2013 to RBS. These showed revenue over the period of £175m, and EBITDA of £6.744m.

vi) On 22 May, however, when Samit sent Arun his "*simplistic cashflow model*", the attached spreadsheet (the same one referencing the "*Baggy.Andy*" payments) contained precisely the same revenue figure (£175m), but a reduced figure for EBITDA of only £5.95m. On that basis, and given the expenditure in the same period, it indicated there was no possibility of the Equalisation Amount reducing in 2013. In fact, the spreadsheet projected a reduction in the Equalisation Amount only in 2016, when it assumed a dividend of £600,000. Nothing was projected in later periods. This gave no confidence that the Equalisation Amount would be paid down in the short or even medium term. Samit accepted in cross-examination that, consistent with this, he had told Arun at the time that there were insufficient funds available to pay down the Equalisation Amount.

215. Mr Quirk KC said that these differences were obviously the product of a dishonest effort by Samit to portray LBNS as less profitable than it actually was. To top it all off, he said the position was made clear by an email sent by Jahangir to Samit on 23 June 2023 (the same day the 2013 Agreement was signed). This dealt with the funding of R&D activity by SYRI, and discussed the possibility of funding being provided by way of dividends, which would "*flow from [GLL] to LBNS and on to GHL*", and from there to SYRI as a loan or share capital. Jahangir said:

> *"[GLL] has sufficient reserves to declare a dividend of up to £4m in the current financial year and there are [no] tax implications*."

216. I think Mr Quirk KC made a strong argument in respect of this second alleged misrepresentation, but in the event I have come to the conclusion I must reject it.

217. I think the high watermark of the argument was the allegation that Samit had dishonestly manipulated the spreadsheets provided to Arun. I agree they bear features which appear suspicious, in particular the deduction of uniform figures for sales costs in the April spreadsheet (above at [214(ii)]) which suggest an intention to engineer a desired outcome in terms of the EBITDA figure, rather than a genuine attempt to calculate an accurate figure. Nonetheless, I am not persuaded that I should accept the submission that the spreadsheets were manipulated for the dishonest purpose of misleading Arun.

218. For one thing – but it is an important point – that was not a pleaded allegation. I have set out the pleaded allegations of misrepresentation above (see at [205]). They did not rely on the dishonest manipulation of data in any spreadsheet. The point only arose during the course of Samit's cross-examination. It was not dealt with in Arun's written evidence for trial. There was no disclosure, as such, directed to it. I therefore do not feel confident that it was fully and fairly tested. That conclusion is reinforced by the fact that Samit said in cross-examination that he had a possible answer to it, which was that the figures provided to Arun were really in the nature of a forecast for the 2012-13 accounting year, and he was cautious because in the previous two accounting years (2010-11 and 2011-12) LBNS's internal EBITDA calculations had been substantially reduced during the audit process. Samit said that in light of that, he had given instructions to an assistant, Nidhi, to make sure that any forecast figures for 2012-13 were conservative, so as to allow for the possibility of future adjustments during that year's audit.

219. In the circumstances, and despite the reservations expressed elsewhere in this Judgment about Samit's character and honesty, I do not think I can reject that explanation, despite the force of Mr Quirk KC's cross-examination. It has a ring of plausibility to it, and in the circumstances was not, and could not have been, fully tested.

220. In summary, I do not consider that Mr Quirk KC's submission of spreadsheet manipulation by Samit is made out.

221. The other points relied on by Krishna, in my view, all suffer from the same fatal flaw, which is that they invite the Court to adopt a rather crude and impressionistic approach, but without the benefit of expert evidence. By this I mean that the question whether LBNS was really in a position to declare dividends, or would have been absent the loans to the Hathi family companies and the other matters complained of, is really an accounting exercise. But it was not addressed in any detail by the experts, since it did not form part of their instructions.

222. GHL's expert Mr Davidson nonetheless made some comments about it, which Ms Hart agreed with, but those comments only serve to emphasise that the matter is one of some complexity and difficulty, which cannot reliably be approached in a broad and impressionistic manner.

223. For example, although it is correct that LBNS's consolidated accounts for the accounting periods 2010-2011, 2011-2012 and 2012-2013 all show fairly substantial reserves (as mentioned above), it is wrong to say these are all distributable reserves, i.e. retained earnings of LBNS and its subsidiaries available for distribution under Part 23 Companies Act 2006.

224. In fact, the initial figure of £11m for the 2010-11 accounting year effectively represents the NAV of GLL which GHL injected into the joint venture as a result of the merger. Apart from anything else, it is not at all obvious that the parties intended this sum (or any part of it) to be available for distribution in a manner that would serve to reduce the Equalisation Amount, because it is exactly the sum which gave rise to the Equalisation Amount in the first place (see above at [87]). It is more natural to think that distributions to shareholders were to be made from declared profits of the new joint venture.

225. As to that, according to the consolidated accounts only GLL appeared to be profitable by 2013. LBNS was not itself a trading company and Laxmico was loss making in 2011 and 2012.

226. It is true that by 2013, GLL had accumulated distributable profits of roughly £9.75m, but that is not the same as being able to say that it was in a position to declare a dividend (via LBNS, its parent company). At least two points are relevant. First, the Group as a whole was doing no more than treading water, and that would have been a strong factor against the declaration of any dividends, given the need to retain working capital and liquidity in the case of unexpected emergencies. Second, clause 12 of the SHA imposed a restriction on distributions, in that it required LBNS to retain an amount equal to 2% of turnover for the relevant financial year.

227. As to the decision to accelerate the period of time over which goodwill would be amortised, this was supported by LBNS's auditors, and was intended to produce a tax saving: so it is difficult to say it was irrational or obviously ill-intentioned.

228. Further, there is the point made by Mr Anderson KC that in order to identify a fully accurate position, it is necessary to look beyond the published accounts. That is because a number of transactions were kept off the books in order to make LBNS look better than it was: I have in mind in particular the fact that the funding amounts received from various parties (including the Hathi family) in 2010 and 2011 were not properly recorded as loans in LBNS's books, but instead used to show £5.5m of bad debts as having been paid rather than written off (see above at [53]). The result was that, even by 2013, there were substantial amounts still owing by LBNS from the 2010/2011 fundraising exercise (see further below at [232]-[233]). These liabilities far exceeded the value to LBNS of the loans to Hathi family companies which Mr Quirk KC relied on as central to his submissions on this misrepresentation.

229. All of this goes to show that, tempting though it may be to conduct a crude analysis, matters are not as straightforward as they might at first appear. Something more considered was required, supported by expert evidence. Without it, I am not persuaded that the impression created by Samit's communications was in fact wrong and misleading.

Source of the £4.5m Funding

230. Finally, I come to the misrepresentation summarised at [164(i)] above.

231. The position here is different. I am persuaded that Samit falsely represented to Arun the source of £4.5m of funding which had been made available to LBNS, so as to encourage Arun to enter into the 2013 Agreement on the terms on which it was concluded.

232. This point is tied into the matter of the additional funding sought and obtained by LBNS in late 2010 and early 2011, already mentioned at a number of points above (in particular at [52]). Typically, given the complexity of Samit's machinations, the background needs some untangling, and so I should explain it in a little more detail:

    i) Two Hathi family companies, Portside North Limited and IFG International, each provided roughly £0.5m in October 2010 and early April 2011 respectively. Portside North was effectively repaid by March 2013: as noted above at [207], the statutory accounts for LBNS for 2012-2013 record a loan of over £500,000 *to* Portside North, and Samit in his evidence accepted that the two loans cancelled each other out. He said "*it should have been zero either way*".

    ii) Jumbogate Limited, Anuj Shah's vehicle, made available a total of £3.5m on two tranches (£2m and £1.5m) in October and November 2010.

    iii) Ironcorp, Ketan Mehta's company, made available £1m in December 2010.

    iv) Arun and his brother Girish, via Keycircle Limited, raised some £650,000 from the sale of a property in Walthamstow, and this was made available to LBNS's subsidiary Laxmico via a cheque from Keycircle dated 3 May 2011. Just under a year later, in March 2012, just before the end of LBNS's financial year, GLL (LBNS's other subsidiary) paid back £650,000 to Keycircle. A few days later, however, Keycircle then paid a total of £600,000 to London Pilsner, the company owned by Samit's uncle Bharat. This was then used by London Pilsner to fund (in part) the repayment of Ironcorp. According to Samit's written evidence, further sums totalling roughly £508,000 were paid to Ironcorp in January and February 2013, and so by that stage Ironcorp was also repaid in full.

233. The upshot of all this was that of the £5.5m originally advanced by a combination of the Hathi family, Jumbogate and Ironcorp, by the time of the 2013 Agreement, only £4m was outstanding, of which £3.5m was owed to Jumbogate and the rest owed to the Hathi family. Meanwhile, Arun and Girish (though their company Keycircle) remained out of pocket to the tune of £600,000. That is the amount (plus interest) now the subject of the Loan Claim, which I will come back to below.

234. Despite all this, and although only £1m of the overall funding had ever been provided by the Hathi family, of which half had by then been repaid, Arun's evidence was that Samit nonetheless represented to him in 2013 that the Hathi family alone had provided some £4.5m of funding which remained unpaid.

235. Samit's evidence was that although he may have said something like that, the reality, as everyone including Arun knew, was clearly that funding had been obtained from sources other than the Hathi family, i.e. Jumbogate and Ironcorp. And as Arun would also have known, Samit regarded either himself or the wider Hathi family as having a moral responsibility to ensure that Jumbogate and Ironcorp were repaid. So although Samit may loosely have referred to the Hathi family having loaned LBNS £4.5m, Arun must have known that embedded within that figure were sums made available by others (in particular Jumbogate), who obviously needed repaying and were not mentioned separately.

236. In short, I have concluded that I should accept Arun's evidence on these points, and reject Samit's evidence. I consider that Samit *did* misrepresent the source of the £4.5m funding referred to, in order to give the impression that it had come from the Hathi family alone, when in fact it had not.

237. To begin with, Arun's account conforms with the terms of the 2013 Agreement, which as noted above at [86], provides for payment to GHL of a Super Priority Dividend in the amount of £5.5m, with payment of the first £4.5m not to count towards any reduction in the Equalisation Amount. That is consistent with the idea of Samit claiming that the Hathi family had made funds in the latter amount available to LBNS, and saying those funds needed to be repaid in priority to any other distributions made by LBNS. Other, later documents are similarly consistent with Arun's account, for example Samit's email to Arun of 24 January 2015 in which (summarising the history) he said as follows (my emphasis added):

> "*In year 1, I put in £4.5m and you put in £700k to keep the business alive. Nothing from Mahesh*."

238. There is then Samit's point that whatever form of words was used, Arun must have appreciated from the overall context that other parties were the source of part of the overall £4.5m figure referred to. I reject that contention.

239. For GHL, Mr Anderson's submissions on this point really came down to the following: (1) Arun was aware of the fundraising exercise conducted in late 2010 and early 2011, and was thus aware that funds had been borrowed from third parties, in particular Jumbogate, (2) although there were no documents suggesting that the Jumbogate monies were owed *in addition* to the £4.5m Samit admittedly referred to, by the same token (3) neither was there any record of Samit ever saying that the Hathi family had to be paid £4.5m while at the same time saying that Jumbogate had to be paid *as well*. Given that, it was safe to infer that whenever Samit referred to £4.5m owed to the Hathi family Arun must have understood him to mean, the Hathi family and others (in effect, Jumbogate).

240. This is a clever submission, but I think it fails in light of the evidence. A number of points may be made.

241. To start with, I accept the proposition that Arun knew in late 2010 or early 2011 – and by July 2011 at the latest – that third parties including Jumbogate were providing funding. The matter is put beyond doubt by a funding request letter sent to Mahesh in July 2011, in which Samit said:

> "*As discussed, to recapitalise and stabilise the company there is a need for a substantial cash injection. The company has received funds from NSL, Jumbogate and the A shareholders to shore up the company but there is now a need to either repay them via a rights issue or indeed offer equity and convert their loans to equity*."

242. The idea that others had made funds available is not, however, inconsistent with the idea that Samit told Arun that the Hathi family had made available £4.5m, effectively from their own resources.

243. Although Mr Anderson KC pressed the contrary argument, I do not find it persuasive. For one thing, the picture presented to Arun was not, in my judgment, sufficiently clear to justify it.

244. At one point during his evidence for example, Arun said:

> "*I did not know when the payments from the Shah, Shah and Necessity had come. All I knew was they provided funding and, from what Samit was claiming, that his family had provided another set of funding ...*"

245. And later he had the following exchange with Mr Anderson KC, to similar effect:

> "*Q. What did you think was the position then with Jumbogate or Mr Shah's money? Did you think that that was never being mentioned by Samit that he was simply overlooking it?*
>
> *A. The position with Jumbogate he had never mentioned. I was aware Jumbogate had loaned. I was aware of 2 million. The 1.5 million, I wasn't exactly aware. And that, we both knew, had been provided.*"

246. In fact, Arun said that it was only much later that Samit had begun to suggest that the Jumbogate funds were part of the £4.5m figure:

> "*The story came along after we discovered that he had forged the bank statements to show us that 4.5million was provided by Jumbogate and Necessity, and he tried to fool us into believing that the 4.5 million was the one which his family provided. And then he started claiming that the liability of Jumbogate's was his family's. Prior to 2018, he had never mentioned that it is Jumbogate's money and that his family has taken the liability*."

247. I accept that evidence. It shows that Arun was given only sketchy information at the time, consistent with him being given the impression that whatever Jumbogate and Ironcorp may have done, it was separate to the funding made available by the Hathi family.

248. I also consider that that impression was created deliberately by Samit. In drawing that conclusion, I rely on the sorry story of Samit's forgery of Laxmico's bank statements, to give the false impression that the funds provided by Ironcorp and Jumbogate had come from London Pilsner.

249. I have given the background to this above at [119]-[121]. Faced with it, Samit's evidence was that it was a stupid mistake, but it was a mistake made only in 2018 when he felt under pressure given Arun's investigations at that stage, and had no bearing on what may or may not have been said to Arun in 2013. In fact, Mr Anderson KC's submission was that the whole misrepresentation case concerning the £4.5m figure was a false case, cynically made up by Arun in order to capitalise on Samit's unfortunate error, once it was exposed.

250. I reject these points. That is essentially because I consider that Samit's account in relation to the forgeries given in cross-examination was entirely implausible and unconvincing.

251. As to that:

i) Samit accepted having altered the bank statement showing the £1m payment by Ironcorp in December 2010, so as to give the impression that the funds came from London Pilsner. He said he had told his lawyers (then CVS Law) afterwards, "[*a]s soon as I'd done it*", although he did not give them a copy. According to Samit's evidence, *"… they told me to put it on the side.*"

ii) He also accepted having altered the two other bank statements, originally showing funds received from Jumbogate, in the same way.

iii) He was then asked whether he had given the forgeries to Arun and Mahesh, in January 2018, as part of the 2017 Equalisation Workings. He said:

"*I didn't mean to. I thought I'd kept them on the side, not to be used, yes? And then, literally a few months later, they had them, so I must have given it to them*."

iv) Samit was then asked about how the forgeries came to be disclosed by Burges Salmon in the Petition proceedings (see above at [119]). His answer was that, although he had not given them to CVS, he had provided them to a later firm of solicitors acting for GHL, Blake Morgan, and Blake Morgan had provided them to yet a further firm, Burges Salmon, who had then produced them by way of Initial Disclosure in response to the Petition.

v) Samit said he had told Blake Morgan that the documents were forgeries at the time of handing them over (in fact, he was emphatic about it: "*Yes, absolutely*"). But he had no convincing answer to the point that the documents were then disclosed by Burges Salmon in response to the Petition without them being identified as forgeries; or to the point that Burges Salmon expressly confirmed in the response to Krishna's subsequent RFI that they were unaware of the alterations Samit had made:

"*Q. You see the words in brackets, 'Burges Salmon (who were unaware of the alterations)'? Do you see those words?*

A Mmm-mm. Yes I see those.

Q. That's because they were unaware that it was a forgery?

A. I take that point.

Q. Well, you say you take that point, that's because it's correct?

A. I take that point, yes."

vi) Samit denied having provided the documents to Burges Salmon so they would be disclosed in the Petition proceedings; but he accepted that he admitted to the

forgery only when confronted about it by Krishna's solicitors, after they noticed the difference between the bank statements disclosed in the Petition Proceedings and the one showing the payment by Ironcorp disclosed in the Keycircle Proceedings. Samit then had the following, important exchange:

"*Q. The purpose of that fraud was to make it look as if 4.5 million had come from you and your family?*

A. Mm-mm.

Q. Could you say 'yes' or 'no' please?

A. Yes.

Q. Thank you. Because that is what you had told Arun and Mahesh since at least 2011?

A. 4.5 we're responsible, definitely.

Q. It was a lie in 2011, it was a lie you reinstated in 2013 and 2016, and you were still lying about it in 2018, weren't you?

A. Yes."

vii) In re-examination, Samit said that in answering yes to this question, he was intending to agree only with the final proposition contained within it – i.e. that he had been lying in 2018 – and did not intend to accept that he had lied at any earlier stage.

252. I find Samit's overall account entirely implausible on these issues, and I reject it. It is entirely implausible I think that he would have told CVS Law that he had forged documents, which at the time he had done nothing with. It is equally if not more implausible that CVS, had they been told that Samit had prepared forged documents, would not have asked for copies. It is implausible that the forgeries, having been prepared by Samit, would then mysteriously have found their way to Arun and Mahesh, without Samit being aware of it. It is implausible that Blake Morgan, if they were told about the forgeries as Samit suggested, would not have informed Burges Salmon (who clearly did not know about them at the time they were disclosed). A firm of solicitors presented with forged documents by a client would be expected to take the matter very seriously. It would be a notable event, and a matter of importance which would certainly be notified to any successor firm.

253. To put it shortly, the whole chain of events seems to me to be a concoction by Samit.

254. What is much more plausible is that Samit forged the documents in 2018 and provided them to Arun and Mahesh in order to perpetuate a version of events he had already told them earlier, i.e., that his family alone had provided 4.5m of funding. Then, having been presented with the allegation in the original (unamended) Petition that this version of events was untrue (see above at [119]), Samit sought to rely on the forged documents again to reinforce his original story. I find that that was Samit's real motivation in allowing the forged documents to be produced by way of Initial Disclosure in the Petition proceedings. I think he got closest to the truth in his unguarded admission

during the passage in his cross-examination at [251(vi)] above, before he finessed his answer in re-examination.

255. There is another fragment of evidence which supports this conclusion. This is from a much earlier stage, in September 2011. It is an email dated 16 September 2011 from Vim sent to Mahesh's adviser, Ash Amin. It attaches a spreadsheet with a tab entitled "*Capital Injected*", which showed "*S Hathi*" having injected a total of £5m, *in addition to* sums from Ironcorp (in fact the reference given is to NSL – Ketan Mehta's other company) and Jumbogate, whose advances were shown separately.

256. Arun accepted in cross-examination he had not seen this document in 2011: it had come to his attention only during the disclosure process. I agree, therefore, that it is not direct evidence of what Arun himself was told at the time. Nonetheless, the separate treatment of Jumbogate and Ironcorp is consistent with Arun having been given the impression that their funding was separate to that from the Hathi family, and entirely *inconsistent* with Samit's case that Arun must have known that funding from a number of separate sources was all compressed together in the same £4.5m figure.

257. Again, I think it helpful to consider the inherent probabilities. What is most likely is that Samit was telling Arun and Mahesh the same thing, which was that the Hathi family itself had provided a substantial amount of funding, and Ironcorp and Jumbogate separate amounts. He knew that to be false, but just as he did later in 2018 with the Laxmico bank statements, was covering his tracks by creating a false documentary record which appeared consistent with the story he had told. I also think it notable and significant that Vim was the author of the September 2011 spreadsheet. He could have been called to give evidence but was not. That being so, I think I am entitled to infer that any evidence he might have given on the topic of the spreadsheet would have been unhelpful to GHL's case.

258. The final point is that I obviously reject Mr Anderson KC's submission that this particular allegation of misrepresentation was concocted after the event, in order to take advantage of Samit's admitted error in forging the Laxmico bank statements. The point does not work anyway as a matter of timing, because Krishna's allegation was first made in the original (unamended) Petition, and the forgeries came to light only later, as a result of the disclosure provided in the Keycircle Proceedings (see above at [120]). Although admittedly the particulars of falsity relied on were subsequently amended, the core allegation that Samit had misrepresented the source of the £4.5m figure was fully formed at the outset, and has not changed.

Rescission

259. In light of my conclusion that there was a misrepresentation by Samit, the next set of questions are about possible rescission of the 2013 Agreement, and about the consequences of rescission.

Should the 2013 Agreement be Rescinded?

260. The argument on this issue revolved around two main issues: (i) did Arun (and therefore Krishna) affirm the 2013 Agreement, knowing of their right to rescind it – if so, then any right to rescind will have been lost; and (ii) in any event, is *restitutio in integrum* still possible – i.e., is it still possible to restore the parties to the position they were in

immediately prior to the 2013 Agreement, because if not (so GHL argued), then there can be no rescission. I also add as a further consideration a point I raised during argument, namely (iii) whether, in light of the Rewind Suite, the illegality doctrine would preclude Krishna claiming the remedy of rescission.

(a) Affirmation

261. The question of affirmation requires consideration of the effect of the Rewind Suite. One of GHL's main submissions was that, despite knowing well before 2018 of circumstances that would entitle Krishna to rescind the 2013 Agreement, Arun had refrained from taking any action at the time, because he knew that doing so would focus attention on the Rewind Suite and more generally on the actions taken in 2010 immediately following the merger, which he knew to have been wrongful. Neither he nor Mahesh wanted such unwelcome attention, as evidenced by the fact that they waited until Colorama had been dissolved in 2018 before initiating any litigation.

262. On the question of earlier knowledge, GHL placed particular reliance a document referred to as "*T1/51*" (after the disclosure number allocated to it), which is an internal LBNS email dated 18 August 2011 sent by a member of the accounts team to Jahangir and Samit. It is headed, "*Capital injection*", and gives details of the amounts made available to LBNS by third parties at various points in late 2010 and early 2011 (which I have mentioned a number of times already above). The text is important, so I will set it out in full:

> "*Hi all*
>
> *Please see detaisl (sic.) of when these monies have been received into the our (sic.) accounts:*
>
> *£2.0m Jumbogate – Oct 2010*
>
> *£1.5m Jumbogate – Nov 2010*
>
> *£0.5m Portside North – Oct 2010*
>
> *£0.65m Keycircle – May 2011 I received in facflow, transferred to current in June 2011.*
>
> *Not sure what the £1.0m ironclaw is for, can you please give me more details and will look into this.*
>
> *Re £0.3m from Mr H, looking into this and will update once I have this info*."

263. A copy of this document was produced by Krishna by way of disclosure. This gave rise to the question of when Krishna had acquired it. Arun's evidence was that it came into his possession only after his suspicions about Samit were first alerted in 2017, as a result of the conversation he said he had overheard concerning the payment to Leyland (see above at [102]). GHL however invited the inference that Arun must have had it much earlier than that, and so must have realised that the Hathi family had not provided £4.5m of funding, but nonetheless decided not to take any steps to attack the 2013 Agreement because he did not wish at that stage to stir up trouble for himself or Mahesh.

264. GHL also relied on another document - "*T1/62*" – as evidencing this same pattern of behaviour: i.e., Arun knowing before 2018 about certain of the matters now complained of, but holding back from making any complaint. T1/62 is what appears to be a photocopy of a pdf headed, "*Laxmi BNS Holdings Limited – Consolidated Profit & Loss Statement – Year 2014-2015*." The particular significance of T1/62 is that it includes, under the heading "*Selling and Administration Costs*", trademark royalty fees paid to LGF (see [101] above). If T1/62 came into Arun's possession at some point in 2015, which was the inference GHL invited, that would be consistent with the idea of Arun knowing at that point about LBNS' trademarks having been transferred away to a Hathi family company.

265. As to the law on affirmation, the parties were agreed that a party entitled to rescind a contract will not be held to have affirmed it unless he has knowledge of the relevant facts, and is aware that they give rise to a right to rescind: see SK Shipping Europe Plc v. Capital VLCC 3 Corp [2020] EWHC 3448 (Comm) at [202]-[203].

266. It has also been held that lapse of time after discovery that there has been a misrepresentation may be evidence of affirmation (see Clough v. L. & N.W. Ry (1871) L.R. 7 Ex. 26, referenced in Chitty on Contracts, Vol. 1, para. 9-145), but equally " ... *there can normally be no affirmation where the representee is ignorant of the truth and therefore of his right to rescind, and the inference of affirmation from lapse of time should therefore be rebuttable by proof of lack of knowledge of the untruth*" – Chitty, op. cit., citing Aaron's Reefs Ltd v. Twiss [1896] AC 273, 287, and Armstrong v. Jackson [1917] 2 K.B. 822.

267. What is required is knowledge. Suspicion is not sufficient. The fact that a person has facts from which he might deduce the truth is not the same as knowledge of the truth. It might provide a basis for inferring knowledge, but at the same time, " ... *it is clear in the present context that the means of discovering knowledge is not the same as knowledge*" – see, again, SK Shipping, per Foxton J at [202].

268. In the present case, I am not persuaded that Arun had relevant knowledge at any point before 2017 or 2018.

269. By relevant knowledge, what I mean is knowledge of the matters I have now determined give rise to a right to rescind the 2013 Agreement – i.e., knowledge that Samit was lying when he represented that £4.5m of funding had been provided by the Hathi family and was still owing to them, when in fact the bulk of the outstanding funding was owed to Jumbogate and the Hathi family had lent only £1m.

270. A number of points arise.

271. First, I am quite unpersuaded by GHL's general theory that Arun was happy to live with knowledge of Samit's wrongful behaviour, because of his own concerns about the Rewind Suite. On this point, I find Arun's November 2017 WhatsApp exchanges with his son Vishal instructive (see above at [111]). In them, Arun's reluctance is about instructing solicitors; he shows no reluctance about confronting Samit, and indeed is eager to do so despite Vishal's objections. He then did confront Samit in November 2017, and in fact instructed solicitors later in the same year. To my mind, this chain of events sits uneasily with the proposition that Arun had knowledge of the true funding position based on document T1/51 but chose not to do anything about it. I think that if

he had had knowledge, then he would at least have raised it with Samit, although he might well have been reluctant to do anything more.

272. Second, I turn to document T1/51. On the question of when it was received, my view is that T1/51 likely did in fact come into Arun's possession only after July or August 2017. That seems to me consistent with the inherent probabilities, since it is natural to think the inquiries he started at about that time would have produced just such a document, and there is no clear evidence pointing to its receipt at any earlier stage.

273. Even if that is wrong, however, I do not consider it matters because there is insufficient information in T1/51 to fix Arun with knowledge that Samit had lied to him about the source of the £4.5m funding. To know that Samit's representation was untrue, a person would either need to be told that the Hathi family had only ever provided £1m of funding, or that the £4.5m figure was a composite, which included funding both from the Hathi family and others. Document T1/51 does not say either of those things, and does not contain enough information to allow them to be deduced. All it tells one is that funding was made available by a number of parties in late 2010 and early 2011. It does not purport to be a comprehensive account of *all* such funding. Neither does it say anything about any overlap between any contribution made by the Hathi family and the contributions provided by others. Indeed, it does not even mention the Hathi family (the opaque reference to "*Mr H*" is unclear and unexplained). To put it another way, the reasonable reader of T1/51 would be entitled to think that anything Samit said was provided by the Hathi family was *in addition* to the amounts listed. That being so, such a person would not have had revealed to them knowledge of Samit's untruth.

274. Third, neither am I persuaded that document T1/62 provides an answer. For one thing, I do not accept Mr Anderson KC's submission, made partly by reference to T1/62, that Arun knew of and consented to the transfer of relevant trademarks to LGF for nil consideration (see above at [100]), and knew or should have known of the practice of charging royalties. I do not consider that Arun did know either of those things, and accept his evidence that he did not. I reach that conclusion essentially for two reasons: (i) I think the same logic applies to this point as to that mentioned above at [271] – i.e., I think if Arun *had* known what was going on he would have cried foul and would at least have complained to Samit; and moreover (ii) as mentioned above at [145], I do not accept Samit's evidence that the omission of a figure for trademark royalties in the 2016 Equalisation Workings was a mistake – on the contrary, I think the figure was deliberately concealed by Samit in order to stop Arun discovering what had been done with the trademarks and about the payment of royalties. All that is consistent with Arun's evidence on the point and reinforces my view that I should accept it.

275. In any event, even if that is all wrong, I do not consider document T1/62 relevant to the issue of affirmation as it arises on the present facts (see above at [269]). Even if Arun did have knowledge of the payment of trademark royalties in 2015, and even if he thought at the time that such payments were questionable and perhaps improper, that would not prevent rescission based on a misrepresentation about the source of the £4.5m funding. At most, it would support an argument that Arun should have been generally suspicious of Samit's actions; but suspicion is not knowledge, and it is certainly not enough to say that Arun could have acquired knowledge by making inquiries. In any case, I am not at all persuaded that Arun *could* have acquired knowledge of Samit's lie, given the efforts Samit was making at the time to disguise the truth. Indeed, the proof of the pudding is in the eating, because when Arun did

make inquiries of Samit in late 2017, that prompted Samit to produce the forged bank statements which were expressly designed to disguise the source of the £4.5m funding.

(b) Restitutio in integrum

276. GHL argued it is not possible to restore the parties to the positions they were in prior to the 2013 Agreement. This argument rested on two points: (i) the fact that the 2013 Agreement effectively compromised warranty claims that LBNS had at the time against both KHL and Arun, and which cannot now be brought in the event of rescission because they are time-barred; and relatedly (ii) an argument based on Samit's evidence that he had only supported the settlement agreements entered into with Colorama's Liquidators in 2014 (see above at [89]-[92]) because GHL/LBNS and KHL had already settled their differences by means of the 2013 Agreement – but rescission of the 2013 Agreement would have no impact on the settlement agreements which would obviously remain in force and could not be altered, which would (or at least might) lead to injustice.

277. Again, I am unpersuaded by these points, neither of which in my view bars rescission of the 2013 Agreement. I think the concerns underpinning them are unrealistic and exaggerated.

278. In describing LBNS's possible warranty claims, Mr Anderson KC said they would have primarily been concerned with the recovery from Krishna and Arun of the losses sustained by LBNS through having had to fund the *debt purchase programme* – i.e., the losses incurred by LBNS in paying off the bulk of Colorama's creditors in order to try and manage the fallout flowing from Colorama's insolvency. His logic was that Krishna was in breach of a number of warranties in the Colorama BPA concerning the state of Colorama's business (see above at [32]), and the payments made to Colorama's creditors under the *debt purchase programme* represented the bail out LBNS had to perform when it turned out those warranties were untrue. The losses accruing from that bail out would have been recoverable as damages for breach of warranty. Mr Anderson KC said there might also have been claims for consequential loss, arising from the reputational and trading damage caused to LBNS by means of the 2010 merger.

279. In short, my opinion is that rescission of the 2013 Agreement would not in fact leave LBNS disadvantaged in either respect – i.e., in the position of having sustained losses for which it could no longer recover damages.

280. Taking first the question of losses sustained by LBNS having funded *the debt purchase programme*, it seems to me there are no such losses in light of the finding I have already made (see above at [171]-[203]) that Krishna *did*, in fact, request the payments made to Colorama's creditors in excess of the Deferred Consideration to be added to the Original Equalisation Amount. The result was that, insofar as LBNS made payments up to the amount of the Deferred Consideration (i.e., up to the market value of Colorama's pharmaceutical assets), it received assets of corresponding value. As regards the excess over and above that amount, this was dealt with under the agreed contractual machinery and as I have held, both parties were happy with that arrangement and assented to it. That being so, I see no room for any claim for damages by LBNS arising out of the same payments: any claim (even if one existed) was effectively compromised by the treatment of the excess as an addition to the Original Equalisation Amount.

281. Although this state of affairs was one of the matters reflected in the 2013 Agreement, it had come into existence prior to the 2013 Agreement and thus existed independently of it. To put it another way, it does not seem to me that rescission of the 2013 Agreement leads to the consequence that the amounts paid to Colorama's creditors should be treated any differently, including by being deducted from the Equalisation Amount. The consensus that they should be added to it was reached before 2013, and is not impugned by the act of misrepresentation which leads to the 2013 Agreement being set aside.

282. As to the other possible claims for consequential loss and reputational damage, Mr Anderson KC did not press these points very hard and I think was correct not to do so. No such claim was ever intimated at the time. Even now, it is completely undeveloped. I do not think the Court should refuse an Order for rescission, if otherwise persuaded to make one, on the basis of an alleged lost claim which is so entirely embryonic in form.

283. The next issue concerns the settlement agreements reached with Colorama's Liquidators. The point here relates to the matters summarised at [92] above. Samit's argument on this was along the following lines. In 2014 he had supported the scheme which led to the settlements being achieved with Colorama's liquidators (including allowing Krishna to give the impression that it had paid certain of Colorama's creditors), but had only done so on the assumption that the position *as between GHL, LBNS and Krishna*, had already been settled by the 2013 Agreement. In particular, he had assumed that any issues as regards payment of Deferred Consideration had already been resolved between GHL, LBNS and Krishna under the 2013 Agreement. Rescission of the 2013 Agreement was therefore objectionable, at least if it would reopen the question of LBNS paying more Deferred Consideration to Krishna, because in light of the settlements reached with Colorama's Liquidators, that could no longer happen as part of an overall readjustment involving Colorama as well. That might generate real injustice and unfairness, if the setting aside of the 2013 Agreement led to LBNS having to pay more by way of Deferred Consideration to Krishna, which Krishna – now having settled its position vis-à-vis Colorama – would not be bound to pay over to Colorama.

284. My opinion is that this is not a realistic concern, and does not prevent rescission of the 2013 Agreement. The reason, again, is that the position between LBNS and Krishna as to the payment of Deferred Consideration was settled *before* the 2013 Agreement was entered into. No-one has sought to impugn that prior agreement. It stands even if the 2013 Agreement is set aside.

285. The agreement is reflected in the September 2011 Completion Account (see above at [57]). This stated baldly that "*Deferred Consideration Due*" was "*£Nil."* On the face of it, this looks like an agreed position as between LBNS and Krishna that there would be no Deferred Consideration payable. If that is so, then rescission of the 2013 Agreement does not lead to any different result.

286. As part of his overall case though, Mr Quirk objected to this conclusion. He wished to neutralise the effect of the 2011 Completion Account given its express affirmation that the Deferred Consideration due was nil, and its implied acceptance that the excess amounts paid to Colorama's creditors should be added to the Original Equalisation Amount. Mr Quirk's point was essentially as follows.

287. Deferred Consideration under the Colorama BPA cl. 4.1 was defined as a cash payment representing the difference between (i) the overall value of the assets transferred by Krishna to LBNS, to be settled on by way of the Completion Account, and (ii) the Cash Consideration already paid by LBNS, less £1,000 to be retained by LBNS as consideration for the issue of B Shares to Krishna.

288. The Colorama BPA set out in cl.5 and Schedule 1 detailed machinery for production of the Completion Account. This was to involve, for example, the preparation of a draft Completion Account immediately after the merger, followed by a review by the Buyer (i.e., LBNS), and a process for referral to mediation and, failing resolution by that means, referral to an independent accountant of any remaining areas of disagreement – all of that to reflect certain agreed valuation parameters set out in Schedule 1. As was accepted by Krishna, that detailed machinery was not followed. All that happened, in effect, was that the parties short-cut the whole process and settled on their own set of figures, as set out at [57] above.

289. Mr Quirk KC acknowledged that cl. 23 of the Colorama BPA permits variations of the BPA as long as they are in writing and signed by the parties. He also accepted that the September 2011 Completion Account was *signed*. But he argued that it did not represent a *variation* in the required sense, because it did not seek to vary the *process* in cl. 5 of the Colorama BPA for production of the Completion Account.

290. The relevant wording of cl. 23 of the Colorama BPA is as follows:

> "*23.1 A variation of this Agreement shall be in writing and signed by or on behalf of each Party.*
>
> *23.2 Any waiver of any right under this Agreement is only effective if it is in writing and signed by the waiving or consenting party and it applies only in the circumstances for which it is given and shall not prevent the Party who has given the waiver of consent from subsequently relying on the provision it has waived.*
>
> *…*".

291. My view, having regard to this language, is that Mr Quirk's argument relies on an artificially narrow interpretation of what a relevant "*variation*" might comprise. His point was that although a change to the agreed mechanism for settling the Completion Account *would* be a variation, an agreement on a figure (or set of figures), apparently without reference to anything recognisable as a replacement for the contractually agreed process, would not.

292. I disagree. Aside from anything else, the introductory wording of cl. 23.1 is clear: it says the parties are free to agree to vary their "*Agreement"*, so long as they do so in writing in a form which is signed. It seems to me that must mean they could vary *any* aspect of their agreement, including agreeing to abandon the prescribed mechanism in cl. 5 entirely if they wanted to. The mechanism in cl. 5, after all, was only a structure designed to produce a final valuation of the assets transferred at the point of merger, so as to produce the net figure for Deferred Consideration. It seems to me the parties were always at liberty to truncate that process at any point, either by agreeing their own value

to be placed on the merger assets, and/or by agreeing a final figure for Deferred Consideration. They were not limited only to agreeing a different or modified valuation process to that originally set out: the valuation process itself was part of their *agreement*, and it seems to me they were free to vary that *agreement* by abandoning the valuation process completely if that is what they wanted to do, and settling on a valuation figure in a different way. I see no good reason to limit the language of cl. 23 in a way that would prevent it, and consequently reject Mr Quirk's argument on this point.

293. The result is that I consider the September 2011 Completion Account effective as a variation of the Colorama BPA, and therefore effective as an agreement that no Deferred Consideration remained to be paid. No proper basis has been suggested for seeking to vitiate that agreement. Arun's evidence only went as far as suggesting that he had paid little attention to the 2011 Completion Account at the time, but he did not claim to have been misled (as was the case with the 2013 Agreement), and lack of attention is not a recognised vitiating factor.

294. Since I consider there was a binding agreement *before* 2013 that no Deferred Consideration was due, I reject Samit's argument that rescission of the 2013 Agreement would expose LBNS to an argument that some element of Deferred Consideration was still payable to Krishna. That being so, I also reject his second argument against rescission of the 2013 Agreement. Even if it is rescinded, the position as regards Deferred Consideration remains settled as between GHL, LBNS and Krishna, and so the basis on which Samit says he supported the settlements with Colorama's Liquidators in 2014 remains sound.

(c) Illegality

295. In Patel v. Mirza [2017] AC 467, Lord Toulson at [99] identified the central issue in illegality cases as one of policy:

> *"Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand"*

296. Lord Toulson later identified a "*trio of necessary considerations*" relevant to operation of the illegality doctrine (see at [101]). These involve the Court (my emphasis added):

> *" ... (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality*."

297. Applying these principles here, although initially I was concerned about the point, I have decided that the illegality doctrine should not operate to bar Krishna obtaining an order for rescission of the 2013 Agreement:

i) The relevant wrongdoing is that reflected in the Rewind Suite and related events. What we are concerned with, in short, is an arrangement involving both Samit and Arun, which involved a misleading picture being given to the outside world – and in particular Colorama's creditors – as to Krishna's interest in LBNS. This seems to have formed part of a broader arrangement, apparently including the making of the "*Baggy.Andy*" payments, designed to secure a favourable outcome for LBNS, GHL and Krishna, in the Colorama liquidation. Looked at in that way, the prohibition which has been transgressed is the principle that company shareholders should be honest about their status both in dealings with the company and with third parties, and the principle that parties who may be contributories in a liquidation should be honest in their dealings with the company in liquidation and any relevant officeholders. The purpose of such requirements is to promote open and honest dealing and, in particular on the present facts, to promote the proper distribution of assets in a liquidation. It seems to me that, on proper analysis, that purpose is not infringed by the Court making the Order for rescission of the 2013 Agreement, because in substance the 2013 Agreement is only concerned with the position as between GHL and Krishna. Its purpose was to amend and restate for the future the arrangement between those parties as (secret) joint shareholders in LBNS. It was not concerned with the position of GHL, Krishna or LBNS vis-à-vis Colorama or Colorama's creditors and has no impact on their position. The effect of rescission, as I have held, will be to return GHL and Krishna to the positions they were in vis-à-vis each other before the 2013 Agreement. Doing so does not, it seems to me, interfere with the policy in favour of transparency towards third parties (in particular creditors) I have described. If such parties still have claims to bring because they say they have been separately misled, they can still do so. I do not see how such claims should be affected by the rebalancing of interests as between GHL and Krishna *inter se* which results from the 2013 Agreement being rescinded.

ii) On the other hand, there is a countervailing policy which would be undermined by denying the claim for rescission. This is the policy against parties inducing contracts on the basis of misleading statements. To leave the 2013 Agreement in place would be to permit Samit and GHL to continue to profit from its terms, in circumstances where, as I have held, they were procured by a fraud. That is not a result the law should readily countenance.

iii) Finally, there is the issue of proportionality. To my mind, an order permitting rescission is a proportionate response, because it serves to deprive the wrongdoer (Samit, and via him GHL) of the fruits of the relevant wrongdoing, but at the same time leaves the way open for claims by third parties if such claims exist and if they wish to pursue them. The obverse result (i.e. refusing rescission) would be disproportionately unfair – i.e., it would permit Samit and GHL to retain the fruits of their wrongdoing, but for no good reason, because it would neither improve or worsen the position of any relevant third parties.

What are the Effects of Rescission?

298. Perhaps most importantly, it follows from what I have said above that the rescission of the 2013 Agreement has no effect either on (i) the requests made by Arun for payments to be made by LBNS to Colorama's creditors, resulting in the amounts paid in excess of the value of Colorama's assets being treated as additions to the Original Equalisation Amount, or on (ii) the valuation figures agreed in the September 2011 Completion Account, and the consequential agreement between LBNS and Kirshna that the Deferred Consideration would be nil.

299. Two other particular points were addressed in the parties' submissions.

(a) "Gowrie Accruals"

300. The first is a relatively small point, but a valuable one. It is whether a proper calculation of the Equalisation Amount should include item (2) in the table set out at [87] above – i.e., the figure of £1.2m for "*Gowrie Accruals*." The figure given is described as an over-accrual – i.e., it implies that the originally agreed NAV for GHL (£11.6m) was an under-value, so that GHL should in fact be regarded as having injected a *higher* NAV than thought at the time of the joint venture in 2010 – with the result that the Equalisation Amount should increase accordingly.

301. The point is that the "*Gowrie Accruals*" figure is set out in Schedule 1 to the 2013 Agreement. It seems to me that, if the 2013 Agreement is rescinded, then logically the agreement contained within it that the "*Gowrie Accruals*" figure should be added to the Original Equalisation Amount likewise falls away. It survives only if there is some prior agreement that it should be included, which is untainted by rescission of the 2013 Agreement.

302. I do not think it safe to conclude that there was any such prior agreement. GHL's case relied principally on the set of "*equalisation calculations*" sent by Samit to Ash Amin on 10 March 2013, which prompted Arun's request for a breakdown of "*accruals information*" on 18 March 2013. In my opinion, however, it is far from clear that these exchanges on their own resulted in any agreement or consensus. The consensus arrived at was that reflected in the 2013 Agreement, and that is now to be rescinded. Since there was no prior agreement as to the treatment of "*Gowrie Accruals*", my view of it is that the £1.2m figure falls away, and should not be included in any further calculation of the Equalisation Amount.

303. Ms Hart in the Joint Statement accepted there was evidence supporting a much smaller over-accrual of roughly £100,000. On the basis of that concession, I agree that that figure should be included in any valuation calculations, but no more.

(b) SYRI's Clinicals Business

304. As they developed during submissions, the points on this topic were essentially as follows.

305. Krishna's basic argument was that the establishment of a *clinicals* business by GHL, via its subsidiary, SYRI, necessarily involved breaches of fiduciary duty by Samit and Govindji as directors of LBNS, because establishing a *clinicals* business had always

been part of the plan for the development of LBNS after the merger. Samit and Govindji pursuing that same enterprise via corporate vehicles owned by the Hathi family involved a diversion away from LBNS of an important corporate opportunity which LBNS itself should have been exploiting, for the benefit its shareholders, including Krishna.

306. I agree with these basic propositions, but in response GHL's position was that Arun – on behalf of Krishna – had assented to, or acquiesced in, GHL/SYRI being permitted to take the initiative in developing their own *clinicals* business. Indeed, it was argued, Arun positively encouraged this outcome, because it suited him to have the R&D costs associated with SYRI's clinicals research deducted from the outstanding Equalisation Amount. Arun had known this was happening and had been content to allow it to happen. Krishna benefited from it because it had the effect of reducing the Equalisation Amount. On the other side of the equation, GHL/SYRI were effectively taking the financial risk associated with seeking to develop new *clinicals* products, and having taken that risk, it was fair that they should be allowed to take the fruits of the research they had funded; and it would be unfair for such benefits now to have to be shared with Krishna.

307. Krishna's position in response was that, although it accepted in principle that it was possible for a shareholder to acquiesce in what would otherwise be a breach of duty by the directors, there could only be acquiescence in the relevant sense if it was properly informed. In a passage in his written Submissions which I did not understand Mr Anderson KC to dissent from, Mr Quirk KC referred to the test for acquiescence being whether, in all the circumstances, it is "*fair and equitable that given his [i.e., the Claimant's] concurrence he should afterwards turn around and sue and it was not necessary that he knew that what he concurred in was a breach provided he fully understood what he concurred in*:" see Palmer at 8.3405; Kaye v Croydon Tramways Co [1898] 1 Ch 358; *Knight v Frost* [1999] BCC 819 (emphasis added). In other words, a breach of obligations (including directors' obligations) is only excused if proper and fully informed consent is given.

308. Here I come to what seems to me the nub of the issue, in light of the findings I have already made.

309. Mr Quirk KC's submissions were that Arun's assent had *not* been properly informed, because Arun had been misled by Samit into thinking that LBNS could not both pay down the Equalisation Amount and pay for R&D, so that he had to make a choice between the two (i.e., misrepresentation (ii), summarised at [164] above). That was misleading because LBNS's performance was not as poor as Samit suggested, and so the premise on which Arun's ongoing acquiescence was based was false. That too was Arun's evidence. For example, at one point in his cross-examination he said:

> "*I reluctantly agreed on that matter, because Samit said equalisation could not be paid and he will take payment for SYRI. At that time, if I knew that there was money -- excess money in the business, I would have not agreed to it at all*."

310. The issue with this way of putting the case is that I have already rejected Krishna's submission that Samit misrepresented the state of LBNS's business at the time of the 2013 Agreement (above at [204]-[229]). I have accepted the proposition that the 2013

Agreement should be rescinded for misrepresentation, but the misrepresentation I have found is a different one: i.e., the misrepresentation concerning the source of the funding obtained by LBNS in late 2010 and early 2011 (above at [230]-[258]). How does that square with the particular line of attack adopted by Krishna?

311. I think the matter has to be approached as follows:

i) Since the 2013 Agreement is to be rescinded, albeit on the basis of a different misrepresentation than that specifically relied on in this context by Krishna, rescission must include rescission of the provision referenced at [86(iii)] above, pursuant to which GHL was given free rein to engage in its own "*pharmaceutical research and development or branding activity*." Thus, if consent to (or acquiescence in) SYRI conducting R&D activities is to be found, it can no longer have its source in the 2013 Agreement.

ii) When asked about this in submissions, Mr Anderson KC said it did not matter, because Arun had given his consent to the arrangements affecting SYRI, not only in the 2013 Agreement but also at each and every turn when the issue arose between 2013 and 2018. He argued that Arun well knew what was going on, in the sense of knowing that R&D costs were being funded by GHL via deductions from the Equalisation Amount, and indeed conceded as much in his evidence.

iii) I do not, however, consider this is a full answer to the point. I accept that Arun was aware of the arrangements, but the question is whether he had a full understanding of the factors necessary for the giving of informed consent to them, such that his actions amounted to acquiescence in the legal sense. I do not think such factors can be limited only to matters concerning the financial status of LBNS at the time.

iv) Granted, there are limits. For example in Knight v. Frost [1999] BCC 819, Hart J held that the effect of a misrepresentation made to the plaintiff had worn off by the time a later decision about borrowing had to be made, so that in assenting to the borrowing the plaintiff *was* making a sufficiently informed decision so as to disentitle him later to complain about it (see at p. 830H). But what I take from this, which appears to me in any event to be the correct principle, is that informed consent must mean consent with knowledge of all matters likely to have influenced the ongoing pattern of acquiescence. In Knight v. Frost, the earlier misrepresentation was not such a matter, because it had no ongoing significance to the decision the plaintiff made.

v) Here, what Arun did not know in acquiescing to SYRI's involvement in R&D activities was that the 2013 Agreement had been procured by fraud and was liable to be rescinded. I do not think it matters that the misrepresentation in question was on a different topic to that which Arun had in mind at the time. I do not see the case as like Knight v. Frost, because there the misrepresentation was too remote in time and content to be material. Here, however, I think it would certainly have been material for Arun to have known that he had been lied to by Samit, even if it was about the source of the funding Samit said had come from his family. That is because it would obviously have been important for him to know, in deciding whether to continue tolerating SYRI's R&D

activities, that he had a basis for rescinding the permissions contained in the 2013 Agreement which allowed them to happen.

vi) In light of that, my opinion is that Arun did *not* have sufficient knowledge of matters relevant to him giving informed consent, and that consequently, notwithstanding his knowledge of the funding of SYRI's R&D activities by means of deductions from the Equalisation Amount, there is nothing unfair in now allowing Krishna to maintain that those activities involved breaches of duty by Samit and Govindji, and that relief should be granted accordingly.

vii) As to the form of relief, the precise details may need to be worked out, but I agree with Mr Quirk KC on the general principle, which is that for the purposes of any valuation, LBNS should be valued as if the *clinicals* business conducted by SYRI had been part of its operations, and the profits of that business available to both of its shareholders, not just GHL.

(c) Other Possible Points flowing from Rescission

312. It seems to me that certain other points of detail may need to be addressed in light of the rescission of the 2013 Agreement. They include (i) the treatment of the Perivale Property, which was transferred to Portside North under the terms of that Agreement (see above at [93]); and (ii) the treatment of the £2m of professional fees, included in the "*Goodwill*" figure underlying the calculation of the Equalisation Amount in the 2013 Agreement (see above at [87] and [202]). I was not, however, fully addressed on such matters. I would invite the parties to consider them and if those or related matters cannot be agreed they will have to be determined by the Court as part of the intended valuation exercise.

VI. Other Matters Affecting Value

313. I turn then to certain other matters affecting value which have been debated in detail and which can be resolved.

Hathi Family Remuneration

314. In the event, the issues under this head are rather narrow. GHL accepted the principle that, in calculating the value of the B Shares, an allowance should be made for remuneration payments made to Hathi family members in excess of market levels of remuneration. The remaining questions are essentially as follows:

i) Whether GHL has already, in effect, conceded that payments have been made in excess of market rates, by reason of the approach adopted by Samit in the 2017 Equalisation Workings (referenced above at [112]).

ii) Whether Govindji's wife, Nirmala, should be entitled to any remuneration at all.

iii) Whether, as Arun alleged, his agreement with Samit that the two of them would take the same remuneration was intended to be comprehensive, so that Samit would not be entitled to claim any bonus in excess of his agreed remuneration levels (which were £100,000 pa up to 31 March 2013, and £180,000 pa, including a £30,000 allowance for travel and expenses, thereafter).

315. Issues (i) and (ii) are closely related, and in my view depend on interpreting certain materials produced by or on behalf of Samit in relation to the 2017 Equalisation Workings. More specifically, these are (a) a Table produced as part of the 2017 Equalisation Workings headed "*Hathi Payment Summary*", and (b) a letter from GHL's then solicitors, Blake Morgan, dated 17 December 2018, which produced the same Table as an attachment and gave a description of it.

316. The short point which arises is this. Both the Table and the letter concede on their face that excessive payments of remuneration were made to four Hathi family members, namely Samit, Govindji, Alpa and Nirmala. In the Table, the excess amounts are identified by reference to certain base amounts, set out under the heading "*Should have been*" – i.e. figures are given for what the remuneration levels should have been, with amounts above those figures treated as the excess. In the Table, no salary figure is allocated to Nirmala in the "*Should have been*" section. In other words, the Table assumes that her salary "*should have been*" nil. As already noted, the Table is replicated as an attachment to the Blake Morgan letter, but is accompanied by a commentary in a covering Note. Instead of using the terminology in the Table to refer to the base level salaries, the commentary describes those same base level salaries as representing *"[a] market level of remuneration*" for Samit, Alpa and Govindji. The commentary goes on to describe sums paid to those individuals above the base levels identified as payments "*in excess of … market levels*", and then also refers to "*all payments made to Mrs N Hathi*" as falling into the same category, i.e. in excess of market levels.

317. The debate between the parties was about what these materials amounted to. GHL's case, as advanced by Mr Anderson KC, was that the original Table, and the figures in it, were put forward by Samit as part of an overall negotiation concerning the Equalisation Amount; that the figures were in effect a concession put forward on a pragmatic basis as part of an attempt to reach an overall resolution; and that that attempt having failed, he (and GHL) should not be held to the figures as a concession of what market levels of remuneration actually were. For that, argued Mr Anderson, one would need expert evidence as to relevant remuneration levels, but none had been put forward, and so the Court could not safely assume that it was starting from the right place.

318. I am not persuaded by this argument. I think the straightforward difficulty with it is the manner in which the figures were characterised by GHL's own solicitors in 2018, no doubt on instructions from Samit. The figures were put forward as representing *market levels of remuneration*, not as concessions put forward on a pragmatic basis without reference to what market levels of remuneration might actually be. Samit in his Table, although he used different terminology ("*Should have been*") was to my mind saying the same thing. That being so, it seems to me that Krishna, and the Court, are perfectly well entitled to take GHL's figures at face value, and to use them as evidence of what GHL itself has accepted are *market levels of remuneration*. Krishna does not seek to challenge those figures. It is content with them. That being so, I see no need for expert evidence. The figures Samit has himself put forward can be used as the base for calculating any excess.

319. That analysis also deals with the position of Nirmala Hathi. She was paid amounts rising to about £71,500 by the year ending 31 March 2017. The evidence was that she provided valuable support and assistance to the LBNS business, specifically spiritual support and organising prayers. The evidence of her activities was not challenged, and Mr Anderson KC invited me to accept that such services were important in the context

of a business like LBNS, given the make-up of its workforce. I fully accept that point, but it seems to me it is different to the question whether such services would typically attract a market rate of remuneration. The point which comes across clearly from the Blake Morgan letter is that they would not, because Blake Morgan treated all payments made to Nirmala Hathi as payments in excess of any recognised market level for the services she rendered. In doing so, of course, Blake Morgan were taking their lead from what Samit had originally said in his own Table, which likewise made no allowance for Nirmala in his "*Should have been*" section. In the circumstances, I would likewise make no allowance in remuneration terms for Nirmala's services, valuable though they undoubtedly were.

320. That takes care of issues (i) and (ii) above. Issue (iii) is a short, evidential point. Arun's evidence was that he agreed with Samit that they would receive the same remuneration. I have given the figures above. GHL's case was that these figures cannot credibly have been intended to represent the full remuneration due to Samit, whose role in running a substantial business was always going to be much more onerous than the role performed by Arun.

321. I accept Arun's evidence on this point, which he affirmed in cross-examination. I reject Samit's evidence. The challenge to Arun's evidence was that it was inherently improbable that Samit would have been content with the agreed figures as the permissible limit of his remuneration, without any possibility of a bonus, but I disagree. I find it entirely plausible that, in the context of LBNS, which after all was intended to be a merger of the Gowrie Healthcare and Colorama pharmaceuticals businesses, the main protagonists would have agreed parity in terms of their basic remuneration levels. Indeed, it seems to me that is what one would naturally expect, notwithstanding the different roles to be performed by them, and the necessarily limited public profile Arun was expected to have in light of the Rewind Suite. Neither Samit's original Table referenced above, nor the Blake Morgan letter, made any reference to bonuses being payable in addition to the salary levels identified. The only evidence pointing in the other direction comes from Samit, but as I have held, Samit was an entirely unreliable witness, and I attach no weight to the account he gave on this topic.

322. In short, on the topic of Hathi family remuneration, I accept that in calculating the value of the B Shares, an allowance will need to be made for excess amounts beyond the market remuneration levels identified in Samit's original Table and the Blake Morgan letter. Calculation of the precise figures can await the quantum stage, but I should say now that the figures put forward by Krishna's expert Ms Hart (a £3m excess up to 31 March 2018, excluding pension benefits of an additional £1.15m) appear persuasive, and the Court will need good reason to depart from them.

Alferez

323. The essential allegation by Krishna here was similar to that made in connection with SYRI: it was that the telesales business of Alferez, which represented a valuable business opportunity for LBNS, had been diverted by Samit and Govindji to their company, Gowrie Pvt., in 2012. Krishna argued that was contrary to the intended structure of the 2010 merger, which it said had always contemplated the telesales business of Alferez being transferred to LBNS. That did not happen and instead, between 2012 and 2021, Gowrie Pvt. charged fees to LBNS for telesales services totalling about £12.5m. That had been to the benefit of the Hathi family, and to the

detriment of LBNS and to Krishna as beneficial owner of the B Shares. Arun and Mahesh said this had all happened in secret: i.e., they both gave evidence that, until 2018, they believed Gowrie Pvt. to be a subsidiary of LBNS, which had been the plan all along.

324. GHL's position, in response, was that Arun was well aware of the transfer of the Alferez telesales business to Gowrie Pvt. which had taken place in 2012, and moreover was well aware at the time and subsequently that Gowrie Pvt. was owned by Samit and Govindji.

325. In terms of the legal question to be addressed, I think this allegation again raises the question of what Arun knew, and whether the circumstances of his knowledge amounted to acquiescence in something which would otherwise have been a breach of fiduciary duty by Samit and Govindji, such that it would now be unfair to permit Kirshna to complain about it.

326. The documentary evidence is again somewhat fragmentary. The parties each referred to a number of documents, both in cross-examination and in submissions, which they said supported their respective positions. The difficulty though is in constructing a coherent overall picture from these individual references. The difficulty is only compounded by fact that the key witnesses who gave evidence on the topic, i.e. Samit and Arun, are both unreliable, and so their oral evidence needs to be treated with real caution unless supported by the contemporaneous documents. It seems to me that in such circumstances, one again must fall back on the inherent probabilities.

327. I can summarise the evidence as follows.

328. Prior to the merger, Alferez – an Indian company – provided telesales services from India to Colorama. Alferez also had a separate export business. At the time, prior to the merger, Colorama held a 70% stake in Alferez. Other shareholders included a Mr Hansraj Patel, who owned 12.5%, and a Mr Chirayush Amin, who also owned 12.5%. Arun in his Witness Statement referred to Alferez being run by Hansraj and Akshat Patel, whom he described as his friends. He accepted in cross-examination that Akshat was a friend – I will need to come back to the significance of this below.

329. One question is how these pre-merger arrangements were intended to be affected by the merger structure, and specifically whether the intention was for the Alferez telesales business to be transferred within the newly formed LBNS Group. Mr Quirk KC said that *had* always been the intention, and Samit had thwarted it.

330. I was referred to a number of documents on this point. The picture which emerges is slightly ambiguous, but I think clear enough overall, and looking at the overall picture I reject Mr Quirk KC's submission.

331. I think the important documents are a Grant Thornton tax structuring paper from March 2010, and the Facility Agreement with RBS entered into by LBNS on 15 March 2010.

332. The Grant Thornton tax structuring paper contains the following description of a proposed "*Associated Transaction*" (emphasis added):

> "*As a separate transaction, we understand that 50% of two Colorama subsidiaries (PIF Limited and Alferez Limited) will be sold to the Hathi family trust for no consideration. These subsidiaries undertake the telemarketing and sales of the CPL trade, and their services will be sold to the Gowrie group post completion*."

333. I should make it clear that the reference here to "*the Gowrie group*" was to the intended joint venture vehicle and its subsidiaries – i.e., to what in fact became the LBNS Group.

334. The RBS Facility dated 15 March 2010 contained the following at cl. 16.13.2 (RBSIF is the RBS entity which was a party – RBS Invoice Finance Limited):

> "*RBSIF acknowledges that the Parent is currently considering the acquisition of Alverez and/or PIF. In the event that the Parent seeks the consent of RBSIF to the acquisition of Alverez and/or PIF or any of their respective assets, RBSIF agrees to consider such request in good faith …*".

335. It seems to me the overall intention described in these two documents is clear: that part of the Alferez business corresponding to its telesales business would be transferred to a Hathi family trust, and would continue to supply to the new joint venture company (in the event LBNS) the telesales services which Alferez had previously supplied to Colorama. I think that is clear from the tax structuring paper. However, the possibility of the telesales business being acquired by the newly formed joint venture company ("*the Parent*") was at least being *considered*. That is made clear by the Facility Agreement, which indicated that if the consideration materialised into a concrete proposal, then RBS – whose agreement might be necessary to the transfer - would assess any such proposal in good faith.

336. In submitting, as I think he did, that a firmer position had been reached in 2010, Mr Quirk relied on the following passage in his cross-examination of Samit, conducted by reference to the Facility Agreement:

> "Q. *'The Parent' was LBNS, wasn't it?*
>
> *A. Yes.*
>
> *Q. And they're correct, aren't they, that what was under consideration was the acquisition by LBNS of Alferez?*
>
> *A. Yes. Is this the agreed final version?*
>
> Q. *It's the version that has been disclosed*."

337. In my opinion, however, Mr Quirk KC was reading too much into what Samit said. Samit was agreeing only with the proposition that LBNS was *considering* the acquisition of the Alferez telesales business. He was not agreeing with the proposition that it was a certainty, only that it might happen. None of that is inconsistent with the idea that, in the meantime, the business would be transferred to a "*Hathi family trust*" and the relevant telesales services made available from that source, under an

outsourcing arrangement. That is the position described in the Grant Thornton tax paper, and indeed had been the position pre-merger, since Colorama's telesales needs had been outsourced to Alferez. Implicit in the fact that a transfer within the LBNS Group was only being *considered* was the possibility that it might never happen, and in fact it never did.

338. What, then, did happen about the telesales business, and what did Arun know about it? I have come to the view that, on the balance of probabilities, Arun *did* know from mid-2012 onwards that the telesales business was being conducted by Gowrie Pvt., and that he also knew that Gowrie Pvt. was owned by Samit and Govindji. I state those conclusions for the following reasons.

339. To begin with, although the detail of the arrangements remains obscure, it is clear that from about 2010 onwards Arun's friend Akshat took over management of the Alferez *export* business and improved its profitability. Arun himself also continued to be involved in the export business, and his evidence in cross-examination was that it was eventually transferred to him in 2016.

340. Meanwhile, Akshat also continued to be involved with the ongoing telesales business. The documents show that from November 2011 onwards he was engaged in setting up the company that came to be Gowrie Pvt., and well knew who the shareholders of that company were – i.e. Samit and Govindji. Arun himself was also involved in arrangements in July 2012 which led to the transfer of Alferez employees to Gowrie Pvt., and in later arrangements in August 2012 which led to the transfer of certain Alferez assets to Gowrie Pvt. By way of example:

    i) Akshat had an email exchange with Jahangir on 31 October/2 November 2011 about "*company incorporation expenses bills"*, in which Jahangir confirmed the ownership structure of the new Indian company – i.e., Gowrie Pvt.: "*Govindji Hathi has 2,500 shares and Samit 7,500. Total 10,000 shares of 1R each."*

    ii) On June 27 2012, Akshat emailed both Samit *and* Arun, attaching an agreement for the transfer of employees from Alferez to Gowrie Pvt., with a proposed effective transfer date of 1 July 2012.

    iii) An email dated 17 August 2012 sent by Akshat to Jahangir, but copied to a number of other recipients, including Arun and Samit, is headed "*Transfer of assets*". The email deals with the mechanics for a proposed transfer of assets from Alferez to Gowrie Pvt. It begins, "*Ref our discussions here, attached please find a list of assets which are to be transferred from Alferez to Gowrie [i.e.. Gowrie Pvt]*." The email then summarises certain proposed transfer values, and concludes, "*You may please go through the same and advise so we can make transfer entries and raise invoices.*"

341. It seems to me, based on these materials, that Arun and Mahesh did know that the Alferez telesales business was to be transferred to Gowrie Pvt., and also knew who owned Gowrie Pvt. Samit and Govindji had made no secret of that, and indeed Jahangir had told Arun's friend Akshat precisely what the ownership structure was to be. Akshat therefore knew that Samit and Govindji owned the telesales business he was working for and I think is very likely to have shared that information with Arun given their friendship and their ongoing working relationship in connection with the Alferez export

business. Akshat was not called to give evidence by either side, but it seems to me that would have been an entirely natural thing to happen, and I infer that it did.

342. In his submissions, Mr Quirk KC drew attention to certain other documents from about the same time, which showed Samit and others giving consideration to the telesales business being brought within the LBNS Group. These included an email from Grant Thornton dated 4 May 2012 referring to a desire "*to bring Gowrie India into the group, either as a direct subsidiary of Gowrie Holdings Ltd … or [LBNS]*", and then describing an intended workstream, involving tax advice to aid the decision "*on how to structure the transfer of Gowrie India into the Gowrie group.*"

343. I accept that such documents show the *idea* of a transfer being given consideration at the time, but they show no more than that, and the fact is that it did not happen. Moreover, just as Samit and Govindji had made no secret of their shareholdings in Gowrie Pvt., neither did they make any secret of the fact that there never was a transfer and that it was Gowrie Pvt. which continued to provide telesales services to LBNS. As Mr Anderson KC emphasised, payments to Gowrie Pvt. were openly disclosed in LBNS's published Accounts each year as related party transactions. In light of that, taken together with the other matters already mentioned above [340], I find it implausible that it was part of Samit's strategy to suppress from Arun the truth about how the Alferez telesales business came to be dealt with. I say that despite the reservations expressed elsewhere in this Judgment about Samit's behaviour. Be that as it may, the available evidence on this point is simply inconsistent with any intention to disguise what was happening.

344. In argument, Mr Quirk KC relied on two matters which he said pushed against that conclusion. One was that neither the 2013 nor 2016 Agreement contained any carve-out giving permission for GHL-related entities to conduct telesales services, in the way in which there were carve-outs for R&D activity by SYRI. I see that point but do not find it persuasive. It is understandable that a specific carve-out was negotiated for the proposed R&D activity, which was a new and important venture in 2013, but the telesales activity was already up and running by then and was nothing new, since it had previously been part of Colorama's own business model. I thus see the present Alferez issue as quite different to the question of the SYRI *clinicals* business, and given the lack of any permission relating to the former in the 2013 Agreement, see no basis for applying here the analysis on affirmation adopted in the context of the latter at [311(v)] above.

345. The further point Mr Quirk KC relied on was the fact that in Blake Morgan's letter of 17 December 2018 (referred to above at [315]), when dealing with the question of the Alferez telesales business, they did not say in terms that Gowrie Pvt. had acquired it, rather that LBNS had changed service provider in 2013. It is true that that is what they said, no doubt on instructions from Samit, and on this point his instructions seem to have been incomplete; but nothing much turns on it, because as I have already held (above at [341]) Arun was well aware of the transfers of staff and assets to Gowrie Pvt. in 2012, because he was involved in those transfers.

346. The upshot on the Alferez issue is that I reject Krishna's complaint that the Alferez telesales business was illegitimately diverted by Samit and Govindji to Gowrie Pvt. I consider that Arun was sufficiently aware of the relevant transfer of the telesales business, and sufficiently aware of the ownership structure of Gowrie Pvt., for his

continued acquiescence on the ongoing state of affairs now to bar any complaint being made.

347. There may be a separate question whether the amounts paid to Gowrie Pvt. represented fair market value for the services rendered, or are otherwise open to challenge in terms of their quantum. But such matters were not ventilated before me and must wait to be dealt with, if at all, as part of any quantum exercise.

Loans to Hathi Family Members

348. In addition to the loan to SYRI which was written off (see above at [99]), it is common ground that over time LBNS made loans to a number of other Hathi family companies. In Krishna's submissions, this activity was relied on essentially for two purposes: (i) as another self-standing example of unfair prejudice (i.e., the making of loans to connected parties without proper authorisation), and (ii) as part of the overall case that it was untrue for Samit to have said to Arun that LBNS was in a poor financial state and was not in a position to pay dividends (see above at [204]-[229]), because it was Samit himself who had depleted LBNS's cash reserves by making loans to members of his own family.

349. I do not think I need to deal with point (i) because the question of unfair prejudice is now conceded, and in any event I am independently satisfied on the basis of my findings above that there has been unfairly prejudicial conduct. As to point (ii), I have expressed above my conclusions on the issue of Samit's alleged misrepresentation concerning LBNS's financial state (see again [204]-[229]).

350. What remains, it seems to me, is the treatment of the loans to Hathi family members (or their companies) for valuation purposes. Any points of detail on this question must wait for any valuation hearing. I think Mr Anderson KC is correct that, as a starting point at any rate, loans made by LBNS, even if to Hathi family members, are value neutral in balance sheet terms – i.e., if they are outstanding then they will be assets of LBNS, and can be taken account of in the overall valuation exercise. It may be that issues arise about the terms of any such loans, and whether (for example) they were made on arms-length commercial terms, and if not then whether adjustments should be made accordingly in valuing the B Shares. But such matters have not been explored before me and will need to be resolved, if they arise at all, on another occasion.

Miscellaneous Payments

351. The issue here is essentially whether certain miscellaneous payments should be treated as for the account of Krishna alone or of GHL alone, and appropriate adjustments then made (as needed) in the exercise of valuing Krishna's shareholding.

Krishna

352. The disputed payments said to be for Krishna's benefit are set out Annex 1 to Krishna's Opening Factual Narrative. Among these are the "*Andy.Baggy*" payments. I have already dealt with these above (see at [69]-[82]), and indicated they were treated as for Krishna's account and thus added to the ongoing Equalisation Amount. I see no good reason to interfere with that allocation, which Arun and Samit agreed at the time.

353. As to the remaining payments under this head, Mr Anderson KC in his written Closing Submissions suggested they were better dealt with in any later phase of this litigation. I agree, and so will make no further comment about them.

GHL/Hathi family

354. The disputed items here are various payments for professional services made by LBNS, but which Krishna alleges were in reality for the benefit of the Hathi family or associated companies. The details are set out in an Amended Annex B to the Petition. As I understand it, the remaining issues in dispute all concern the items in the Table forming the second part of Annex B, under the heading "*GLL Tax Computations*". Taking the disputed items in turn, by reference to the rows in relevant Table, I find as follows:

i) Row 1 - There are 3 points. (a) February 2016 payment to Grant Thornton: I accept Mr Quirk KC's submission that this payment was likely concerned with the treatment of trademark royalties made by LBNS to LGF (see above at [100]). Since such royalties were part of a hidden pattern of extracting value from LBNS to the detriment of Krishna, I agree that an adjustment will be needed in the exercise of valuing the B Shares which reverses out the cost of the Grant Thornton advice. (b) April to June 2015 Payments to CVS: I think the same logic applies here, and so an appropriate adjustment will be required. The costs relate variously to the drafting of the trademark royalty agreements (above at [100]), and to the transfer of the MHRA licences to SYRI and to the SYRI licence agreement (see [95]-[96] above). These again were all part of the same pattern of extracting value from LBNS to the detriment of Krishna, and the valuation of Krishna's interest in the B Shares should not be affected by the associated costs. (c) January to June 2012 Payments to CVS: The relevant advice has not been disclosed. If it was advice to LBNS, there would seem to be no good reason why it could not be disclosed to Krishna, which is a shareholder. The non-disclosure gives rise to the inference that it was advice to another party, and so again, an adjustment will be needed in any valuation of Krishna's shareholding.

ii) Row 2 - There are two points. (a) May 2014 to January 2015 payments for pension related services. The picture here is a little unclear, but Samit's unchallenged evidence was that these payments were for general employee pension related services. That seems plausible evidence and, despite my reservations about Samit's character and reliability expressed elsewhere in this Judgment, I accept it. (b) July 2013 payment to One E Tax Ltd. Samit in his evidence accepted that this payment was partly related to remuneration to him, Govindji and Alpa. I have already determined the questions related to Hathi family remuneration in favour of Krishna. I think it follows that these costs, insofar as they relate to levels of remuneration paid to Hathi family members *above* the market rates referenced above (see at [314]-[322]), will also need to be the subject of an appropriate adjustment in valuing the B Shares.

iii) Row 3 - February to June 2013 payments to CVS law: The advice has not been disclosed, and so the same logic applies as under (i)(c) above. Additionally, as Mr Quirk KC pointed out, the timing in relation to other activities ongoing in this same period suggests the advice is likely to have been concerned with a

possible plan to wind-up LBNS, which Arun was never told about. Again therefore, an appropriate adjustment will be needed.

iv) Row 6 - November 2012 Payment to PwC: This advice related to a possible restructuring of GHL's various shareholdings and commercial interests. These were not, it seems to me, proper expenses of LBNS, and Samit accepted in cross-examination that the advice was really advice for the benefit of GHL. An adjustment will need to be made on valuation.

VII. The Petition: Discretion and Remedies

General Points

355. At a high level, as I have already noted, the question of remedy is agreed between the parties, because GHL has conceded that relief in the form of a buy-out order should follow, albeit on the narrow basis that rescission of the 2016 Agreement was improperly resisted after KHL had become registered as a shareholder of LBNS in 2018.

356. It follows from my findings above that there were also, in my opinion, a number of other acts of unfair prejudice which occurred before 2018 – principally, the misrepresentation by Samit which induced the 2013 Agreement, and the breaches of fiduciary duty by Samit and Govindji implicit in matters such as the diversion of the SYRI clinicals business without proper authorisation (above at [95]-[97]) and the extractions of value from LBNS which were not reflected in calculation of the Equalisation Amount and which Samit misleadingly sought to characterise as mistakes (above at [145]-[146]).

357. GHL's concession makes it strictly unnecessary for me to have regard to those instances of unfair prejudice in order to justify granting a remedy, but had it been necessary to do so, I would have held that they too provided a basis for the grant of relief, notwithstanding that they occurred in the period between 2010 and 2018, when Krishna had only a beneficial interest as shareholder in LBNS under a secret trust of which GHL was trustee.

358. To start with, it seems clear that the Patel v. Mirza approach to illegality is also relevant to the question whether a trust settled for an improper purpose should be recognised (see Lewin on Trusts, 20th Edn., at para. 6-031). Here my view of it, essentially for the reasons already explained above at [297], is that the balance is in favour of giving effect to the arrangements the parties entered into between themselves, because allowing a rebalancing between them does not obviously affect the position of third parties, and to refuse to do so would produce disproportionate and unfair results. To the extent necessary, therefore, my opinion is that the Court should recognise the trust arrangement which arose in 2010.

359. What though of the point that Krishna was not in fact a registered shareholder of LBNS until 2018? The same point arose, on similar facts, in Lloyd v. Casey [2002] 1 BCLC 454, a case under s.459 Companies Act 1985. There the Petitioner, Mr Lloyd, who did not wish his shareholding in the company to come to the notice of his employer in a competing business, disguised his shareholding by means of an agreement under which his shares were held on trust by the other shareholder, Mr Casey. Only later did Mr Lloyd come to be registered as legal owner of the shares, and he sought to rely on

matters said to constitute acts of unfair prejudice which had occurred prior to him becoming the registered owner. Mr Casey argued that Mr Lloyd should not be entitled to do so, because at the time it occurred, the conduct complained of was not prejudicial to his interests as a member. This unmeritorious argument was rejected by Ferris J at [50], who held that the words in s. 459 ("*the company's affairs are being or have been conducted in a manner which is unfairly prejudicial …*" – my emphasis added) were wide enough to capture the conduct complained of, and did not require the Petitioner to have been a registered member when the conduct took place.

360. Mr Anderson KC suggested a different result in the present case, relying on Re Bateson's Hotels (1958) Limited [2013] EWHC 2530 (Ch). There, a shareholder who had become the registered holder of shares sought to rely on alleged acts of mismanagement during an earlier period when he had been only the beneficial owner of the shares under a family trust. The claim for unfair prejudice was struck out because the acts he later sought to complain of had been the subject of unanimous consent by all the shareholders at the time, including the trustees of the family trust. Mr Anderson KC said the same principle applied here, and there was no prejudice when (for example) the extractions of value took place, because the only shareholder at the time was GHL, which approved of the extractions and benefited from them. I do not see how that can be the correct analysis, however. Its logic would exonerate GHL from any act of wrongdoing, however egregious and however damaging to the interests of Krishna, from which it benefited. I think the present case very different to Re Bateson's Hotels, because there the assent of the family trust to the alleged acts of mismanagement, which effectively bound the Petitioner, was the product of the independent and legitimately formed judgment of the trustees. Here, GHL's willing receipt of the fruits of Samit's breaches of fiduciary duty and deceptions is different: it is itself part of the wrongdoing complained of, and so GHL's assent cannot in my judgment preclude Krishna from obtaining relief if it is otherwise entitled to it.

361. There is also a wider dimension to consider, which concerns whether Krishna should be granted relief as a matter of the Court's discretion. Again, the focus here it seems to me is on the Rewind Suite and on the admittedly improper purpose for which it was implemented.

362. GHL's position was that although the Rewind Suite should not prevent an order being made for it to acquire Krishna's shares, it should have an impact on the nature of any such order. Mr Anderson KC argued that because the purpose of the Rewind Suite was really to protect Krishna from an attack on the B Shares by the creditors of Colorama, and because it was those creditors who had been misled and might wish even now to bring claims against Krishna, as might the appropriate public authorities, any amounts paid for the B Shares should be paid into Court and ring-fenced until the position became clear. Further, Mr Anderson said that since Krishna's actions had also exposed GHL and LBNS to the risk of claims by third parties, Krishna should be required to provide an indemnity to those parties as part of the overall package of relief in relation to the proposed sale of the B Shares.

363. Arun on the other hand rejected the basic premise of these submissions, namely that he was the principal architect and beneficiary of the Rewind Suite. His case was that the real wrongdoer was Samit, who had taken the opportunity presented by Colorama's liquidation to engineer the Rewind Suite, because it suited his long term purposes to have Arun (and Krishna) out of the way. Mr Quirk KC also submitted that Colorama's

creditors had not in fact been misled by the Rewind Suite, because although Arun had sought to rely on it, when he was sent a letter before action in October 2010 it made no reference to the Rewind Suite, and when Mahesh was interviewed in January 2011 he expressed the view he was still a shareholder (see, generally, above at [63]-[64]). Mr Quirk KC said that Colorama's creditors had thus not been taken in.

364. I find the debate over who was the principal instigator of the Rewind Suite is a rather sterile one. For one thing, the truth of it in my view is that neither side has been entirely candid about how the Rewind Suite came into being or about its overall effect. I think that Arun, for his part, gave only a partial picture of his interactions with Baggy (see above at [135]-[138]), but in my judgment so did Samit, who was in contact with Baggy himself before Colorama's administration and wanted "*our own guy*" (in the event, Mr Andronikou) to be appointed (see above at [187]). For another thing, I also think it perfectly plain that, whoever may first have thought of it, both parties went along with the idea of the Rewind Suite, which quickly developed into a joint enterprise, from which they both benefited for a period of about 8 years. Indeed, as I have mentioned above, Samit not only sought to rely on the Rewind Suite for his own and GHL's benefit during the Trust Proceedings, but persisted in doing so even after Arun had come clean. In such circumstances, and looking at matters in the round, I find the exercise of blame-shifting between the parties somewhat unseemly and unnecessary.

365. I think it also diverts attention away from a more troubling and fundamental point.

366. By this I mean that although I see some force in Mr Quirk KC's submission that Colorama's creditors were not taken in by the Rewind Suite (see [363] above), I do not think I can be clear about that, because quite apart from the picture presented by the documents making up the Rewind Suite, and quite apart from Balsara & Co's apparent scepticism about what they were told by Arun, there was also a broader pattern of ongoing activity which included the "*Baggy.Andy*" payments (see above at [69]-[82]) and which culminated in the settlements reached with Colorama's Liquidators in 2014.

367. As to these broader issues, I am conscious again of Mr Anderson KC's submission that the Court should be wary of making findings about serious matters which may impact on the reputations of individuals who were not represented before the Court (principally, Baggy and Mr Andronikou). At the same time, however, I think I have to say that the circumstances surrounding the "*Baggy.Andy*" payments are highly suspicious, and in the absence of any clear contrary explanation – and none has been forthcoming from either Arun or Samit – are suggestive of wrongdoing in connection with the ongoing liquidation of Colorama, which the creditors of Colorama cannot have known about at the time but which both Arun and Samit *did* know about. They were both involved in the making of the "*Baggy.Andy*" payments, and both benefited from the settlement agreements with Colorama's Liquidators which the payments may have helped to bring about.

368. How then to approach this situation as a matter of discretion? I have come to the following conclusions.

369. First, I accept that I am not in a position to make findings about the "*Baggy.Andy*" payments, about the arrangements under which they were made, or about what effect, precisely, they may or may not have had on the outcome of the Colorama liquidation. All I have, as it seems to me, are justifiably serious concerns that there may have been

wrongdoing in the course of that liquidation which may have had an impact on its outcome. Likewise, there are likely to have been other respects in which third parties (such as LBNS's auditors and bankers) were misled into thinking that GHL was the sole shareholder in LBNS between 2010 and 2018, whereas in fact there was another shareholder whose interests were kept hidden.

370. Second, despite what I have said above, it does seem to me clear that, whatever was going on, both Arun and Samit were implicated in it. They were perhaps implicated in different ways, and may have had differing levels of knowledge, but both were certainly involved in the making of the "*Baggy.Andy*" payments, including the mechanism adopted of International Law Consultants invoicing Keycircle, and Keycircle then providing invoices bearing false descriptions to LBNS for payment (see above at [77]-[82]).

371. Third, it is open to the Court to refuse relief of any kind to a Petitioner which has been involved in illegality or wrongdoing. That said, the settled approach seems to be that, in order to act as a bar to relief, the illegality or wrongdoing must have had an immediate and necessary relationship to the unfairly prejudicial conduct complained of. This follows from Richardson v. Blackmore [2006] B.C.C. 276 in which the Petitioner was granted relief (an order for the buy-out of his shares), even though at an earlier stage, when he had been seeking to acquire the shares of the majority shareholders, he had forged a letter from an allegedly interested third party in order to support a low valuation figure for those shares. On the relevance of the forgery to discretion, Lloyd LJ at [55] said that the Judge was:

> *"… right to disregard it in relation to the question whether to exercise his discretion to make any, and if so what, order under s. 461. The forgery itself had no immediate or necessary relation to the circumstances upon which the petitioner's entitlement, or otherwise, to relief depended. At best it was an episode in the background history …* ."

372. Fourth, I am persuaded here that at least some of the matters relied on as constituting unfairly prejudicial conduct were sufficiently removed in time from the Rewind Suite that, viewed in terms of the overall chronology, the Rewind Suite was no more than an episode in the background history by the time they occurred. I think that is certainly true of the act of unfair prejudice conceded by GHL (i.e., refusing to accede to rescission of the 2016 Agreement in the period after Krishna became registered as a shareholder), because by then, the effects of the Rewind Suite had dissolved. Although the point is more difficult, I think it is also true of the other acts of unfair prejudice referenced above at [356], including Samit's misrepresentation inducing the 2013 Agreement. The point is more difficult because although such matters were all concerned with the relationship between GHL and Krishna, it was a relationship (as joint shareholders in LBNS) which at the time was being disguised, as part of an overall strategy of managing the Colorama liquidation in a favourable way for the benefit of both GHL and Krishna. Nonetheless, it is also true that the position as between GHL and Krishna is something different than the relationship they (or LBNS) had with Colorama and Colorama's creditors. Further, it is true that refusing relief at this stage to Krishna would result in Arun and Mahesh being locked into a business run by Samit (who they understandably have no remaining confidence in), and would also result in Samit and his family profiting from their historic wrongdoing. I therefore conclude that

some form of relief *should* be ordered, but I agree with Mr Anderson KC's general proposition that it should take account of the possibility of Colorama's creditors (or others) wishing to take their own action. To put it another way, I do not consider it contrary to the interests of justice for machinery to be put in place now which aims to resolve the issues as between GHL and Krishna, as long as nothing results from that which might prejudice the possible claims of third parties arising from the historic effects of the Rewind Suite and the circumstances surrounding it.

373. Fifth, I have considered, but discounted, the possibility of a more drastic remedy, such as an Order for the winding-up of LBNS. I was impelled towards this view by my reservations as to Samit's character and his fitness to act as a company director. In the end, however, neither side advocated this course of action, and in the balance against it is the fact that LBNS is a substantial company with an active workforce and a number of interested stakeholders, such as its bankers, who would be affected by such an Order but who have not been before the Court. The case is therefore distinguishable from cases such as Re Full Cup International Trading [1995] B.C.C 682, where a winding-up Order was suggested as the appropriate course, but where the company was dormant and neither side had any use for it as a going concern.

374. Sixth, I do not propose either (1) to make any immediate Order for the payment of funds due to Krishna into Court, or (2) to require Krishna to give an indemnity as a condition to any buy-out order. As to (1), the reason is that there is no immediate prospect of any payment being made. Directions will now need to be given for a valuation exercise. The point at which Krishna will actually become entitled to any payment from GHL is some time away. Thus, I see no need for any Order to be made at this stage. The matter can be considered in the future, depending on the reaction (if any) of affected third parties (including in particular Colorama's former creditors) to this Judgment. As to (2), I repeat the observations made at [364] above. In my opinion the Rewind Suite and its effects were the product of a joint initiative which both Samit and Arun supported, and from which both GHL and Krishna benefited. I therefore see no proper justification for Krishna being required to indemnify GHL against the effects of their joint wrongdoing.

375. Seventh and finally, I think that in the circumstances, the appropriate course to take is to encourage consideration by possibly affected parties of the matters of concern addressed in this Judgment arising from the Rewind Suite and the circumstances surrounding it. I think copies of this Judgment should be provided to parties who may have an interest. I will consider submissions as to who such persons may be, but they are likely to include any members of the former committee of Colorama's creditors who are presently identifiable, and LBNS's auditors and bankers. It may be that some or all of such parties are already aware of the matters of concern I have drawn attention to, and are content to take no further action. If so, then so be it, but it seems to me they should be given an opportunity to consider their positions further, and to take such action as they may deem appropriate. Beyond that, I propose to make no specific further provision at this stage to deal with the possible positions of interested third parties, but further directions may be necessary in due course if some or all of them choose to take action.

Specific Points

376. Certain other matters relevant to the question of remedy can also be dealt with at this stage.

Valuation Date

377. The parties are agreed that, for the purposes of sale, the B Shares should be valued as at the date of presentation of the Petition – i.e., 25 June 2019. I am content with that approach.

Valuation Methodology

378. This question will need to be the subject of more detailed debate at a future stage, but I pause here to mention one point, which is the nature of the adjustments that will be needed to take account of certain of the matters mentioned in this Judgment.

379. The position is clear in relation to some points. Most importantly, my conclusion as regards the payments made to Colorama's creditors has the result that the relevant amounts should be added to the Equalisation Amount. Likewise, I think my conclusion on the issue of "*Gowrie Accruals*" (above at [303]) must result in an adjustment to the Equalisation Amount (since this is an addition to the NAV of GLL, and that is a component in the calculation of the Equalisation Amount). On the other hand, my conclusion as regards the treatment of the SYRI *clinicals* business (above at [304]-[312]) results in a different form of adjustment, in short that the SYRI *clinicals* business should be treated as forming part of the LBNS balance sheet.

380. Some other matters are perhaps not so straightforward. I have in mind in particular (i) the matters conceded by GHL (see [107] above), which Samit said should have been treated as deductions from the Equalisation Amount but were excluded by mistake, (ii) the excess remuneration paid to members of the Hathi family, in light of my conclusions on that topic (see above at [322]); (iii) the miscellaneous payments dealt with at [351]-[354] above; and (iv) the other individual payments mentioned in GHL's written Closing Submissions at para. 9(iv). Should these matters be dealt with by means of adjustments to the Equalisation Amount, or in some other way?

381. I prefer not to state any final conclusion on this point, which was rather undeveloped in submissions at trial. I think it better to leave over for further consideration precisely what form of adjustment or adjustments will most effectively provide a fair outcome.

382. I will however make one observation. This is that one of the questions flagged in submissions was whether there had been an informal agreement between GHL and Krishna for value adjustments between the two of them to be addressed by means of additions to, or deductions from, the Equalisation Amount, whether or not such adjustments fell strictly within the parameters of the Equalisation Agreement.

383. I accept that there was an informal agreement of some type. We know that for certain because, for example, the "*Baggy.Andy*" payments were treated as additions to the Equalisation Amount by agreement between Samit and Arun (see above at [82]). Whatever the scope of such informal agreement, however, it does not seem to me it extends to the treatment of payments made for GHL's benefit which Arun did not know

about. He did not know about the payments for GHL's benefit mentioned at [380(i)] and [380(ii)] above, and likely others in [380(iii)] and [380(iv)] as well. In such circumstances there is a question whether the proper and fair way of adjusting for such matters is by way of deduction from the Equalisation Amount or not. That may be correct, but there may be other (and fairer) ways of adjusting for them in any valuation. I do not think it right to make any final determination at this stage, and will invite further submissions on the point in due course.

Quasi-Partnership

384. Krishna seeks a finding that its shareholding in LBNS should be valued on the basis that LBNS is a quasi-partnership. The relevance of such a finding would be to support a valuation of the B Shares on a *pro-rata* basis, without any minority discount. I explained the issue as follows in my Judgment in Isaac v. Tan (Re Cardiff City Football Club (Holdings) Limited) [2022] EWHC 2023 (Ch), at [136]:

> "*Although the categories case in which a pro rata valuation is applied are not closed – the overriding objective in every case is to arrive at a remedy which is fair, and so each case must turn on its own facts – the paradigm is the quasi-partnership case (see the discussion of Ebrahimi v. Westbourne Galleries, above). The special characteristic of such cases is that the parties' business relationship, although carried on in corporate form, has many of the same incidents as a partnership; and it is thought to be fair, where the basis of the relationship has effectively broken down because of unfairly prejudicial conduct on the part of the respondent, to allow the departing quasi-partner to recover in full the rateable value of his share of the business, in the same way that he would have done in a partnership case if the partnership business were sold as a going concern: see, e.g., CVC Opportunity Equity Partners Ltd v. Demarco Almeida [2002] UK PC 16, [2002] B.C.C 684 at [40], per Lord Millett, as referenced in Shanda Games Ltd v. Masco Capital Investments Ltd [2020] UKPC2, [2020] B.C.C 466 by Lady Arden at [39]*."

385. On the quasi-partnership point, however, I disagree with Krishna's submission. I do not consider LBNS to have been a quasi-partnership. As noted in the quotation above, the paradigm case is Ebrahimi v. Westbourne Galleries [1973] AC 360, but there the parties' business has previously (prior to incorporation) been conducted as a partnership; and that being so, there was said to arise, at the point of incorporation, an agreement or understanding binding in equity that the business would be carried on in the same way as before – notwithstanding the new corporate form – with both former partners participating in management. That seems to me to be some way removed from the present situation, where there was no prior partnership; where the background was not the continuation of a prior relationship but instead the creation by a merger of a new one; and where the new structure, contained as it was in the detailed 2010 Transaction Documents, reflected the product of a hard fought commercial negotiation which sought to balance the competing, and different, interests of the parties at the time (e.g. by means of the mechanism in the Equalisation Agreement and the Articles described above at [26]-[27]). Given all that, I see no parallel with cases like Ebrahimi, and no

basis for implying into this corporate structure any agreement binding in equity that it would operate in a manner akin to a partnership. There was a trust arrangement in place, certainly, after the Rewind Suite came into effect, but as I see it that is something different.

386. The result is that I am not persuaded that one can justify a rateable valuation of Krishna's B Shares on the basis that it was a participant in a quasi-partnership. That is not to say it may not be justified on some other basis (see, again, the quotation from Isaac v. Tan above), but argument on such points must come at a later stage.

VIII. The Keycircle Proceedings

387. The outcome of the Trade Debt Claim (see [128(i)] above) is that Keycircle owes a principal amount of £249,486.82 to GLL, together with ongoing contractual interest.

388. The only remaining issues are in connection with the Loan Claim. The questions are (i) whether the creditor in respect of the relevant loan is Keycircle or Arun; (ii) whether the debtor is GLL or LBNS (which also affects whether Keycircle has a set-off against GLL in respect of the Trade Debt Claim); (iii) whether interest is still accumulating and if so at what rate; and (iv) whether under its terms the relevant loan (whoever it is due to) is presently repayable.

389. In his submissions for LBNS, Mr Harrison argued that all these questions were answered by the 2016 Agreement. I have set out Cl. 8 above (see at [105(v)]). Relying on this Mr Harrison submitted that Arun was the creditor, LBNS (referred to as "*the Company*" in cl. 8) was the debtor, interest was not accumulating (see cl. 8.1), and that the loan was not repayable, because there had been no relevant decision by the LBNS Board (see cl. 8.3).

390. This submission obviously ran into some difficulties given Mr Anderson's acceptance on behalf of GHL that the 2016 Agreement should be rescinded. Mr Harrison persisted nonetheless. He made the point that the 2016 Agreement was made between five parties – GHL, Krishna, LBNS, Arun and Mahesh – and while Mr Anderson's concession might have resulted in its rescission as between GHL and Krishna, cl. 8, which dealt with the position as between Arun and LBNS, was a free-standing provision affecting those two parties, untainted by any relevant misrepresentation, and therefore survived the rescission. He further argued that Arun had not in fact sought rescission in his own name.

391. I am not persuaded by these arguments. To begin with, it is a settled principle that a misrepresentee can only rescind the whole contract and not part of it (see Chitty on Contracts, 24th Edn., at 9-135, and the authorities there cited). In light of GHL's concession I find it very difficult conceptually to see that any part of the 2016 Agreement can survive, unless such part is capable of being seen as a separate and distinct agreement in its own right. I do not see how cl. 8 is divisible in that way.

392. As I have explained above (see at [104]), the 2016 Agreement was intended to reflect a general reckoning between the shareholders in LBNS, and to put their overall relationship on a new footing. It is referred to as a "*Shareholders Agreement*", and its purpose was to regulate the relationship between the shareholders in LBNS in all relevant respects. LBNS was a party as the joint venture company, but the main parties

were the shareholders, GHL and Krishna, and Arun and Mahesh were tied in because they were the individuals standing behind Krishna. In my opinion, given its nature, the 2016 Agreement has to be looked at as an overall package. I find it quite artificial to suggest that, if the rest of it falls away, then cl. 8 can continue to stand in isolation. It contained what on the face of it was a substantial compromise by Arun, i.e., that interest would stop running on the debt which (according to cl. 8 at any rate) was due to him, and I think it must be correct to regard that concession as having been made as part of the overall package of new shareholder rights reflected in the 2016 Agreement as a whole. It cannot continue to stand if the overall structure of which it was part is to be swept away, as the shareholders agree it should.

393. In any event there is a further point, which is that I do not think Mr Harrison was correct to say that cl. 8 was untainted by any relevant misrepresentation. Cl. 8.1 refers to the "*Arun Patel Debt*", but cl. 8.2 also refers to the "*Samit Hathi Debt*". The "*Samit Hathi Debt*" is in fact the same £4.5m of additional funding Samit said the Hathi family had provided, plus interest. As I have already held, however, Samit's representation that £4.5m of additional funding had come from the Hathi family was untrue (see above at [230]-[258]). So even looked at in isolation, it seems to me cl. 8 is liable to be set aside because that misrepresentation was continuing in 2016, and the truth of it only came to be revealed much later, after Samit's forgery of LBNS's bank statements was finally exposed (see above at [119]-[121]).

394. As to Mr Harrison's point about Arun not having sought rescission in his own name, I do not see that that matters. If it is right that cl. 8 is not divisible, then it falls away with everything else. Even if it is divisible, I have found that Arun was lied to in relation to matters directly relevant to the operation of cl. 8. It would be completely artificial to deny him the remedy of rescission in such circumstances on the basis that he had pressed for it in the pleadings only on behalf of Krishna and not on specifically on his own account.

395. Mr Harrison had another point, based on the following passage from Snell's Equity (34th Edn., 2021), quoted in his Written Closing:

> *"Rescission is barred where it would defeat rights which third parties have acquired without notice of the circumstances entitling the claimant to rescind. Accordingly, while there is no special difficulty in rescinding a multipartite contract where all the other parties are implicated in the wrongdoing, there can be no rescission where only one of the parties whose rights would be destroyed is innocent."*

396. Relying on this principle, Mr Harrison objected to the unfairness which would arise in this case if LBNS's rights, which included the benefit of the concession in the 2016 Agreement that interest would cease to accrue, were set aside.

397. I see two problems with this objection. The first is that the proposition stated in Snell is one about the remedy of rescission being barred. But I did not understand Mr Harrison to be saying here that rescission of the 2016 Agreement should be barred. Instead, he wanted Mr Anderson KC's concession to stand, but with a carve-out for Cl. 8. I do not see anything in the passage in Snell which supports that sort of pick-and-mix outcome. On the contrary, it seems to me to be dealing with the practical effects

of the fact that rescission is an all or nothing remedy. The second difficulty is that Mr Harrison's submission assumes LBNS to be an innocent party. In my judgment, it was not innocent. Samit was a director of LBNS at all material times, and obviously a controlling individual within LBNS. Insofar as attribution is an issue, I see no difficulty in attributing to LBNS Samit's conduct in misrepresenting the source of the £4.5m additional funding he lied about, because in the context of cl. 8 of the 2016 Agreement that lie was designed to bring a benefit to LBNS, i.e., Arun's concession that interest would stop running on the amount stated to be owing to him.

398. It follows from the above that the answers to the questions arising on the Loan Claim cannot be found in the 2016 Agreement. We must look for them elsewhere. My conclusions are as follows.

399. First, as to the identities of the creditor and debtor, I was referred by both sides to various items of correspondence which overall presented a somewhat inconsistent picture. This is not surprising given the erratic and informal way the parties managed their affairs. In such circumstances, it seems to me the correct approach is to step back from the detail and look at the overall picture in a common sense way, in order to try and identify what the nature of the agreement was when the funding was first made available.

400. I have mentioned above (see at [52]) that this was part of a wider initiative pursued by Samit in late 2010 and early 2011, at a time when LBNS was facing a funding crisis given the fallout from the 2010 merger and the Colorama liquidation, including the cashflow pressures arising by having to make funds available to pay Colorama's creditors.

401. It was in those circumstances that Arun spoke to his brother Girish. I have already explained the outcome above at [232], but to summarise, via their company Keycircle Limited they raised some £650,000 from the sale of a property in Walthamstow. This was then made available to GHL's subsidiary Laxmico. Just under a year later, in March 2012, just before the end of LBNS's financial year, GLL (GHL's other subsidiary) paid back £650,000 to Keycircle. A few days later, however, Keycircle then paid a total of £600,000 to London Pilsner Limited, owned by Samit's uncle Bharat. This was used by London Pilsner to fund (in part) the repayment to Ironcorp of funds it had made available to support LBNS.

402. Looking at the substance of it, my opinion is that these events reflected an agreement under which *Arun* would make sums available to *LBNS*. That seems to me to make sense, since it was Arun who – via Krishna – was the investor in LBNS, and the crisis being addressed was an LBNS funding problem arising out of the merger Arun had been responsible for orchestrating. I think the proper way of characterising it in legal terms is that he reached an agreement with Girish which would allow the Keycircle property to be sold and the proceeds of sale made available to him (Arun) to assist with the funding of his new business, LBNS. I think that view of things is also consistent with the way the funds, when made available, were then utilised. They appear first to have been used to provide liquidity within the LBNS Group as a whole (i.e., they seem to have been treated as part of an overall fund used both by Laxmico and GLL), and then later, when passed back through Keycircle, were used to repay the funding to LBNS made available by Mr Mehta's company, Ironcorp.

403. I think this interpretation is borne out by later events. In particular, the loan did not feature as an asset in Keycircle's accounts, and perhaps more significantly, when Arun later came to demand repayment in January 2018, his demand letter was sent to LBNS on letterhead in the name of "*Arun Patel*", and read as follows (emphasis added):

> "*I refer to the loan of £739,753 made by me to Laxmico Limited/Laxmi BNS Holdings Limited. This loan is payable on demand.*
>
> *I hereby demand that you repay the £739,753 loan to me immediately.*
>
> *Please contact me and I will give you the details of the bank account into which the payment is to be made.*
>
> *Yours faithfully,*
>
> *Arun Patel*"

404. When asked about this letter in cross-examination, Arun responded by saying, "*Oh yes, that's on behalf of Keycircle*." But on its face it was not, and I think that in giving that evidence Arun was trying to fit his story to the outcome he wanted to achieve. At the time, in January 2018, Arun was not suggesting Keycircle was owed anything. It was only later in about October 2018, after GLL began chasing Keycircle for payment of what became the Trade Debt, that Arun came to press the idea that it was Keycircle that was the creditor in respect of the loan. That was not the characterisation adopted before then, including in the 2016 Agreement, although of course that is now rescinded.

405. In light of these matters, my conclusion is that Arun is the correct creditor in respect of the loan, and LBNS the debtor.

406. As to interest, since the 2016 Agreement is swept away, it follows that the arrangement subsisting prior to then is resurrected. It is common ground that interest was to accrue at 5.5% per annum. In my judgment, that remains the position and interest continues to accrue at that rate.

407. Finally, as to whether the loan is presently repayable, Arun's written evidence for trial was that he agreed the following with Samit in 2012:

> *" … instead of the loan having to be repaid as soon as possible (which was the initial oral agreement between us), it was to be repaid when LBNS could afford to do that and again I accepted that …"*.

408. It seems to me that must remain the position. That gives rise to the question whether repayment is in fact due. I will not determine that point in this Judgment. Keycircle's submission was that it is, but the argument was put very shortly on the basis that LBNS has sufficient cash. That may well be the correct analysis, but the point was not addressed by LBNS and deserves some further consideration. LBNS's point was that no remedy at all should follow because Arun is not a named Claimant, and so cannot obtain judgment in his own name. I will need to hear some further submissions about

that. It would be a very unattractive idea to suggest that Arun must now start new proceedings. I very much hope the parties will be able to reach some accommodation which avoids that, or alternatively make proposals for the efficient disposal of any residual questions relating to the Loan Claim.

IX. Overall Conclusion & Disposition

409. I will allow the Petition on the terms described above, which include a declaration that the 2013 Agreement be rescinded. An Order will be made for the acquisition by GHL of Krishna's shareholding in LBNS accordingly, the relevant valuation date to be the date of the Petition.

410. As to the Keycircle Proceedings, The Trade Debt Claim succeeds. In light of the findings made above in connection with the Loan Claim, I will need to hear further submissions from the parties as to how that claim is to be dealt with.

411. I will need assistance from counsel in drawing up a form of Order which properly reflects the findings in this Judgment. I am extremely grateful to them and to the parties' solicitors for their efforts so far in dealing with this most difficult and challenging case.