Neutral Citation Number: [2021] EWHC 1119 (Comm)

Case No: CL-2019-000023

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2021

Before :

MR JUSTICE JACOBS

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Between :

(1) GLOBAL DISPLAY SOLUTIONS LIMITED
(2) GDS TECHNOLOGY LIMITED
(3) GLOBAL DISPLAY SOLUTIONS SPA
(4) GLOBAL DISPLAY SOLUTIONS (SUZHOU) CO LIMITED — **Claimants**

- and -

(1) NCR FINANCIAL SOLUTIONS GROUP LIMITED
(2) NCR GLOBAL SOLUTIONS LIMITED
NCR CORPORATION — **Defendants**

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Stuart Ritchie QC and David Lascelles (instructed by **Stevens & Bolton LLP**) for the **Claimants**
Orlando Gledhill QC (instructed by **Ashurst LLP**) for the **Defendants**

Hearing dates: 01–04, 08-11 and 16 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Jacobs :

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Section A: Introduction

A1: The parties and the claims

1. The claim in these proceedings arises from the termination of a long-standing relationship between two global groups of companies. The Claimants (collectively "GDS") are part of the GDS group which manufactures screen displays and component parts thereof, including for use in bank automatic teller machines ("ATMs") and retail point of sale systems ("POS systems"). The Defendants (collectively "NCR") are part of the NCR group which manufactures ATMs used by banks and POS systems. Until January 2013 GDS had supplied products to NCR or its associated companies for many years. In the light of the arguments that developed at trial, it is generally not necessary to distinguish between the various companies that collectively comprise GDS and NCR.

2. An aspect of the contractual supply relationship between the parties was the provision of regular forecasts from NCR setting out NCR's projected demand from GDS for the supply of products to NCR's plants around the world. The forecasts were provided on a rolling 12-month basis. GDS's case is that it used these forecasts in making decisions as to its manufacturing plans.

3. NCR provided forecasts over many years. NCR's last forecast was provided on 14 January 2013. In line with previous forecasts, it was for over 176,000 displays over the next 12 months. This included over 11,000 displays in December 2013, just under 12 months away. The forecast demand had a value of over US$50 million.

4. Two days after this forecast had been supplied, on 16 January 2013, there was a telephone call in which NCR informed GDS that it had taken the manufacture of displays in-house. This "desourcing" of GDS by NCR, and the 16 January call, was the culmination of a lengthy process, known as Project Dynamo ("Dynamo" or "Project Dynamo"), whereby NCR had worked on bringing manufacture in-house. NCR cancelled around US$ 5.1 million of existing purchase orders. It also reduced all its forecasts to zero. GDS had received no prior warning from NCR that this cancellation and reduction of forecasts would happen. NCR accepts that this is so, although there is some evidence that GDS had its suspicions that it might be desourced at some point. GDS contends that the result of NCR's action was that it faced an imminent and potentially fatal liquidity crisis for which it was unprepared. It had a substantial pipeline of stock and was geared up to meet the outstanding purchase orders and the substantial future demand indicated by NCR's forecasts.

5. Discussions took place between NCR and GDS at the end of January and in February 2013 concerning whether NCR would take a "last time" supply of products and if so at what price. After discussions, including a meeting in New York in January 2013, the parties signed a "Letter of Agreement, Release and Waiver" ("the Letter Agreement"). The construction of the Letter Agreement, and specifically whether it precludes the claims made by GDS in these proceedings, is a central issue in the proceedings. NCR contends that GDS's present claims have been settled. The circumstances leading to the Letter Agreement, including the discussions at the New York meeting, have been explored in considerable detail during the trial. Those circumstances are relevant to arguments advanced by NCR concerning the factual matrix in which the Letter Agreement was concluded, and claims by NCR for rectification for mutual or unilateral mistake. They are also relevant to a claim made by GDS for the tort of intimidation.

6. GDS's claims are advanced on various bases: breach of contract, deceit, procuring breach of contract (although this claim is no longer pursued), conspiracy, and the tort of intimidation. It disputes NCR's case that these claims are precluded by virtue of the Letter Agreement.

7. As a result of an order made at the case management conference, certain issues were reserved for later determination. The reserved issues were in summary as follows:

    a) Reliance: did GDS rely upon any of the alleged representations and, if so, were NCR aware and did they intend that GDS would do so?

    b) Loss: as a result of the alleged unlawful conduct, has GDS suffered and are they entitled to claim the loss and damages claimed?

    c) Interest: is GDS entitled to interest?

8. In consequence, this judgment does not finally determine GDS's claims for damages whether in tort or in contract. Whilst at the start of the trial there appeared scope for disagreement as to which issues fell within and without the scope of the present trial, there was ultimately no dispute as to the issues which required resolution. The principal issues can be summarised as follows.

    a) whether the claims of GDS in deceit, breach of contract and conspiracy are in principle well founded as far as liability (but not quantum) is concerned, but leaving on one side issues of reliance and the effect of the Letter Agreement;

    b) whether all the claims of GDS in these proceedings are precluded by the terms of the Letter Agreement on its true construction, or as rectified pursuant to NCR's case of rectification for common or unilateral mistake;

    c) whether the Letter Agreement is ineffective as a barrier against any of GDS's claims, because it was entered into as a result of NCR's intimidation or due to the continuing influence of NCR's deceit and unlawful means conspiracy, with the consequence that GDS is entitled to relief in respect of all losses suffered by virtue of their entry therein.

9. The first series of issues, as to whether GDS's various claims are well-founded in principle, concerns events prior to the phone call on 16 January 2013 and in particular the giving of false forecasts prior to that time. These issues are addressed in Sections B and C below.

10. This series of issues is narrower than once appeared, because shortly before trial NCR made certain admissions as to the falsity of the forecasts which were given in the period between the end of April 2012 and January 2013. The central factual issue, which requires resolution, is whether false forecasts in fact started to be given prior to that time: GDS's proposed start date is July 2011.

11. A secondary factual issue, which also requires resolution, concerns the individuals who were party to the giving of false forecasts. NCR do not accept that the evidence justifies

a finding against any individual other than Mr. Evan Kaparis who, as will appear below, was a leading figure on Dynamo as well as in the relationship with GDS. GDS contends that others were involved in a conspiracy: principally two very senior individuals (superior to Mr. Kaparis) namely Mr. Bob Ciminera and Mr. Scott Delamater, but also three individuals (below Mr. Kaparis) who were involved in the relationship or operational dealings with GDS, namely Mr. Craig Mannion, Ms. Holly Ma and Ms. Kathleen Lappin. The allegation of involvement also originally extended to another individual, Mr. Flavio Canadas who worked for NCR in Brazil. By the end of the trial, and after Mr. Canadas had given evidence, the case against him was no longer pursued. The issue as to which individuals were involved is (or at least at present appears to be) very much a secondary issue, because no issues of attribution arise: NCR made it clear in opening that they do not advance any contention which seeks to distinguish between the various NCR defendant companies in terms of liability for deceit. Whilst the involvement of a number of individuals is potentially relevant to GDS's claim in conspiracy, that claim does not seem to add anything to the cause of action in deceit which is, except for reliance and loss, effectively admitted in respect of the period after April 2012.

12. A further narrowing of the issues concerned the breach of contract claim. In its closing submissions, GDS said that the breach of contract claim tracked the deceit claim, so that NCR were liable for breach of contract in respect of false forecasting from July 2011 (or whatever date the court determined to be appropriate). At an earlier stage, GDS appeared to put its breach of contract case on a wider basis, in reliance upon an implied term of good faith and fair dealing. However, that case appeared to add nothing to the claim that the giving of false forecasts was a breach of contract, which is no doubt why GDS ultimately submitted that the breach of contract claim tracked the deceit claim.

13. The second series of issues – namely whether all the claims of GDS in these proceedings are precluded by the terms of the Letter Agreement on its true construction or as rectified – concern the events and discussions between the parties between the 16 January 2013 phone call and the conclusion of the Letter Agreement on 22 February 2013. The factual background to the Letter Agreement, which is relied upon particularly by NCR in relation to both construction and rectification, is set out in Section D. The issues of construction and rectification are addressed in Sections E – G.

14. The third series of issues, which principally concern the intimidation claim, focus mainly on events between 16 January 2013 and the conclusion of the Letter Agreement, but (as a result of an amendment which I permitted at the start of trial) not exclusively so. I address those issues in Sections H and I.

15. This leaves one issue which was not specifically reserved for later determination pursuant to the order made at the CMC, namely NCR's potential liability for exemplary damages. Competing submissions were made as to whether it is appropriate finally to determine that claim in the context of the present trial: see Section J below.

16. These proceedings were commenced many years after the relevant events. The claim form was issued on 14 January 2019, which was just before the expiry of 6 years after the 16 January 2013 phone call. It was accepted, however, that the present claim was brought in time so that no limitation defence arises.

A2: The trial

17. The trial took place over 9 days in February 2021, using the Zoom video platform. After opening submissions, oral evidence for GDS was given by Mr. Luca Bisognin and Mr. Giovanni Cariolato. They were cross-examined for approximately 2 days. A statement had been served by Mr. Jason Kendell, but NCR did not in the event wish to cross-examine him. For NCR, oral evidence was given by Mr. Craig Mannion, Mr. Flavio Canadas, Mr. Graham Crabb and Ms. Kathleen Lappin. NCR was unable to call Mr. Evan Kaparis due to his ill-health. My assessment of the evidence of these witnesses is contained in the main body of this judgment.

18. There was no expert evidence. After conclusion of the evidence from NCR's four witnesses, NCR sought permission to adduce a statement from Mr. Ciminera, and to call him as a witness. I refused that application. The parties then submitted written closing arguments, and oral closings took place on the 9th day of the trial, 16 February 2021.

Section B: The contractual and factual background to GDS's substantive claims

19. This section describes the contractual and factual background in the period to 16 January 2013 relevant to GDS's claims in deceit, breach of contract and unlawful means conspiracy. NCR's unlawful conduct in this period was also relied upon in relation to GDS's claim in intimidation. Whilst the documentary evidence, and to some extent the oral evidence, was wide ranging, this section focuses on the facts relevant to those issues which were substantially in dispute. These concerned (i) the period during which false forecasts were given, and specifically whether this started in July 2011 or only later; (ii) the individuals who were party to the false forecasts; (iii) the facts relied upon by NCR to justify its conduct.

B1: The companies and the relevant individuals

20. The 3rd Claimant, Global Display Solutions SPA, is an Italian company. It is the parent company of the 1st and 2nd Claimants, Global Display Solutions Ltd. and GDS Technology Ltd., both English companies, as well as the 4th Claimant which is a Chinese company. The Claimants are all part of the GDS group, which has its headquarters in Cornedo, Italy, with further subsidiaries in the USA, Taiwan and Romania. As previously explained, it is convenient simply to refer to GDS as encompassing both the group and the individual companies, since no issue presently arises which requires any distinction to be drawn.

21. Mr. Giovanni Cariolato has at all material times been the President and CEO of GDS, and, with family interests, a 50% shareholder. Mr. Luca Bisognin was the Display Modules – Business Division Manager of GDS, and its manager for NCR. He is still employed by the business, as Operations Manager. The other member of GDS's senior management team at the material time was Mr. Richard Swetman.

22. A number of other individuals feature in the relevant events. Mr. Jason Kendell was employed as GDS's Customer Account & Supply Line Manager, almost exclusively on the NCR account. He was responsible for collecting and processing NCR's demand forecasts, turning these into GDS's factory production plans and identifying and helping to resolve supply issues. Following the 16 January 2013 call, a number of

shareholders were involved in communications and discussions with Mr. Cariolato. These included Mr. Marco Bergozza, Mr. Marco Cohen (who was also a GDS employee) and Mr. Emmanuel Grodzinski. Legal advice was provided in January and February 2013 by Mr. Michael Frisby, a partner in Stevens & Bolton LLP who continue to act for GDS in these proceedings.

23. NCR Corporation, the third Defendant, is a company incorporated in Maryland, USA. It is the parent company of the First Defendant, NCR Financial Solutions Group Ltd., an English company, and the Second Defendant, NCR Global Solutions Ltd (an Irish company). Since it is generally unnecessary to distinguish between the various companies, both the group and the individual companies are referred to herein simply as "NCR".

24. Mr. Bob Ciminera was employed as NCR's Vice President of Strategic Sourcing and Chief Procurement Officer, responsible for its overall strategic supply. Mr. Scott Delamater was employed as NCR's Senior Director of Global Strategic Sourcing, responsible for all strategic sourcing requirements. He reported to Mr Ciminera. Messrs Ciminera and Delamater were responsible for making key decisions on Dynamo: NCR accepted that they were the decision-makers on Dynamo. It was Mr. Ciminera who in due course signed the Letter Agreement.

25. Mr. Evan Kaparis was NCR's Commodity Director and reported to Messrs Ciminera and Delamater. Alongside Mr. Craig Mannion, he managed NCR's relationship with GDS. He was also one of the 4 project coordinators of Dynamo from the outset, being the lead on the commodity management side. The documentation at trial shows that he largely directed the project on a day-to-day basis.

26. Mr. Craig Mannion was employed by NCR as a Global Commodity Manager, responsible for supplier selection and management on NCR's display supply line. He reported to Mr. Kaparis. As GDS's relationship manager, Mr. Mannion managed NCR's side of the supply of GDS's displays. Along with his colleague Ms. Holly Ma, Mr. Mannion was the primary contact at NCR for GDS's Mr. Kendell, the individual at GDS receiving and processing NCR's forecasts. Mr. Mannion was also heavily involved in Dynamo. From no later than April 2011, Mr. Mannion was designated the "*GDS Transition Leader*" on the project. The disclosure indicates that where Mr. Kaparis sent or received an email of any significance in relation to Dynamo, Mr. Mannion was most often also a recipient. He was also invariably an invitee to NCR's Project Dynamo meetings.

27. Mr. Graham Crabb was employed by NCR in Dundee as Senior Engineering Manager for Displays. He managed a global team with responsibility for displays and worked closely with GDS's engineering team with whom his team had a good relationship. Mr. Crabb was also a Dynamo project coordinator from the outset, being responsible for delivering the engineering side of Dynamo.

28. Ms. Kathleen Lappin was employed by NCR as Global Planning Manager. Her role involved assessing NCR's customer demand, checking NCR's 12-month production plans in light of such demand and ensuring that products from suppliers were coming into the correct NCR plants in the correct amounts so that customer demand was met.

29. The individual who provided most of NCR's forecast demand schedules to Mr. Kendell was Ms. Holly Ma. She had the role of Supply Line Management and Global Buyer and was based in Beijing. She worked with Mr. Canadas. In their Re-Amended Defence and Counterclaim served in January 2021, when NCR admitted the falsity of some of the forecasts, NCR also admitted its knowledge that Ms. Ma was continuing to send forecasts to Mr. Kendell which showed demand for products over the subsequent 12 months, and that she was instructed to continue in accordance with her normal practices in order to avoid revealing NCR's work on Project Dynamo.

30. A large number of other individuals at NCR were copied on e-mails or important documentation relating to Project Dynamo or participated in internal discussions concerning the project. The evidence indicated that all such individuals were required to sign non-disclosure agreements or "NDAs" in relation to Project Dynamo, and this was a standard approach within the company. It is not necessary, however, to describe these other individuals. It is clear that Project Dynamo was a very significant and important project within NCR, and the agreed List of Issues recorded that the decision to put in place an alternative supply channel for GDS's products was a major strategic decision for NCR which was taken or approved by NCR at board level; and that it required lengthy planning and setting up and testing of an alternative supply chain, and involved a significant number of individuals at NCR knowing of its plans.

B2: The contractual relationship

31. The relevant contract between the parties was a purchase agreement between the First Claimant and the Second Defendant, made in March 2004, and amended on 15 November 2006 ("the Purchase Agreement"). It was common ground, as set out in the List of Issues, that the Purchase Agreement was made against a factual matrix which included the following:

    a) NCR had at all material times been a very substantial customer of GDS;

    b) GDS had made investment in connection with its relationship with NCR including design and development of new products for NCR;

    c) The products or their functional equivalents were an essential part of each of NCR's ATM / POS systems and it was vital to NCR's business that they be supplied in accordance with NCR's requirements;

    d) GDS would wish to know NCR's likely demand for products significantly in advance of having to supply that demand;

    e) NCR's relevant business was subject to fluctuations in demand including on occasion with little notice. NCR's forecasts of demand might have to be amended, including sometimes with little notice;

    f) NCR engaged in just-in-time manufacture and sought to place the risks of fluctuations in its demand on GDS; and

    g) GDS was exposed to the cost of maintaining sufficient stock for NCR.

32. The Purchase Agreement had an initial term of 1 March 2004 to 1 July 2007 and was automatically to renew for successive 1-year periods unless either party provided written notice to terminate 120 days prior to the end of the then current term. This notice period had been extended by the 2006 amendment from 90 days in the original.

33. Clause 6 of the Purchase Agreement, and Appendix E, dealt with forecasting. Clause 6 related to products supplied on a just in time ("JIT" or "deljit") basis, and it was common ground that this was the relevant basis for the purpose of the present proceedings. Clause 6 provided as follows:

> "6.1 Forecast demand schedules will be issued to the Supplier on a regular basis or by exception in the event of major schedule changes. These forecasts will cover forward period of up to twelve (12) months, updated at least on a monthly basis. Subject to clause 6.2, the forecast demand schedules are non-binding forecasts, can be amended by NCR at any time, and do not constitute the commitment of NCR to purchase the forecasted quantities, or any Product whatsoever. NCR will issue a blanket purchase order to the Supplier for each JIT Product. Such order will cover the supply of that Product covering a period of up to a year. The blanket order will give a projected Product quantity requirement for such period; however such quantity will be subject to amendment by NCR. The blanket purchase order does not constitute the commitment of NCR to buy the stated quantity of Product, or any Product whatsoever. NCR may cancel any outstanding blanket order for Product forthwith provided that any such cancellation shall not affect any outstanding Product orders under then issued "call-off" documentation (see clause 6.4 below).
>
> 6.2 The Supplier may procure raw materials and detail parts in preparation for assembly of a Product based on forecast demand schedules, provided that in no event shall NCR be liable for:
>
> Detail part holdings in excess of 6 weeks.
>
> Finished Product holdings in excess of 4 weeks.
>
> NCR's liability will be strictly limited to such holdings.
>
> Notwithstanding the foregoing, in the case of any component which has an exceptionally long lead time NCR may agree, in advance, to accept the potential liability for an extended holding. Any such agreement will be reflected in Appendix C of this document.
>
> Notwithstanding the foregoing, NCR will have no liability to the Supplier for excess or obsolete Products or Spare Parts which are not purchased by NCR due to the Product's or Spare Part's failure to meet Specification or warranty provisions of this Agreement

> or to the extent that the Products or Spare Parts (including raw materials or detailed parts) are readily reusable or resealable.
>
> 6.3 The Supplier will deliver strictly in accordance with the NCR "call-off" schedule of quantities and delivery dates. This schedule will be provided to the Supplier 2 weeks prior to requirement of Non-LSS Products and 5 days prior to LSS Product requirement.
>
> 6.4 NCR will be committed to purchase of JIT products, and the Supplier will be committed to deliver such Products, only upon the Supplier's receipt of NCR's "call-off" documentation for a specific quantity of the Product.
>
> 6.5 The authority for the control and issue of "call-off" documentation under this Agreement rests solely with NCR's Purchasing Department.
>
> 6.6 The Supplier's forward planning will allow for NCR program changes. Supplier's capacity will be based on the NCR Delfor. Relative to the Delfor, unrestricted downturn can be accommodated subject to the funding arrangements defined in 6.2. Uplift will be limited to a maximum of 40% of the forecast total demand in any 24 week period following issue of the relevant Delfor. Of this additional quantity, approximately four tenths will be immediately available. The balance of uplift capability can be made available at not less than 4 weeks notice by using up forward holdings of details parts (6 weeks' worth). (For example, if the 24 weeks of Delfor is 100, NCR can increase its call-off by an additional 16, and the Supplier will deliver the Products in accordance with such call-off.) Beyond 40%, further uplift will depend on unscheduled replenishment of the pipeline and especially on expediting long lead time components. Such activity will be pursued on a joint best efforts basis by NCR and Supplier on the understanding that all exceptional costs incurred by the Supplier will be advised to NCR and will be refunded by NCR. In these circumstances, by definition, Supplier will be free of its contractual supply line uplift obligations until the normal levels of target stocks and pipeline have been re-established.
>
> 6.7 More complete details of the forecasting, delivery scheduling, and ordering processes are described in Appendix E."

34. Appendix E, headed "Purchase Order and Scheduled "Call-Off" Procedure" provided as follows:

> "All forecasts and call-offs will be provided through the EDI Delfor and Deljit. One Blanket Order per part will be issued, showing a single quantity, and a date. The Delfor messages providing forecast quantities will provide a weekly estimation of

> the schedule for supplier capacity planning purposes. Delivery call-off will be controlled through the Deljit. Material liability will be as per clause 6.2."

35. Clause 6 and Appendix E therefore envisaged that NCR would provide forecasts (abbreviated to "Delfor", meaning delivery forecasts), followed by blanket purchase orders ("BPOs") and then the issue by NCR of subsequent "call-off" documentation. The evidence indicated, however, that the parties generally did not act in precisely this way. Mr. Kendell's evidence, which was not challenged, was that BPO's were in fact only used in limited circumstances. While forecasts were provided as envisaged under the agreement, there was no practice at any material time of NCR placing BPOs except on a limited basis. Generally, rather than placing BPOs, NCR placed Purchase Orders ("POs") which specified the quantity of product required (using a "deljit" or line number) and date required.

36. The issue of reliance reserved for later determination may require more detailed consideration to be given to the terms of the Purchase Agreement and in particular clause 6. However, for present purposes it is sufficient to note that forecasts were indeed provided, on a regular basis, pursuant to clause 6.1.

37. Importantly, it was also common ground in the List of Issues that NCR was obliged to supply forecast demand schedules to GDS which reflected NCR's genuine and honest belief as to its estimated future requirements.

38. Prior to the re-amendment of its defence in January 2021, there was an issue as to whether NCR was in breach of its obligation to supply forecast demand schedules which reflected its genuine and honest belief. A number of significant admissions were made in that re-amendment. These were that:

    a) By the forecasts e-mailed by Ms. Ma to Mr. Kendell, NCR made express representations to GDS that NCR had estimated future requirements for the Products there set out at the times there stated;

    b) By about the end of April 2012, NCR did not expect to order significant quantities of products from GDS after about the end of 2012. That expectation was subject to the progress of Project Dynamo, which was a complex, long-term project that had experienced delays and might well experience further delays;

    c) From about the end of April 2012, the express representations by Ms. Ma to Mr. Kendell did not reflect NCR's estimated future requirements from GDS after about the end of 2012, and NCR admitted that from about the end of April 2012 they knew that was the case;

    d) If the forecasts from about the end of April 2012 had reflected NCR's estimated future requirements after about the end of 2012, that would have revealed Project Dynamo to GDS, thereby (on NCR's case) exposing NCR to unacceptable risks of retaliation;

    e) From about the end of April 2012, NCR was in breach of clause 6.1 and Appendix E of the Agreement in that the forecasts contained in the

spreadsheets e-mailed by Ms. Ma to Mr. Kendell did not reflect NCR's estimated future requirements from GDS after about the end of 2012.

B3: The forecasting process

39. In view of these admissions, as well as the nature of the issues which arise for decision at the present stage, it is not necessary to describe the forecasting process in detail. It is sufficient to summarise the common ground that was set out in the List of Issues.

    a) Around once a week, from July 2012 at the latest, Ms. Ma emailed a spreadsheet setting out NCR's global 12-month forecast supply demand to Mr. Kendell.

    b) Ms. Ma's emails were also copied to Messrs. Mannion and Canadas and Ms. Lappin.

    c) Mr. Kendell produced manufacturing plans and production schedules based on NCR's forecast demand.

    d) Mr. Kendell also emailed micro-schedules of planned deliveries to NCR's sites to NCR including Ms. Ma, Mr. Mannion, Mr. Canadas and Ms. Lappin. Mr. Kendell sought feedback from NCR in relation to the micro-schedules.

    e) The forecast demand spreadsheets and the micro-schedules were discussed on telephone conferences attended by Mr. Kendell, and one or more of Ms. Ma, Ms. Lappin, Mr. Canadas and Mr. Mannion. On the calls, inter alia, Ms. Lappin, who took an active role in monitoring forecasts, directed where priorities should lie in terms of future supply as between NCR's different factories. The micro-schedules were updated in light of the discussions.

    f) Ms. Ma, Mr. Mannion, Mr. Canadas and Ms. Lappin acted in the course of their duties and within the scope of their authority from their respective employers.

40. Although the recorded common ground concerned the period "from July 2012 at the latest", the evidence indicated that forecasts had been provided to GDS during the entire period which is relevant to GDS's false forecasting claim: ie prior to and from July 2011. Mr. Kendell, who joined GDS in 2007, gave evidence as to the way in which the forecasts were given. These were typically for a forward looking period of 48 – 52 weeks. They fluctuated week on week, and Mr. Kendell understood from conversations with NCR's representatives that they would sometimes receive last minute orders from their own customers. NCR's forecasts were originally sent by Electronic Data Interchange or "EDI", but from around the start of 2011 they were generated by a supply chain management software system called Kinaxis. The forecasts were provided to GDS in Excel format, although there were occasions when Mr. Kendell received forecasts that had been manually updated. Whilst over the years he had received demand forecasts from various individuals at NCR, those received in 2011, 2012 and early 2013 were generally provided by Ms. Ma. She began providing weekly forecasts in around the second quarter of 2011.

B4: September 2009 – April 2011

41. Prior to 2009, the relationship between GDS and NCR had been close, and harmonious, for a long time. Mr. Mannion in his evidence indicated that this was in part a consequence of NCR's management being insufficiently challenging. That changed in 2009 when a new USA-based management team was brought in to take charge of NCR's supply line management team, headed by Mr. Ciminera and, beneath him, Messrs Delamater and Kaparis. The new team was heavily focused on cost reductions.

42. With the new team's arrival, NCR put immediate commercial pressure on GDS to reduce its costs and GDS put up resistance, each party acting in its commercial interests. A difficult meeting took place between NCR and GDS in Cornedo Italy in June 2009. Mr. Kaparis was a man who could be brusque and rude, and he told Mr. Cariolato at the meeting that NCR would not be able to award GDS any new business opportunities: GDS was being put on what was described as "new business probation". Mr. Crabb's evidence, which in this regard I accept, was that in response to this Mr. Cariolato exploded and told NCR that GDS were not going to be shipping any more displays to NCR ever again. The individuals in the room from NCR had to leave the room and give him some time to calm down.

43. NCR place heavy reliance on the events at this meeting in support of their case that its deception of GDS, by the provision of false forecasts, was justified. Justification is advanced as a defence to the claim in conspiracy and intimidation, but not in relation to the claims for breach of contract or deceit. The defence therefore has a limited potential impact, even if valid. For reasons given in Section C below, I do not accept that there was any justification, whether in fact or by way of a legal defence, for NCR's provision of false forecasts.

44. The evidence indicated that, despite Mr. Cariolato's outburst, the relationship between the parties continued after the Cornedo meeting in relative harmony.

45. In July 2009, NCR started a project known as Project Neptune, which was coordinated by Messrs Kaparis and Crabb and covered by an NDA. This considered moving the supply of displays from GDS elsewhere. In the first half of 2010, however, Project Neptune was abandoned. There had been a positive meeting between Mr. Cariolato and Mr. Ciminera in March 2010 and this period coincided with advances in lighting technology. The latter entailed a move from fluorescent lamp to LED backlit displays, thus necessitating an upgrade of NCR's display portfolio. NCR decided to put this project – known later as Ecolution – out to tender. GDS was invited to tender and NCR could then assess it against other tenderers and go with the winner. GDS did tender for Ecolution and won it convincingly. They were awarded the Ecolution contract, conditional on making further costs concessions.

46. NCR started considering from July 2010, however, that it did not need original display manufacturers such as GDS, and could design its own displays and outsource manufacture. By September 2010 individuals within NCR, including Messrs Mannion, Kaparis and Delamater, were being asked to sign NDAs because NCR was kicking off Project Dynamo.

47. An initial planning session for Dynamo took place on 24 September 2010. The documentation for the planned discussion comprised a set of well-prepared "slides"

which were circulated to the intended participants. Subsequent documentation followed the same format, with the slides providing a clear picture of how matters were developing, and the issues which were being encountered and addressed. The participants for the initial meeting included Mr. Ciminera, Mr. Delamater, Mr. Kaparis, Mr. Mannion and Mr. Crabb. The slides described Mr. Bill Hanley as the Project Lead, Mr. Crabb as the Engineering Lead, Mr. Kaparis as the Procurement Lead, and Mr. Mannion as one of the "other key team members" with a responsibility for procurement.

48. On 17 November 2010, Mr. Hanley told his colleagues on the project that he had set up a weekly meeting to review progress on Project Dynamo, and sent round a calendar invite for that purpose. He said in his covering e-mail that he was hearing that the project was being "committed to cost savings in 2011 yet our discussions does not have this yielding a return until 2012". He said that they needed to close the gap and understand and agree what would be delivered in 2011. It is a theme of NCR's internal documentation relating to the project that NCR's senior management saw it as an important cost-savings measure, and were keen to bring it on-stream rapidly so as to start to deliver cost savings as soon as possible.

49. By April 2011, the weekly Dynamo meetings had become unwieldy with (according to an e-mail from Mr. Bryan Smola at that time) 160 people on a call. Accordingly, the decision was made to move Project Dynamo forward with a weekly meeting of the core team, which was known as the Strategic Rationalisation Team or SRT. That team included Messrs Kaparis, Mannion and Crabb. There was also a monthly meeting of the wider team. Monthly meetings, referred to internally as "Pulse Check", were also set up with more senior executives, including Messrs Ciminera and Delamater as well as Messrs Kaparis, Mannion and Crabb. Slide packs were circulated in advance of these meetings to provide progress updates on the different aspects of Project Dynamo.

B5: April – August 2011

50. GDS's case is that from July 2011, the forecasts issued by NCR to GDS did not reflect NCR's genuine and honest estimated requirements for the products in question from GDS. They submit that from that time, NCR estimated that they would only require GDS to supply 80% of NCR's requirement for certain products (for example the 15" display with the product designation "SB15") in May 2012, with a declining requirement for that and other products thereafter. However, the forecasts provided to GDS continued to be based on GDS supplying 100% of NCR's requirements for these products. Those forecasts did, by July 2011, cover the period up to May 2012, when NCR's intention was to start to meet their needs in part from their own production, rather than 100% from GDS.

51. In my judgment, this factual case is very clearly established by NCR's internal documents generated in the April – July 2011 period, as described below.

52. A very extensive and detailed set of slides was compiled for the April 2011 Pulse Check meeting. In the slide headed "What is Dynamo Phase 1", NCR identified the suppliers who would be impacted. By far the largest was GDS, where the spend was US$ 70 million. The slide also identified when the exit would start and end: the second quarter of 2012 was exit start, and the first quarter of 2013 was when the exit would be completed. Later slides confirmed that the plan was to introduce NCR built products in a phased manner, whilst at the same time continuing to purchase product from GDS.

The slide headed "Proposed GDS Exit" put forward a "recommended plan" which was to "dual source GDS (80% award) up until all Dynamo displays are in full production in all sites then desource GDS". The pros and cons of this approach were then identified. The pros included a "small volume drop for GDS – can run dynamo under the radar until we're ready to pull the plug". The cons included: "Confidentiality leak … 2 years is a long time".

53. Mr. Crabb was asked about this particular slide in cross-examination, and fairly accepted that the slides indicated that with an 80/20 share, NCR would be able to conceal from GDS the fact that it was not getting the full supply of NCR's requirements.

54. Mr. Crabb also accepted (and in any event I would conclude) that one of the other recommendations as part of the recommended plan – namely "Take GDS Ecolution to ITC stage but not into mass production" – meant that the plan was to lead GDS to believe that the Ecolution project would continue, whereas the intention was to stop it at an intermediate "ITC" stage rather than taking into full production. When asked about this, Mr. Crabb said:

> "Yes, Well that would be the plan, but if anything was to go wrong, we would take it the full way, I would imagine. That was the plan".

This was one of the ways in which NCR decided to mislead GDS.

55. Before continuing my description and discussion of the internal NCR documentation, I pause to consider this particular answer of Mr. Crabb in its wider context. The answer encapsulates a running theme in NCR's argument as to why the case of deceit and GDS's other causes of action were not established in respect of the period prior to April 2012. That case was, essentially, that there was a very considerable amount of uncertainty as to the successful realisation of NCR's intended plan to bring its own production on-stream in the timescales envisaged in NCR's internal documents. It was submitted that Project Dynamo was a complex project, involving numerous workstreams, with senior management wanting performance to be achieved in relatively short order but without necessarily appreciating the complexities and engineering challenges which were involved. As Mr. Crabb put it in the above answer, something could go wrong in which case the plan would change.

56. I do not consider that this provides any answer to GDS's case.

57. First, it was common ground that NCR was required under the Purchase Agreement to provide forecasts which contained its genuine and honest belief as to its estimated future requirements. If, as was the case in April 2011 and certainly by July 2011, NCR was planning to start to begin its exit from GDS by meeting 20% of its total requirements from its own production, and only taking 80% from GDS, then any forecast which was based upon NCR taking 100% of its requirements from GDS did not represent NCR's genuine and honest belief as to its estimated future requirements. If, as here, a carefully prepared plan and internal assessment is made as to how NCR's future needs will be met, and there is an intention to execute upon that plan, then I do not consider that NCR can maintain that different figures given to GDS were either genuine or honest. All estimates as to what will happen in the future necessarily have an element of uncertainty. Of course things can go wrong. But the admitted obligation required NCR

to provide forecasts which were genuine and honest as representing their current intentions, which would naturally take into account uncertainties. If NCR's then current intentions were not to take 100% of their requirements from GDS during the period covered by the forecasts, then the forecasts should have reflected that fact.

58. Secondly, when the case was opened by Mr. Gledhill on Day 1, he made relatively brief submissions about the timelines contained in the various slide presentations. He said that it was a massive project with no guarantee of success. He said that junior people produced indicative timelines from quite early on in the piece, but those plans were really aspirations or ambitions or documents to structure people's thinking; because without some sort of plan, "you've got nothing". They did not represent decisions taken at that stage, and far less do they represent decisions by senior people. The timelines were frequently cut and pasted. Busy people were creating timelines but cutting and pasting from the last one to the extent possible.

59. Whilst I accept that Project Dynamo was a very substantial project and that, at the outset at least, there was no guarantee of success, the evidence at trial did not support the remainder of the argument which sought to downplay the significance of the timelines or the care with which NCR's internal presentations were put together and the seniority of the people who prepared them. It was apparent from the exploration of NCR's internal documents in cross-examination that they were thoroughly and carefully prepared, and that this was done by senior people within the team rather than by junior people who were cutting and pasting without any careful thought. The timelines in the SRT and Pulse Check presentations were supported by detailed workings on each of the key aspects (engineering, technical operations, supply chain management and finance). Very frequently, data which were summarised in an individual slide could be traced back to a detailed Excel spreadsheet containing, for example, minute analysis of costings.

60. In his evidence at the end of Day 7, when Mr. Crabb had been asked about various documents from around the April 2011 period, he accepted that the slide decks were produced as a result of a team effort from a variety of specialist teams within NCR. He agreed that the slides were put together for the benefit of senior management, and there would have been no intention to mislead them but rather to keep them updated as to the progress of the project. He agreed that one should look to the Pulse Check documents to see "what the intentions were of the organisation" at that moment in time, although he emphasised the importance of looking at all of the Pulse Check documents. It was then put to him by Mr. Ritchie:

> "Q. And those documents, therefore, represented from time to time the best estimate that the team working on Dynamo was able to provide of the progress of the project?
>
> A. At the snapshot in time of those documents, yes".

61. When that evidence was given by Mr. Crabb, I thought that it was an obviously sensible answer and in accordance with what one would naturally conclude by examination of the documents themselves. There was some attempt by Mr. Crabb to row back from that evidence in response to questions in re-examination which sought to emphasise the uncertainties surrounding the project. However, I have no doubt that Mr. Crabb was right when he accepted that the estimates provided in the Pulse Check documents did

represent the best estimate of the NCR project team at the time. This applies also, in my view, to similar estimates which were contained in other slide decks for meetings which were not Pulse Check meetings. When Mr. Mannion was asked about one of the timelines in documentation produced in September 2011, he was asked:

> "Q … it's your best assessment of the timeline of project Dynamo at this point?
>
> A … Every one of these documents is."

62. Similarly, when asked about a document in the slides for the October 2011 SRT meeting, Mr. Mannion initially agreed that the "cutover" date of 1 October 2012 was their best estimate of the date on which supply would cut over from GDS to Dynamo.

63. Since these internal estimates represented NCR's best internal estimates of their future needs, it cannot in my view be the case that the projections given to GDS – which contained very different estimates – contained NCR's genuine and honest belief as to its future requirements. If the best internal estimate showed (for example) NCR only taking 80% of product from GDS, with that figure reducing over time, then an estimate given to GDS showing 100% of product being taken cannot represent NCR's genuine and honest belief as to its estimated future requirements.

64. I now return to the April 2011 Pulse Check documentation, although it is not necessary to describe every page. It contained slides which set out the major milestones which were planned to be achieved, and the target savings. NCR had for some time previously given consideration to different ways in which the relationship with GDS could be brought to an end. A slide at the end of the pack, which built upon a slide prepared back in September 2010, set out various GDS Exit Strategy options and the pros and cons thereof. One of these options was the 80/20 dual sourcing approach, which would de-risk the Dynamo program and give "NCR flexibility and time as we don't need to tell GDS". Other scenarios had significant disadvantages which were identified.

65. The slide headed "Proposed GDS Exit", which set out the "recommended plan" therefore represented the preferred option: the 80%/20% approach. Mr. Mannion in evidence accepted that one of the "Pros" of this course – namely "Small volume drop for GDS – can run dynamo under the radar until we're ready to pull the plug" – meant that GDS would not be told, and that this meant that GDS would carry on thinking that it was business as usual. He said that this was a recommendation to the vice presidents of NCR. It is apparent from the subsequent documentation that this recommendation was in due course accepted.

66. On 10 May 2011, Mr. Bryan Smola (who was the Commodity Manager and Dynamo Project Co-ordinator from 2011) e-mailed his colleagues saying that they had a "VERY difficult decision to make with respect to how we want to handle the exit from GDS (specifically, when do we let them know about our plans)". He described the decision as being difficult solely because of the "unknown" reaction that would come from GDS given the fact that NCR was over 50% of GDS's business. His email continued: "The ultimate fear is that GDS will shut down and therefore destroy NCR's ability to continue shipping ATMs. If this is a valid possibility then we need to consider how much risk we want to take to supply continuity vs implementing cost reductions".

67. The concern being expressed, therefore, was not that GDS would retaliate by not shipping products, but rather that the discontinuation of business would have such a deleterious effect on GDS that it could not continue to trade. Mr. Smola's e-mail also recognises a point that I consider to be relevant when it comes to considering NCR's case that its deception of GDS was justified by its business need to ensure continuity of supply. If there is pressure to bring in cost reductions very rapidly, then the risks to continuity of supply will necessarily be greater than if there is a longer period of transition, with cost reductions being brought in at a gentler pace. There is therefore a balance to be struck. NCR's internal documents indicate to me that NCR's focus was very much on the rapid introduction of cost reductions.

68. For the purposes of the discussion which he initiated, Mr. Smola circulated a set of slides headed: "Dynamo – GDS Exit Plan/ SLRP Impact". The slides recommended the 80/20 plan, and one of the decision points was to reach agreement on proceeding with the 80/20 GDS strategy. The slide identified the savings that would accrue if that strategy were adopted, including a US$ 1 million saving in 2012.

69. In June 2011, a further set of Pulse Check slides was produced and circulated. This was the first set of slides to contain a detailed product-by-product timeline for the replacement of those supplied by GDS (and other suppliers) with Project Dynamo production. Consistent with the approach taken in the April 2011 Pulse Check slides, the timeline envisaged that products previously supplied by GDS would start to be replaced by Dynamo products in the second quarter of 2012. One of these products (the 5967 15" display) was not subject to an 80/20 share: the slide envisages that product being fully supplied under Dynamo in the second quarter. Four other products, however, were to be subject to an 80/20 share also beginning in the second quarter, before coming into full production later in the year.

70. There was a very detailed underlying Excel spreadsheet which itemised each product by part number and supplier, and which showed on a month-by-month basis the production plans for Dynamo in relation to each such product. This spreadsheet showed that the 80/20 split shown on the coloured timeline on the slide represented the broad rather than the precise picture. For example, the first GDS product to be produced under Dynamo was the 15" display with the part number 009-0026887. The June spreadsheet showed the forecast for this product being 10% from Dynamo in May 2012, increasing to 15% in June and 30% in July 2012.

71. By the end of June, the prospect of the timeline contained in the June 2011 Pulse Check slides actually being achieved was reflected in other documentation, including confident statements by Mr. Kaparis. On 17 June, Mr. Kaparis told a colleague that he should delete GDS from his memory/ rolodex/ contact list: "We are exiting GDS … we are months away from starting production at NCR Beijing and the last thing we need is more engagement with GDS". By 28 June 2011, Ms. Ma had been brought into the circle of confidence, and (as Mr. Mannion indicated in his evidence) she would have been told about the aims and objectives of Project Dynamo. Mr. Kaparis told her and other colleagues that the decision had been made to end the GDS "SMI" (ie Supplier Managed Inventory) program for all sites. Accordingly, a hub for GDS-supplied NCR products was to be shut down. It is also clear that by September 2011, Ms. Ma must have been aware of Project Dynamo and what it was intended to achieve: she was one of the recipients of an email which explained how a volume of certain displays could be supplied by NCR in-house and another supplier.

72. On 30 June 2011, Mr. Kaparis e-mailed various senior colleagues including Mr. Ciminera, copying in Mr. Mannion:

> "Gents, the very first Dynamo 15" FSD displays (A models) are a reality. Hardware and firmware working like a charm. GDS's days are numbered folks. A major milestone has been reached by the Dundee team."

73. The next relevant timeline was produced in July 2011, and is dated 18 July. This showed a similar but not identical picture to the June 2011 Pulse Check. The Dynamo production of the 5967 15" display was, as before, to be used from the second quarter of 2012. As before, the Standard Bright display was to be subject to an 80/20 split from the second quarter. Other products were to start the 80/20 split a little later, in the third quarter. The "full ramp" of all relevant products (apart from the 5867 15" display) was to take place at the beginning of the first quarter of 2013.

74. Mr. Smola's e-mail to his colleagues on 26 July 2011 indicates that senior management were looking for a more aggressive approach which would deliver greater cost savings earlier. At that time, anticipated cost savings for 2012 had been reduced from US$ 2.4 million to US$ 1.2 million. Mr. Smola asked his colleagues for help to get back to the US$ 2.4 million as a minimum, and also to start the "pulling in full ramp start to November": ie November 2012 rather than January 2013.

75. In August 2011, the timeline had been subject to some adjustments, but they are not material to the key point: NCR's plan and intention was to start using Dynamo products in increasing volumes from the second quarter of 2012 onwards, and thereafter moving to full ramp up. That plan and intention was not the plan and intention which was communicated in the forecasts given to GDS, which continued to project GDS supplying all of NCR's requirements. Those forecasts were a pretence. It was also a pretence that Mr. Kaparis sought to maintain through other communications. On 25 August 2011, Mr. Kaparis e-mailed various senior colleagues including Mr. Mannion as follows:

> "Confidential: Heads up folks. GDS is coming to the US September 13-16… The game plan here is to keep up the pretensions with GDS as we continue executing project Dynamo. GDS is nervous and suspicious. I am hearing this loud and clear from our embedded supply chain (AUO etc.) Our mission is to calm them down and continue on our business as usual state of the affairs with them…In general, our party line is that GDS is a major and important to supplier to NCR and we are always open in exploring new opportunities with GDS."

B6: September 2011 – April 2012

76. It is not necessary to describe all of the timelines during this period. The overall picture is that NCR continued to give forecasts to GDS which were on the basis that all of its requirements for the next year would be taken from GDS, when NCR's internal plans show that this was not their intention and that the time when Dynamo would actually

produce products was coming ever closer. The picture can fairly be described by the following illustrations.

77. At the Dynamo SRT meeting on 7 October 2011, the project was progressing to a timeline dated 29 September. This showed that various products would start on the 80/20 split in the second quarter of 2012 with full ramp up of all products by the start of the fourth quarter or shortly thereafter. The slide headed "Outstanding Action from the workshop" asked the question (referred to earlier): "When do we execute the "LTB" from GDS for spares? Based on 1st October 2012 cutover". (The acronym "LTB" referred to "Last Time Buy"). In other words, the intention at this stage was for NCR to be largely or entirely self-sufficient by 1 October 2012.

78. This is confirmed by the slides dated 28 October 2011 for the Dynamo SRT meeting held shortly thereafter, where a slide shows the GDS "trigger" – which would be the notification date – being 1 October 2012. This internal NCR plan is to be contrasted with the forecasts being provided at around that time to GDS. By 14 November 2011, Ms. Ma was providing forecasts to GDS which stretched to 19 November 2012.

79. On 12 March 2012, Mr. Mannion and Mr. Kaparis produced a set of slides entitled "Project Dynamo Exit Plan – Summary and Scenarios". This document was therefore produced before the period (April 2012) when NCR accept that it was in breach of contract by providing false forecasts. In my judgment, however, there is nothing which enables any distinction to be drawn between the forecasts given after April 2012, and those given in the prior period. Nor is there anything which could justifiably lead to the conclusion that those forecasts given after April 2012 were deliberately false, but those given prior to that date were not. There is no watershed event. Rather, the substance of the documentation produced in March 2012 is essentially the same as the documentation produced both prior and subsequent to that time, as far as concerns NCR's intentions.

80. The 12 March 2012 slides contain a timeline which shows GDS being informed of the exit at the end of July 2012, less than 5 months away. It shows the 80/20 split for certain products starting at the beginning of the 3rd quarter (ie 1 July). This is only a short time later than the start that had been indicated in the very first in the series of timelines produced in June 2011, with some small slippage from the middle of the 2nd quarter to the start of the 3rd quarter. It shows the full ramp for many products as starting on or before 1 October 2012. Yet the forecast sent by Ms. Ma at around this time, on 19 March 2012, showed forecast demand to 25 February 2013.

81. Also at around this time, Mr. Kaparis visited Beijing to meet with the Beijing team including Ms. Ma. Mr. Kaparis in an e-mail described the visit as being heavily focused on Project Dynamo, with the "game plan" including walking the team "through Project Dynamo from A-Z in more detail including the GDS exit steps". The visit to the Beijing factory was timed to coincide with a business-as-usual quarterly meeting with GDS at its factory. In his email on 13 March 2012, Mr. Kaparis referred to the need at the meeting to "keep the pretentions and pressure to deliver going". The recipients of that e-mail included Mr. Delamater and Mr. Mannion.

B7: April 2012 onwards

82. On 10 April 2012, Mr. Kaparis sent his colleagues, including Mr. Mannion and Mr. Delamater, his recommended exit plan. This was a detailed step by step plan as to how the exit would be dealt with. It included notifying GDS in writing as well as verbally that NCR would be cancelling all open purchase orders across the enterprise globally. In due course, as discussed in Section D below, this particular aspect of the plan changed. The plan also included "GDS and Benchmark demand/forecast reduction to Zero for all NCR Sites and CFC". It was therefore envisaged that NCR would be placing purchase orders with GDS for goods that it did not intend to take, and giving forecasts to GDS for goods that it also did not intend to take, with the forecasts being reduced to zero on the day when the exit was revealed to GDS.

83. The proposed steps were then incorporated into a more detailed slide presentation dated 12 April 2012 entitled "Dynamo Exit Strategy". The intention was not to cancel current purchase orders or reduce forecasts to zero until there was a sufficient quantity of GDS stock in hand or in transit in order to avoid problems on the transition to Dynamo products.

84. It is not necessary to describe the position after April 2012 in detail in view of NCR's admission that knowingly false forecasts were given. NCR's admission in paragraph 39 of its Re-Amended Defence and Counterclaim is, however, to some extent limited. Whilst it admits the knowing falsity of the forecasts, it does so in respect of the forecasts in so far as they concerned NCR's estimated future requirements "after about the end of 2012". NCR's case is, therefore, that the forecasts were honest and genuine in respect of the period up to the end of 2012, or at least were not proved to be other than honest and genuine. I reject that aspect of NCR's case. The timelines in the slide presentations in and after April 2012 (as well as the timelines prior to April 2012) show Project Dynamo products being used in increasing quantities during the remainder of 2012. Contrary to the information given in the forecasts, NCR did not therefore anticipate taking its entire requirements from GDS during 2012.

85. During the remainder of 2012 there were various developments which meant that the planned date for notification to GDS was pushed back, with the date finally being fixed for 16 January 2013. During that period, NCR had continued to provide GDS with forecasts covering the following 12-month period. As late as 14 January 2013, two days before the phone call, Ms. Ma sent a forecast to Mr. Kendell setting out NCR's estimated demand for the next 12 months. This was stated to be for over 176,000 displays, including 11,000 displays in December 2013. This was NCR's last ever forecast of demand.

B8: Conclusion in relation to the period of false forecasting

86. In the light of the facts described above, I conclude that during the entire period from July 2011 to the time when NCR revealed its hand on 16 January 2013, forecasts were given by NCR to GDS which did not represent its genuine and honest belief as to its estimated future requirements.

87. This conclusion is reinforced, in my view, because there has been no clear evidence from any of NCR's witnesses which identifies April 2012 as the start-date for the false forecasts, or explains why it is that the forecasts were false after that date but not before.

NCR's witness statements for these proceedings did accept that false forecasts were given. Thus, Mr. Kaparis said in his witness statement that he was aware that there was "a short period during which GDS was receiving demand schedules that were not accurate, subject obviously to when Dynamo would be ready, because, although no final decision on dates had been taken until later in 2012, GDS were not likely to be supplying products to NCR for all of the products in the forecast". Mr. Mannion's evidence in his witness statement was that there "would have come a stage later in 2012 when forecasts would continue to go out even though NCR knew there would come a point where we would stop buying from them, even though we were not sure what the precise stop date would be". The reference to "later in 2012" is imprecise, but appears to relate to a period some time after his meeting with Ms. Ma in the spring of 2012 which is described a few paragraphs earlier. Ms. Lappin's evidence was that she knew that the "data GDS were seeing in the demand schedules might not have been accurate for the entire period it covered, because at some point NCR intended to swap GDS parts for Dynamo parts".

88. It is a feature of all of these statements that none of them clearly states when it was that the forecasts became false, and none of them identifies April 2012 as the start date for falsity. Mr Gledhill sought to make a virtue of the vagueness of NCR's evidence by emphasising the fact that the relevant events occurred many years ago, and the witnesses were doing what witnesses should do: ie giving their best recollection of events by searching their memories rather than looking at a large volume of contemporaneous documents. In their opening submissions, NCR explained that the NCR witness statements did not attempt to reconstruct from documents in the disclosure, which the witnesses had not seen for 8 years or more (if ever), what probably happened or to present that reconstruction as recollection. It was therefore unsurprising that no NCR witness gave "about the end of April 2012" as the relevant date. They submitted that the most likely date or period has to be worked out from the contemporaneous documents. Mr. Gledhill in his submissions also from time to time directed criticisms at GDS's witnesses for basing their evidence (or, as NCR would submit, reconstructing their recollection) on a careful reading of the contemporaneous documents, rather than upon what they actually recalled.

89. I am not persuaded that there was any virtue in the way in which NCR's witnesses had given their evidence in their witness statements, vague as it was, as to the period during which false forecasts were given. There was a significant issue in the present litigation not only as to whether false forecasts were given at all (a matter that was in issue until NCR's amendment in January 2021), but the period of those false forecasts. There is no reason at all why NCR's witnesses should not have considered, and indeed looked carefully, at the significant volume of contemporaneous documentation before giving their evidence in relation to the question of when the forecasts became false to their knowledge. The Civil Procedure Rules were amended early in 2021, after witness statements had been served in the present litigation, so as to introduce new rules relating to the way in which witness statements should be prepared. Even under the new rules, however, it remains permissible for witnesses to refresh their memory from contemporaneous documents before setting out their evidence in witness statements: Paragraph 3.2 of PD 57AC, and the Statement of Best Practice contained in the Appendix to the Practice Direction at paragraphs 2.6 and 3.4, contemplate that witnesses will be shown contemporaneous documents, particularly those which they have previously seen when the events were fresher in their minds.

90. If NCR's witnesses did not wish to refresh their memory from the substantial body of contemporaneous documents considering them carefully, or if NCR did not wish them to do so, then that is to my mind surprising although it is not impermissible. However, it does mean that their evidence is far less likely to be reliable than it might otherwise have been. It also means that there is no, or at best a very shaky, evidential foundation for NCR's case, that forecasts were not false until around April 2012 and then only in respect of the period covered by the forecast after the end of 2012.

91. In the present case, I have no hesitation in rejecting Mr. Kaparis's evidence that there was only a "short period" where GDS was receiving demand schedules that were not accurate. Even on NCR's case at trial, an 8 – 9 month period beginning in April 2012 cannot properly be described as short. But for reasons given, false forecasts were given from July 2011 onwards. Similarly, I reject Mr. Mannion's evidence that it was only at a stage "later in 2012" (ie some time after his meeting with Ms. Ma in Beijing in the spring) that the forecasts became false. Ms. Lappin does not volunteer a date, and her evidence therefore does not take NCR any further forward.

B9: Which individuals were party to the giving of the false forecasts?

92. The parties' submissions addressed the question of the individuals who were party to the giving of false forecasts. The issue is of limited relevance in view of the absence of issues as to whether the conduct of particular people can be attributed to particular NCR defendants. As previously indicated, NCR did not seek to draw any distinctions between the various NCR companies for the purposes of the deceit claim.

93. GDS's case is that the principal individual parties to the deceit were at all material times Messrs Kaparis, Mannion, Ciminera and Delamater as well as Ms. Ma. They say that Ms. Lappin was also party to the deceit from no later than early February 2012.

94. NCR submitted that the question of who was party to the giving of false representations would matter much more in a case where the defendant was denying the making of such representations. But here there was a relevant admission. Mr. Gledhill submitted that it was not necessary to look beyond Mr. Kaparis: he was an individual who knew about the forecasts, knew about Dynamo and was in a position to do something about the forecasts had he wanted to. It therefore did not matter very much whether others knew that the forecasts were incorrect.

95. However, he submitted there was insufficient evidence to find that others were party to the deceit. Ms. Ma had very little knowledge of Project Dynamo until quite late in the piece: he referred to e-mails to and from her in September 2012 where it looked as though she learned a little more about the changeover. As far as Ms. Lappin is concerned, he submitted that although she signed an NDA in early 2012, there was nothing to indicate that she had been given a Project Dynamo timeline. Mr. Mannion was comparatively junior and he was not a person of sufficient seniority or ability to control forecasts. These three individuals were, in Mr. Gledhill's submission, akin to robots: junior people who did what they were told under a legal obligation not to give the secret away.

96. Mr. Ciminera and Mr. Delamater were much more senior. Mr Gledhill submitted that they had quite sporadic involvement until late in the game. They were dealing with hundreds of suppliers.

97. I accept GDS's case that all of these individuals were party to the deceit of GDS. I accept Mr. Gledhill's point that Mr. Mannion, Ms. Ma and Ms. Lappin were not in a position to stop it, but each of them nevertheless participated in it.

98. Mr. Mannion worked very closely with Mr. Kaparis, and together they were the managers of the relationship governed by the Purchase Agreement. Mr. Mannion's witness statement described his role as managing the relationship with GDS and the supply of display screen assemblies. This included development activity and escalations from the buying team with regard to supply issues. His evidence indicated that whilst he did not have a close working relationship with Ms. Ma, he was aware that forecasts were being sent to GDS. Indeed, he was regularly copied in on the e-mails sent by Ms. Ma to Mr. Kendell which enclosed the forecasts, and upon responses from Mr. Kendell. He accepted in cross-examination that he was aware that there came a time at which a fundamental inconsistency developed between the forecasts being sent out to GDS and the intentions of NCR as to what it was actually going to need.

99. Mr. Ciminera and Mr. Delamater were senior individuals who were the decision-makers in relation to Project Dynamo. They were the recipients of important documentation such as the slides for the Pulse Check meetings. When Mr. Kaparis prepared his first detailed step by step approach to the GDS Exit in April 2012, he copied his email to Mr. Delamater. I agree with GDS's submission that it accords with common sense that they would have authorised each of the steps under Project Dynamo. At the New York meeting, Mr. Kaparis apologised to GDS for what had happened, and told them that he had been doing what he had been told to do by Mr. Ciminera and Mr. Delamater.

100. Ms. Ma was the individual who actually sent out the forecasts. There is no evidence that she was a recipient of the detailed Project Dynamo slide presentations. However, she was a recipient of various documents which showed that she was within the Dynamo circle of confidence by June and certainly September 2011. On 28 June 2011, she was sent an e-mail which referred specifically to the "NDA Project Dynamo", and which referred to the ending of the Supplier Managed Inventory programme. In September 2011, she was sent correspondence about future production which would have made little sense if she had not been told about the project. By October 2011 at the latest she had signed an NDA herself – although it is likely that she had in fact done so earlier. She was also a recipient of Mr. Kaparis's "keep up the pretentions" e-mail of 13 March 2012. I agree with GDS that it is reasonable to infer that Ms. Ma would, when first told about Dynamo, have been provided with a briefing or presentation which informed her of the key details of the project including its timeline: Ms. Lappin's evidence was that she received such a briefing, and it is probable that Ms. Ma would have received one too. If she did not receive such a briefing when she was first introduced to the project, it is overwhelmingly likely that she would have received it in March 2012 in connection with Mr. Kaparis's visit to Beijing. I conclude that it is probable that, particularly in the period after March 2012, she knew that the forecasts that she was sending on a regular basis to GDS were false.

101. During 2012, Ms. Lappin was regularly copied in on the 12 month forecasts provided by Ms. Ma, and she had regular e-mail and phone contact with GDS throughout that period including on weekly "allocation calls" with Mr. Kendell. Ms Lappin said in her oral evidence that, after signing the NDA at the start of 2012, she must have been invited to a meeting that "laid out the plan". It was a handover of information as to what the project was about: she could not remember who was there, but suspected that it was a

big meeting. She thought that she would have been given an indication and timeline of what at that stage was being intended under the project. Mr. Gledhill submitted that she was a suggestible witness. But I see no reason to disregard this evidence. Not only was the evidence actually given by Ms. Lappin, but it accords with what one would expect to have happened once she had signed the NDA.

102. Ms. Lappin said that, as far as she recalled, Project Dynamo would be happening "within the year", and she agreed that it would probably be much sooner assuming that the project design "went okay and we could manage to get material". She also knew that it was very important that GDS was not told about the project. She said that she knew that forecasts were being rolled out to GDS, and that if the project went to plan it was expected that in 2013 NCR would not require that material from GDS.

103. In view of Ms. Lappin's close and regular involvement with Ms. Ma and GDS in 2012, and the fact that she was copied in on the forecasts during that period, she was in my view party to the ongoing deceit. She was also cross-examined about correspondence with GDS in the second half of 2012 concerning a particular product with the designation 5965, and culminating in an email which she sent on 24 October 2012. I agree with GDS's submission that the e-mail was misleading, in that it gave a false explanation as to why there had been an apparent drop-off in demand for that product. Had the true explanation been given, GDS would have understood that it was about to be desourced. This showed her willingness to go along with the deceit.

104. NCR's submission that I should not go beyond a finding that Mr. Kaparis was party to the deceit implies either that Mr. Kaparis was acting alone in relation to the deceit, or possibly that he was acting in conjunction with individuals but not the above 5 individuals each of whom had a central involvement either in Project Dynamo or forecasting or both. Both of these propositions are inherently improbable.

Section C: The causes of action arising from the events prior to 16 January 2013

C1:Deceit

105. Both sides referred to my summary of the principles of the tort of deceit in *Vald. Nielsen Holdings and Ors v Baldorino* [2019] EWHC 1926 (Comm) at [130] – [159], and there was no dispute as to the applicable principles. The tort of deceit requires the claimant to show that: (i) the defendant made false representations to the claimants; (ii) the defendant knew the representations to be false, or had no belief in their truth, or was reckless as to whether they were true or false; (iii) the defendant intended the claimant to rely on the representations; (iv) the claimant did rely on the representations; and (v) as a result the claimant has suffered loss and damage.

106. As explained above, the issues for resolution at the present trial were narrow in view of the reservation of certain issues for later determination, and admissions made by NCR. In its opening submissions, NCR made it clear that it admitted that the Second Defendant made false representations from about the end of April 2012 and that NCR knew that that was the case. NCR did not pursue the point that the First Defendant and the Third Defendant were not responsible, together with the Second Defendant, for such false representations as may be found to have been made, nor the point that they were only made to the First Claimant and not the remaining Claimants. Otherwise, the ingredients of the claim were in issue. However, reliance, including whether NCR

intended GDS to rely on the representations, and causation and loss and damage are ingredients of the cause of action, but they are not issues for this trial.

107. The live issues under this heading for this trial therefore fall within (i) and (ii) of the above summary of the legal principles. NCR submitted that they boil down to whether NCR knew earlier than the end of April 2012 that the forecasts did not reflect its estimated future requirements from GDS.

108. For the reasons given in Section B above, I conclude that NCR knew from no later than 1 July 2011 that the forecasts did not reflect its genuine and honest belief as to its estimated future requirements. Accordingly, those elements of the tort of deceit which are relevant for the purposes of the present trial are established in relation to the period 1 July 2011 to 14 January 2013 (when the final forecast was given).

109. I did not understand NCR to submit that there was a defence to the claim in deceit based upon the matters which are alleged, in the context of GDS's unlawful means conspiracy claim, to have justified NCR acting as it did. No authority was cited in support of the proposition that a party otherwise liable in deceit has a defence based upon alleged commercial justification for its deceitful conduct. Even if such defence were potentially available (which I do not consider that it is), I would reject it on the facts for the reasons given in the context of the conspiracy claim below.

C2: Breach of contract

110. There were initially aspects of GDS's case which sought to rely upon implied representations and an implied term as to good faith which, if established, would have entailed obligations beyond the admitted obligation to supply forecast demand schedules that reflected NCR's genuine and honest belief as to its estimated future requirements. However, GDS's written closing submissions made it clear that the breach of contract claim "tracks the deceit claim", and I did not understand GDS to pursue a wider breach of contract case based upon implied terms. In relation to its breach of contract claim, GDS sought a finding that NCR is liable for breach of contract in respect of false forecasting from July 2011.

111. In its opening submissions, NCR admitted that from about the end of April 2012, the Second Defendant was in breach of the Purchase Agreement with the First Claimant in that the forecasts contained in the spreadsheets e-mailed by Ms. Ma to Mr. Kendell did not reflect NCR's estimated future requirements. No admissions were made as to causation and loss, which are not for the present trial.

112. For reasons given in Section B above, I find that the Second Defendant was in breach of the Purchase Agreement with the First Claimant in giving false forecasts during the period from July 2011 to 14 January 2013. I did not understand it to be alleged that there were breaches of contract by other NCR parties (other than the Second Defendant) vis-à-vis other GDS parties (other than the First Claimant).

C3: Unlawful means conspiracy

113. There was no dispute as to the requirements of a claim for unlawful means conspiracy, and I was referred to a number of authorities including the recent decision of the Court

of Appeal in *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300. The requirements are as follows:

a) A combination or understanding between two or more people;

b) An intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention. It is sufficient if the defendant intends to advance its economic interests at the expense of the claimant;

c) Unlawful acts carried out pursuant to the combination or understanding; and

d) Loss to the claimant suffered as a consequence of those unlawful acts.

114. On the authority of the majority of the Court of Appeal in *The Racing Partnership,* it is not necessary for a defendant to know the unlawfulness of the means used to be liable in conspiracy.

115. It is difficult to see how the claim in conspiracy adds to the claim in deceit, bearing in mind that none of the alleged individual conspirators are defendants. Indeed, in their closing submissions, GDS said in relation to the conspiracy claim that it relied principally on its claims in deceit and, in so far as necessary, their claim that the 6 individuals (Kaparis, Ciminera, Delamater, Mannion, Ma and Lappin) were joint tortfeasors in relation to the deceit.

116. In the light of my findings in Section B above, I consider that the requirements of the tort of unlawful means conspiracy are made out, save for causation and loss which are issues for the subsequent trial.

117. Thus, there was a combination between two or more people. All 6 individuals were party to the giving of false forecasts to GDS. The decision to do so was taken by individuals of seniority with NCR, namely Messrs Kaparis, Ciminera and Delamater.

118. I accept that the other 3 less senior individuals were essentially carrying out their instructions, and were not significant contributors to the decision to mislead GDS. Indeed, Ms. Lappin was only briefed on Project Dynamo in early 2012, some time after NCR had started to give false forecasts to GDS. In relation to those individuals, NCR relied upon a passage in *Clerk & Lindsell* paragraph 23-103 where the authors state that: "it seems to be the better view that an employer is not ordinarily "in combination" with his employees and that no charge of conspiracy can be brought when the latter merely go about his business". The footnoted reference indicates that there was a divergence of views expressed on this point in the decision in *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435, where Viscount Simon said: "even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about". I do not need to resolve how the law stands in the light of that divergence of views. Even assuming that Mr. Mannion, Ms. Ma and Ms. Lappin were merely going about the business of NCR and for that reason could not be party to the conspiracy, the same cannot be said of Messrs Kaparis, Ciminera and Delamater who were the individuals who decided upon the strategy of deceit. Accordingly, even if the three individuals lower in the hierarchy are left out of account, the first requirement of conspiracy is established against NCR.

119. The second requirement is an intention to injure GDS. In my view, this intention is clearly established on the facts. On any view, NCR was seeking, by its deceit, to advance their economic interests at the expense of GDS. Indeed, NCR's case on "justification", discussed below, effectively concedes this. That case is premised on the fact that, as sole supplier to NCR, GDS had a degree of power which it could use to its economic advantage if given notice of NCR's intention to cease purchasing from GDS. For example, GDS might be able to use its bargaining power in order to charge higher prices for its goods after having been told of NCR's intention to desource, and during the period when NCR was not yet in a position to meet its needs from Project Dynamo. NCR's deceitful conduct towards GDS was directed towards advancing its own economic interests by giving GDS to understand that business was proceeding as usual, whilst at the same time taking steps "under the radar" to put itself in a position to maintain continuity of supply from Project Dynamo when the time came to tell GDS the truth. By this route, NCR would neutralise and destroy any economic bargaining power that GDS would have enjoyed if it had been told the truth.

120. This conclusion is supported by the e-mail sent by Mr. Kaparis on 18 January 2013, two days after the call to GDS on 16 January. Mr. Kaparis reported to his colleagues that GDS was now "toast". At the end of his e-mail, he said that GDS "can and most likely will go belly up in less than 30 days. We have all the aces in our sleeves and the deck is stacked in our favour. That was not an accident. That was engineered". It was not part of GDS's case that NCR's deceit was motivated by a positive desire to destroy GDS. However, Mr. Kaparis's email does show that NCR's approach was motivated by a desire to put NCR in the best possible economic position, vis a vis GDS, as and when the time came to tell GDS the truth, and simultaneously to ensure that GDS was in no position to do anything about it.

121. The third requirement is that unlawful acts were carried out pursuant to the combination. Here, false forecasts were given over an extended period of time and NCR thereby committed the tort of deceit and the Second Defendant acted in breach of contract. This requirement is therefore made out.

122. The final requirement, causation and loss, does not arise at the present stage.

123. NCR submitted that it could defend the claim for unlawful means conspiracy by reliance on a defence of justification. Reliance was placed on the discussion in *Clerk & Lindsell* paragraph 23-118, where the authors say that the question of whether a defendant can rely on a defence of justification to avoid liability for unlawful means conspiracy is not straightforward. They express the view, however, based on the judgment of Toulson LJ in *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, that:

> "… where a claim alleges a *conspiracy* to breach a contract it may be appropriate to recognise a defence of justification of a breadth equivalent to the potential defence of justification for *procuring* a breach of contract. Otherwise, a party who could rely on his "equal or superior" right as justification for procuring a breach could nonetheless end up liable – as a conspirator – for having combined with the party in breach to cause loss to the claimant by means of the breach".

124. NCR also referred to the discussion in *Clerk & Lindsell* paragraphs 23-57 – 23-61 of the defence of justification in the context of inducing breach of contract, and the equivalent discussion in *Grant & Mumford: Civil Fraud* paras 3-069 – 3-075.

125. I do not consider that any defence of justification can arise in the present circumstances. The conspiracy alleged in the present case is not simply a conspiracy to breach a contract, but a conspiracy to commit the tort of deceit. The conspiracy does encompass a breach of contract, since the contract obliged NCR to give forecasts which were genuine and honest estimates. The relevant breach involved NCR acting fraudulently. There is no authority which supports the proposition that a defence of justification can arise in such circumstances, and in my view there is every reason not to recognise such a defence. Fraud has always been regarded by the law as the most serious infringement of a party's rights, and it would be surprising and in my view regrettable for a court to countenance fraud in any circumstances by saying that it was justified.

126. Even where the defence of justification may be available in inducing breach of contract or analogous cases, the case-law establishes that the commercial or other best interests of the inducer or the contract breaker do not amount to justification: see *Edwin Hill & Partners v First National Plc* [1989] 1 WLR 225, 230. That must in my view apply with even greater force where, in order to advance its commercial or other interests, a party commits fraud.

127. The decision of the Court of Appeal in *Edwin Hill* contains a full review of the authorities in relation to the defence of justification. One of the authorities cited in support of the proposition – that the commercial or other best interests of the interferer or the contract breaker does not amount to justification – is the decision of the Court of Appeal in *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 732. The court in *Edwin Hill* described this decision as an important case. In *Read*, the plaintiff had entered into an apprenticeship contract with a company called Wigg. The defendant society learned of this contract, which was allegedly in breach of a contract between Wigg and the society as to the basis on which apprentices should be taken. In order to protect the interests of their members, the society threatened a strike by their members if the plaintiff started work on the terms of his contract. As a result, Wigg terminated the plaintiff's contract. The plaintiff then sued the society, whose defence of justification was rejected. In the Court of Appeal, Collins MR (with whom Cozens-Hardy LJ agreed) said at 737:

> "On these facts the case seems to me to be clear. The plaintiff was entitled to the benefit of the contract which he had made, and that benefit he would have continued to enjoy but for the intervention of the defendants. The object of the defendants' intervention was to deprive him of that benefit. The facts leave no room for doubt as to that. He was not a member of their society, and was under no obligation, legal or moral, to conform to their rules. In these circumstances they conspired to enforce, by threats of a formidable character which they had the means of carrying into effect, a breach by his employers and instructors of the contract which the latter had with him ; and the only justification they can suggest for this conduct is that Messrs. Wigg & Wright had come under an obligation to them, not perhaps legally enforceable, if not illegal, not to make such a

> contract as they had made with the plaintiff. But the justification to be of any avail must cover their whole conduct, the means they used as well as the end they had in view. As against Messrs. Wigg & Wright they had whatever rights within the law the rules assented to by Messrs. Wigg & Wright afforded them. But to combine to coerce them, by threats of the character I have described, to break their contract with the plaintiff was in my judgment an illegal act carried out by illegal means. They cannot be in a better position if the rules are unenforceable than they would have been had a breach of them given them a legal cause of action. But in such case how can they possibly justify taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by breaking his contract with the plaintiff?"

128. He continued at page 738 – 739:

> "The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be "just cause," or, in other words, suffice to negative malice. There was no relation between the defendants and either of the parties in this case at all analogous to those existing in the instances put of father and child, or doctor and patient, which I leave for solution when the case arises. The defendants have no higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only."

129. Accordingly, even if the society did have an enforceable contract with Wigg and the latter were in breach of its terms, that could not justify both the illegal act and the illegal means adopted: the coercion of Wigg by the threat of strike action.

130. In my view, the present case is even clearer than *Read*. The factual basis upon which NCR seeks to justify its conduct in deceiving GDS over a considerable period of time was based upon NCR's concern at "retaliation" by GDS in the event that the plan to desource GDS was revealed. It was said that such retaliation could or would have involved GDS breaching its contract with NCR, or committing unspecified tortious acts, which would have had the effect of disrupting the continuity of supply which was essential to NCR's business. Heavy reliance was placed upon Mr. Cariolato's conduct and threats at the 2009 meeting in Cornedo, when he had what might be described as a melt-down after being told that GDS was being put on new business probation.

131. I was unpersuaded that retaliation of this kind was at all likely to eventuate, or that it was anything more than a very remote possibility. On the contrary, it seemed to me that Mr. Cariolato's evidence, as to what would have happened if GDS had been given notice, was sensible and reflected commercial common-sense. When it was suggested

to him that GDS would have exercised its leverage over NCR during the remaining period that NCR needed to receive GDS products, he said:

> "We were not using that leverage because it was a kind of a challenge to our customer. We were more concern about risks and responsibilities, so if this has to happen we are very afraid that it happen. It would be a big problem for GDS but if this has to happen we have to manage properly, manage the problem is to … reduce the risk of GDS to reduce the US$ 20 million of working capital which sat on.
>
> …
>
> [The leverage] is not existing because you know it's the last thing that a company like GDS could do, because if you do that …. And then what? Then what? You have finished to work with the customer? You end a 20 years profitable relationship? You cut your future? You risk to remain with the US$ 20 million of working capital which may be five to ten millions are invoiced to be paid which the customer will have stopped immediately to pay, so what is the sense to do that?"

132. Mr. Delamater's view, expressed to Mr. Kaparis in April 2011, was to similar effect:

> "I know you are working hard Evan, but to be honest, Dynamo is not on the forefront of my mind, it really is not. I am thinking about how to keep my job for 2011, not project that will take 3 years to implement etc … I know all the reasons why and quite frankly, if you have anxiety around how GDS will react, don't.
>
> Reason being: the best thing that can happen to us is for them to stop shipping. It will just vindicate and validate our broken record message of "we are sole sourced and have no alternatives". There is part of me that hopes they do shut us down. Then folks will realize what a precarious position we are in. That being said, they will not because they need the revenue more than we do. That is the bottom line. Either way, it will be interesting for sure".

133. Later on in his evidence, Mr. Cariolato described what in his view would normally happen, and in his view should have happened:

> "There are different way to terminate a contract. You could expect to be given notice, and you could expect that you are offered to ramp down your manufacturing, respecting the forecast that has been provided to you, in order that somehow to protect the customer, because in somehow you work as a safety net while they are ramping up, and it allowed the supplier to adapt, to adjust to a new scenario"

134. Again, it seemed to me that this evidence reflected commercial common-sense.

135. However, even if I had been persuaded that there was a real risk of retaliation by GDS, with a real risk of a threat to NCR's supply continuity by possible breaches of contract or tortious conduct by GDS, I cannot see that this justified NCR in effect taking the law into its own hands by a conspiracy to deceive GDS over a lengthy period of time in order to avoid the possibility of a breach or tort by GDS. If NCR had put in place contractual agreements whereby it was entitled to receive goods from GDS, and if in due course GDS had threatened not to perform its contracts with potentially serious consequences to NCR, then the appropriate way to proceed would have been for NCR in that situation to have applied for an interim injunction to restrain GDS's breach of contract or other unlawful behaviour. To apply the words of Collins MR: NCR has no higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only. Accordingly, the notion that NCR's relevant individuals were justified in conspiring to deceive GDS over a lengthy period of time, in order to ensure that NCR's supply chain continuity was maintained, is in my view a complete non-starter.

136. NCR also invoked the possibility that GDS would, if told the true position, "retaliate" by measures which fell short of breaching their contractual obligations or acting tortiously. For example, NCR referred to the possibility that GDS would use the period between notification and NCR being self-sufficient in order to raise prices, or take other steps which were within their contractual rights. I do not see how this possibility could provide a defence to the unlawful means conspiracy case. If, in consequence of being told of NCR's decision, GDS had a degree of leverage or bargaining power which could legitimately be exercised during the ramp-down period, I see no reason at all why GDS should not have been able to use it, and conversely no reason at all why NCR should be entitled to resort to fraudulent conduct in order to prevent it. Ultimately, the consequence might have been that NCR would have had to pay higher prices, or been more accommodating towards GDS in other respects, than they might otherwise have been. This might have been disadvantageous to NCR commercially, although there was no evidence to suggest that this would have caused a major difficulty in the operations of NCR, which is a very substantial business. As I have said, it is well established that the commercial or other best interests of the "interferer", in an inducing breach of contract case, do not provide a defence of justification.

137. The decision in *Hill* is authority for the proposition that the defence will operate, in the context of inducing breach of contract, where the defendant is able to identify an equal or superior right which justified interference with the claimant's contractual rights. In that case, a lender was owed very significant sums by a borrower, and could have called in the loan. Instead, the lender agreed to advance additional funds, but on the basis that the borrower's architect for a proposed development was replaced. A claim by the architect for inducing breach of contract failed because the lender was justified in doing what it did. The lender's rights as a secured creditor were being protected by their actions. They were in a position to exercise a remedy, as a secured and unpaid creditor, to appoint a receiver, and thereby put an end to the architect's contract. The leading judgment in the Court of Appeal was given by Stuart-Smith LJ. He said that it would be anomalous and illogical if the lender could appoint a receiver thereby terminating the contract with the architect, but could not reach the same result of putting an end to the architect's contract by reaching an accommodation with the borrower. In both cases, the lender would be acting to protect his rights as a secured creditor, which were equal or superior to the rights of the architect to maintain his contract.

138. NCR is not in an equivalent or analogous position to the lender in *Edwin Hill*. The lender had no contractual obligations towards the architect and (apart from the allegation that it was inducing a breach of the architect's contract) was not acting unlawfully, still less dishonestly, in its dealings with its borrower. In the present case, by contrast, NCR had a contractual obligation to provide honest and genuine forecasts to GDS. The giving of false forecasts was also (subject to the reserved issues) tortious, involving dishonesty in the sense in which that expression is used in the context of the tort of deceit. It is no answer to a case in either breach of contract, or for the tort of deceit, that NCR had concerns as to possible retaliation by GDS. Even if GDS had in fact broken any contract with NCR, this would not entitle NCR to breach its contractual obligations in relation to forecasting, or to deceive GDS. In those circumstances, I do not accept that NCR had any right, equal or superior to that of GDS, which it was justified in protecting by a conspiracy to defraud GDS.

139. For these reasons, the defence of justification fails. It is not therefore necessary to discuss at length the detailed facts on which each party relied in support of their respective cases as to the seriousness of any threat of retaliation by GDS in the event that NCR's plans were revealed. It is sufficient to summarise briefly my conclusions on those facts, in so far as I have not already done so.

140. Mr. Kaparis was deliberately provocative at the July 2009 Cornedo meeting. His approach to the GDS relationship and to costs in general on that occasion was, as GDS submitted, part of a general strategy of "shock and awe". He was brusque and rude, seeking to move GDS out of its comfort zone. His putting GDS on new business probation was patronising and provocative. Mr. Cariolato reacted badly at the meeting: he had a melt-down, and did threaten not to supply product to NCR. However, this is not what actually happened.

141. Shortly after the meeting, Mr. Bisognin wrote a lengthy letter to Mr. Kaparis dated 14 July 2009. That letter did not threaten to cease supplying product to NCR. In section 10 of the letter, GDS said that it could only continue to provide its existing services if there was trust and respect between the key players on both sides and within the framework of a rolling, 2-year supply agreement. The letter said that the statement made at Cornedo that GDS would not be invited to participate in new business programs (ie new business probation) effectively began a disengagement process. GDS said that under such conditions "GDS must protect itself and would need to transfer immediately to NCR responsibility for all the risks of NCR's business and their related costs". This meant that GDS could be obliged to do a number of matters, including moving to firm orders based on purchase orders rather than "delfor". One of the matters at the end of the list was: "Other measures TBA". However, there was no indication in the letter that GDS intended to breach its contractual obligations or act improperly. An internal e-mail sent by Mr. Cariolato on 2 August 2009 shows that he did not have breaching the contract in mind, even if GDS went down the disengagement route: he referred to putting in place the disengagement model "as hard as the contract allows".

142. Subsequent to the meeting and the 2 August 2009 letter, NCR prepared a set of slides for the purposes of a reconvened discussion with GDS. The slides made no reference to any threat to continuity of supply, but instead focused on how to exert costs pressure on GDS. The same is true of NCR's preparation note for a meeting in New York on 12 August 2009.

143. Although a two-year supply agreement was not agreed as requested by Mr. Bisognin in his July 2009 letter, the relationship between the two companies was soon back on an even keel, albeit that NCR maintained the costs pressure on GDS. As NCR correctly accepted in its opening, relations between GDS and NCR stabilised in the months after the 29 June meeting. There was therefore no disengagement by either party. GDS continued to supply products to NCR. In March 2010, Mr. Ciminera told his colleagues about a meeting with Mr. Cariolato: Mr. Ciminera had not been expecting much, but he "walked away with a good feeling about Giovanni". He thought that GDS was now "listening better". The "new business probation" was not carried through. GDS was asked to tender for the Ecolution project and it became clear that GDS was in fact the most price competitive supplier that NCR could in practice use. In its internal evaluation of GDS's alignment with its core values in 2010, NCR awarded GDS top marks using its evaluation scale. There was no evidence that GDS had materially broken any contractual obligations in the period between July 2009 and the telephone call in January 2013.

144. I agree with GDS that the July 2009 meeting has been greatly exaggerated by NCR in this case, as part of a narrative to seek to explain and justify the unjustifiable acts which were undertaken later on. In my view, the exchanges at that meeting, and the statements made in the July letter that followed, did not have the ongoing significance which NCR sought to attribute to them. Approximately 15 months after the Cornedo meeting, the slides prepared for the "Initial Planning Session" on 24 September 2010 identified the various risks involved in Project Dynamo. These did not include the risk of retaliation by GDS. Instead, the risks included:

> "Time to savings vs. continuity of supply: "Critical Mass" of GDS staying in business in jeopardy if we gradually starting taking business away and go past their tipping point".

145. In a more detailed slide within that presentation, headed "Possible Scenarios", the first scenario was moving business away from GDS as each organic display comes on line, and buying safety stock in anticipation of GDS' "implosion". The pros and cons of that course were identified, but no concern was expressed at the possibility of retaliation by GDS. The concern, consistent with the earlier slide, was that GDS might fold or be forced to exit the business. The 80/20 scenario was also included in this slide and (see Section B above) was ultimately adopted: this would allow NCR to "complete the whole operation without GDS knowing we are about to de-source them." Continuity of supply was therefore an important consideration for NCR. However, the concern was not retaliation by GDS, but rather a concern as to whether GDS would stay in business or be able to perform. Similarly, the relevant slide for the Dynamo Pulse Check meeting in April 2011, which recommended the 80/20 plan, referred to this mitigating the risk of GDS "imploding" and putting supply and revenue in jeopardy. It does not refer to any risk of retaliation.

146. Some of NCR's documents showed that individuals in NCR did think about the possibility that GDS would cease supply other than through implosion. However, this was not regarded as a major risk, at least by the decision-makers Mr. Delamater and Mr. Ciminera. Mr. Delamater's email to Mr. Kaparis on 15 April 2011 ("If you have anxiety around how GDS will react, don't … They will not [shut us down] because they need the revenue more than we do") shows that Mr. Delamater did not regard a shut down as a realistic scenario. Since Mr. Delamater was one of the two decision-makers

on Project Dynamo, his view there expressed is important. I was not referred to any documents which specifically evidenced the view of the other decision-maker, Mr. Ciminera, and there is therefore no evidence that he had a different view to that of his senior colleague Mr. Delamater.

147. I accept that Mr. Kaparis may have had concerns notwithstanding Mr. Delamater's April e-mail. In an e-mail to Mr. Smola and other colleagues on 14 June 2011, in connection with slides that Mr. Smola had prepared, Mr. Kaparis commented on something that Mr. Smola had written: "what is your point on the "GDS negative response" potential. We know it's going to be negative, that's why we are going down the path with the 80-20 rule etc. You might want to consider removing this item unless I am missing anything here". The evidence does not show what Mr. Smola had originally written, since it appears to have been removed from the finalised slide available in the hearing bundle. It appears, however, that Mr. Kaparis may have had more concern as to an adverse reaction than his other colleagues. Mr. Smola had himself, in an earlier e-mail dated 24 May 2011, described the possibility of GDS stopping production as "the worst case". A worst-case scenario is, however, not a likely scenario.

148. Whilst there may have been differing views in early 2011 as to the risk of a negative response, NCR's perception of the likely risk by the autumn of that year can be seen in the slide presentation for the 30 September 2011 Pulse Check. The "Risk Barometer" slide addresses the relevant point squarely: it identifies scenarios in the form of a number of possible weather conditions ranging from "sunny" to "tornado". The tornado was: "Vendor hears of our plans prior to replacement products being finalized and stops delivery of the current product". In relation to tornado, the "mitigation" comment was: "This is self-destroying on behalf of the vendor. Likely hood is will look for short term price hike or promise of continued orders". This comment is broadly consistent with the evidence of Mr. Cariolato, described above, as to why there would have been no point in stopping continued orders. It is also consistent with the view expressed by Mr. Delamater in his 15 April 2011 e-mail to Mr. Kaparis. There is no reference in this slide, or indeed in NCR's internal documents generally, to anything that had been said in the June 2009 Cornedo meeting.

149. Moving on in time, NCR's internal documents show a recognition of the likelihood of deliveries continuing under purchase orders that had been placed: ie NCR was not anticipating that GDS would breach contractual obligations. For example, in an e-mail to Mr. Peter Little (the Project Manager of Project Dynamo from September 2011) and others in December 2012, Mr. Chad Lockhart said: "further incremental orders likely to be delivered beyond point of disclosure with the risk of disruption due to breakdown of relationship although it is thought GDS would deliver any products they have material to build". This comment was incorporated into a December 2012 slide presentation. A similar sentiment had been expressed by Mr. Little himself in an earlier e-mail dated 31 October 2012: ("if they are committed to buy, they are less likely to tell us to go away once the announcement is made, and we may be able to bump up safety stock a bit before then"). Although NCR referred to another e-mail where Mr. Little had referred to mitigating the risk of GDS "going postal" (which apparently means becoming uncontrollably angry, often to the point of violence, and usually in a workplace environment), there is nothing to suggest that Mr Little thought that this was a serious risk.

150. I therefore do not accept that, as NCR submitted, NCR's determination to keep GDS from finding out about Project Dynamo was strongly driven by its fear of reaction to any advance warning, or that NCR was shocked and frightened by what was said at the meeting in Cornedo or in subsequent correspondence. Rather, the decision to mislead GDS was simply a commercial decision taken in order to achieve the swiftest possible implementation of Project Dynamo and thereby obtain the benefit of cost savings as quickly as possible and avoid the cost of possible price increases during a ramp down period or the possibility that a negotiated ramp down period would result in a delayed introduction of Dynamo.

151. If NCR and its principal individuals had acted honestly in relation to the giving of forecasts to GDS, as in my view they should have done and the law required them to do, then the obvious commercial course would have been for the parties to sit down together and agree an orderly transition. There were significant commercial incentives on both sides to reach agreement. It would, as Mr. Cariolato's evidence indicated, be commercially extremely strange if not suicidal for GDS to have decided to cease supply: it would have had stock in hand, it would lose the profit on sales, it would risk not being paid accounts payable particularly if it broke contractual commitments, and it would be hoping that the relationship could continue in some form as a potential second source supplier. The parties had been dealing with each other for very many years, and it is difficult to see how a sensible commercial negotiation would not have led to a mutually acceptable ramp-down. This might have been more expensive to NCR, and delayed the introduction of Dynamo for a relatively short while. If so, then that would simply have been a consequence of honest commercial dealings reflecting the relevant bargaining power of the parties. It is not a justification which excuses the unlawful means conspiracy that took place.

Section D: January/ February 2013 and the circumstances leading to the Letter Agreement

D1: Introduction

152. The issues in the case mean that it is important to consider in some detail the dealings between GDS and NCR, and the intentions of the principal participants, in the period leading up to the Letter Agreement. Matters that were communicated in the written and oral exchanges between the parties were relied upon by NCR, and to some extent GDS, as forming the factual matrix against which the Letter Agreement is to be construed. Those communications, as well as internal communications on each side, were also relied upon in support of NCR's case that the Letter Agreement should be rectified for common or unilateral mistake. That case required scrutiny of the documentary record, including internal communications, in order to establish the state of mind of relevant participants. Aspects of the communications during this period were also relevant to GDS's case based on the tort of intimidation, although by the end of the trial the focus of that case (as far as intimidatory acts are concerned) was principally upon the unlawful acts of deceit and conspiracy which preceded NCR's call to GDS on 16 January, rather than upon any implicit or explicit threats made thereafter.

153. There was a considerable imbalance between the evidence relating to these events which was called or adduced by each side. GDS called two very senior individuals within GDS, Mr. Cariolato and Mr. Bisognin and they were cross-examined for over 2 days. I have re-read the entirety of the relevant parts of their cross-examination

concerning the events commencing with the 16 January call. Both witnesses sought to answer questions honestly and did so in a manner which was largely consistent with the contemporaneous documents, although their evidence was inevitably to a degree coloured by their knowledge of the case that GDS is advancing in the present proceedings. Whilst Mr. Cariolato at the beginning of his cross-examination gave very lengthy answers, which were not clearly focused on the questions asked, he soon appreciated that this was not appropriate. His answers in cross-examination on the period after 16 January were generally shorter and more to the point, as were Mr. Bisognin's. Both witnesses had clearly looked carefully at the contemporaneous correspondence, and to a large extent their evidence was based upon what was contained in the documentation. Despite criticisms by NCR as to this approach, on the basis that it was largely based upon what the documents said rather than independent memory or recollection, I did not think that there was anything wrong with it. As discussed in Section B above, it is legitimate for witnesses to look at contemporaneous documentation in order to refresh their memory of relevant events, and an enquiry into what a witness remembers independently of the contemporaneous documents is in my view not something which needs to be carried out or which is likely to be productive.

154. In addition to providing evidence from the two key individuals, GDS waived privilege in all communications during the relevant period between its representatives and lawyers, Stevens & Bolton ("S&B") where the matter was dealt with by Mr. Michael Frisby. This waiver meant that there was a wealth of documentary material on the GDS side, shedding light on the contemporary perceptions and thinking in the period leading to the signature of the Letter Agreement, and in particular in the period after the first draft of the proposed Letter Agreement was sent to GDS.

155. Notwithstanding the burden on a party who seeks rectification to provide convincing proof of the facts which are said to make rectification appropriate, and by contrast with the evidence adduced by GDS, there was a relative paucity of evidence which NCR sought to adduce.

156. There was no dispute that the decision-maker, as far as the Letter Agreement was concerned, was Mr. Ciminera. Although he was employed by NCR as recently as October 2020, and therefore well after the present litigation had been commenced, no witness statement was served in accordance with the relevant court orders. A very belated attempt was made to adduce evidence from him, pursuant to an application made after cross-examination of all of NCR's witnesses had been completed, and I declined to give permission for that evidence to be adduced. Nor was any evidence served at any stage from Mr. Delamater, who reported to Mr. Ciminera and who was significantly involved in the relevant events.

157. It is frequently the case, in rectification cases, that a party will adduce evidence from the legal adviser who was responsible for drafting the document which it is sought to be rectified. This will also, very frequently, be accompanied by a waiver of privilege of documents which provide contemporaneous evidence supporting the factual case that a mistake was made. The position here is that the contemporaneous documents show that an in-house lawyer at NCR drafted, or was certainly involved in drafting, the Letter Agreement: on 15 February, after GDS had accepted NCR's proposal as described below, Mr. Kaparis told his colleagues that "our attorney (Louise M) is preparing the specific language that needs to accompany our offer to GDS + the subsequent purchase orders that follow". No adverse inference can be drawn from the fact that privilege has

not been waived, or that the relevant lawyer has not been called to give evidence as to the instructions received or the legal advice given or the reasons why the Letter Agreement was drafted in the way that it was. However, the absence of such evidence may mean that evidential gaps in the evidence submitted by the party seeking rectification have not been filled. As further discussed in Section F below, NCR's evidence in this case has not sought to provide an explanation of why the Letter Agreement was drafted in the way that it was.

158. The positive witness evidence that was relied upon in support of the rectification case was given by Mr. Mannion and Mr. Kaparis. At the start of his oral evidence, in response to questions asked by way of examination in chief, Mr. Mannion sought to explain that he was giving evidence not only as to his recollection of what he thought, but also as to what others within NCR were thinking at the time. It was obvious that this evidence was given in recognition of the evidential gap created by the absence of any evidence from Mr. Ciminera (and indeed Mr. Delamater) and the inability of NCR to call Mr. Kaparis due to ill-health. As Mr. Mannion's evidence progressed, however, it became clear that he was not closely involved in the consideration of the terms of the Letter Agreement. There were also other difficulties with his evidence, as discussed in Section F below. He was therefore not in a position to fill the evidential gap – a fact which no doubt contributed to the belated application to adduce evidence from Mr. Ciminera.

159. As far as Mr. Kaparis is concerned, NCR was ultimately unable to call him as a witness owing to ill-health. At the time that the court was advised of NCR's decision not to do so, the medical evidence relating to his alleged inability to give evidence by video-link was by no means satisfactory. Indeed, there was no evidence from a doctor or healthcare professional as to his then current state of health, and such evidence as was given came from NCR's US in-house attorney Mr. Murphy, basing himself on information given by an NCR employee in Greece (Mr. Kaparis's line manager) who was in turn basing himself on information from a relative of Mr. Kaparis. Eventually, however, some more direct evidence of Mr. Kaparis's ill-health was forthcoming (albeit still unsupported by evidence from any medical professional). I accept, on the basis of that evidence, that NCR was not in a position to call Mr. Kaparis during the trial and that there were legitimate reasons for NCR not wishing to seek a lengthy adjournment in order to accommodate the uncertain possibility that Mr. Kaparis might be able to give evidence in the future.

160. Mr. Kaparis, in his witness statement, did give evidence in support of the rectification case, but for the above reasons it was not cross-examined upon. I will discuss the reliability of Mr. Kaparis's evidence in that regard in due course, after I have considered the contemporaneous documentary evidence.

161. The contemporaneous documentary evidence is of considerable importance in any rectification case, and the documentation was relied upon by both sides in support of their respective cases in particular in relation to rectification. The following description of events therefore focuses on the story which emerges from the contemporaneous documents, and in particular on issues relevant to the rectification case including the subjective intentions of the parties. Some aspects of the negotiations, in particular the nature of the complaints made by GDS and more generally the issues under discussion, are in my view admissible as part of the factual matrix on issues of construction. The

description includes, where appropriate, my findings of fact which are relevant to issues considered later in this judgment.

D2: December 2012

162. It is appropriate to start in December 2012 since this casts light on NCR's thinking prior to their announcement to GDS. GDS's case is that, at this time, NCR's focus was on its potential contractual liability to GDS in consequence of cancellation of orders which had been placed. NCR was not therefore thinking about any possible wider potential liability to GDS in consequence of the false representations which had been made in forecasts for some very considerable time previously. GDS contends that the documentation shows that this remained NCR's mindset, and that it explains why the Letter Agreement was drafted in the way that it was and also why there is an absence of evidence to establish that NCR had the relevant intention necessary to establish a case of rectification.

163. As far as NCR is concerned, Mr. Gledhill sensibly acknowledged in his oral closing that there was no documentation pre-January 2013 which showed that NCR was considering their own liability for false forecasting. He submitted in his oral closing submissions that the reason for that was probably that they mistakenly thought or failed to consider that because the forecasts were not binding commitments to purchase, that NCR was allowed to zero them out. NCR therefore probably thought that the non-binding nature of the forecasts meant that "they did not mean anything at all". He said that this was wrong in law, but may explain why NCR was not giving a lot of consideration to forecasts and it may explain why there isn't "much documentation considering their liability for forecasts pre-January". As will become apparent, I think that this is a realistic explanation of NCR's mindset prior to the 16 January call. (These facts are relevant to the question of exemplary damages: see Section J below). I also consider that it was also NCR's mindset thereafter. Whilst it is true that false forecasts were a significant matter raised by GDS in the parties' discussions, there is nothing in the NCR internal documentation which indicates that NCR's pre-16 January mindset was altered. In my view, this explains why (as GDS submitted) the Letter Agreement was drafted in the way that it was. This is borne out by the chronology described below.

164. A slide presentation headed "Dynamo SRT Special", and dated 5 December 2012, shows the NCR exit strategy thinking at that time. The SRT was, as explained in Section B, the Strategic Review Team. There were a number of SRTs within NCR, and the SRT for Dynamo comprised a core group of individuals. The presentation included a recommendation "to disclose to GDS first week of January". One of the slides, headed "Exit Strategy" had a number of points under the heading "Legal":

- Contract will run until June 2013. We are required to give 12 weeks notice prior to termination
- We are committed to take 10 weeks stock of which 4 weeks is finished goods and 6 weeks is incoming raw materials.
- Exception is where we have explicitly agreed to the procurement of long lead items

165. One of the difficulties which NCR was facing at this time, and which remained a continuing issue, was the need to maintain continuity of supply at the same time as bringing Dynamo on stream. The slide pack identified a particular difficulty with the "5965" product in terms of continued supply, and various options to mitigate a 5965 shortfall risk. That option included placing increased orders on GDS in order to cover demand in the first quarter of 2013.

166. The "Legal" slide was repeated in an SRT slide deck dated 17 December 2012. Mr. Ritchie submitted, correctly in my view, that what NCR was here contemplating was that there would be a termination of the Purchase Agreement pursuant to its terms. Clause 13 of the Purchase Agreement provided for termination without cause upon NCR giving 90 days written notice to GDS (ie a period just in excess of the 12 weeks referred to in the slide). It appears that NCR may at this stage have lost sight of the 2006 Amendment Agreement which extended this to 120 days. Clause 13 also obliged NCR to meet the cost of all product delivered to and accepted by NCR prior to notice and "Stock being held by the Supplier pursuant to clauses 6.2 and 7.3 of this Agreement". Clause 6.2 referred to a liability for "Detail part holdings in excess of 6 weeks" and "Finished Product holdings in excess of 4 weeks". It was these periods which were referred to in the "Legal" slide. That slide also referenced situations where NCR had agreed to the procurement of long lead items, and this was also referenced in Clause 6.2 of the Purchase Agreement.

167. On 20 December, Mr. Kaparis circulated a slide deck headed "Dynamo – GDS Exit Disclosure & Exit Plan". The recipients were Mr. Ciminera and Mr. Delamater, with copies to Mr. Mannion and another. Mr. Kaparis indicated that he would be walking them through the deck in a call later that day. The "Agenda" slide indicated that the topics included "Review and agree on GDS Disclosure Game plan" and "Post disclosure next steps". The "Proposed GDS Disclosure Game Plan" slide indicated that, at that point, NCR was assessing its liability, upon submitting their termination notice, by reference to 6 weeks on incoming raw materials, and 4 weeks for finished goods, although there was a greater liability (6 weeks of finished goods and 12 weeks WIP ie work in progress) for India and Brazil. It is clear that NCR's own assessment of its liability on termination was by reference to those limited volumes of finished goods and raw materials. In respect of those volumes, the slide indicated that as part of the "Post disclosure next steps", there would be a negotiation:

> "Negotiate Finished Goods Receipt quantity vs. Raw Materials exposure and agree on delivery schedule."

168. It is clear that, at this stage, no thought was being given to any potential liability as a result of the deceitful projections which NCR had given GDS.

D3: 1-15 January 2013

169. Although the plan had been to disclose to GDS in the first week of January, this did not happen. The internal NCR slide deck dated "Dynamo GDS Exit Disclosure" indicates the likely reasons. The slide headed "Dynamo High Level Status" showed that there were certain products where the "run out" date (ie when NCR would run out of GDS stock) was relatively soon. The relevant risks were identified with a traffic light system, with three products having a "red" risk and a number of other products having an "amber" risk. Other slides confirm that there were potential issues in relation to

continuity of supply. There had also evidently been some further thought given by NCR as to how to approach the termination, as shown by the slide headed: "GDS Contractual Obligation on Exit". This stated:

> "If we will need GDS displays beyond the 30 + 30 days after our disclosure to Exit GDS (5965 and Thermally managed 15" displays) instead of terminating the contract (which cancels all open POs) we should cancel only PO's that we don't need material for".

170. It is apparent that consideration had been given to the terms of Clause 13 of the Purchase Agreement. This provided that the termination of the agreement itself would have the effect of cancelling all outstanding purchase orders. NCR would be able then to place a purchase order, but GDS's only obligation was to use best efforts to supply. The result would therefore be that, in relation to goods which NCR really needed, the cancellation of the Purchase Agreement would result in GDS's obligation reducing from a commitment to supply to best efforts to supply. This could potentially have serious consequences, particularly if the effect of termination on GDS was to create liquidity problems which might impact upon the best efforts which it could make. Accordingly, as evidenced by the slide, NCR had the idea of only cancelling certain purchase orders, rather than cancelling the Purchase Agreement itself.

171. Mr. Mannion was shown this slide in cross-examination, and the conclusion to be derived from that slide (as described above) was put to him. He said that he did not believe that this was the case. I reject that evidence as unreliable, since it is an obvious conclusion to be drawn from the document. I consider that, as Mr. Ritchie submitted, there was indeed a change of approach at around this time, caused by the potential adverse effect to NCR of terminating the Purchase Agreement. This provides the explanation as to why, come 16 January 2013, there was a cancellation of selective purchase orders. The slide headed "Proposed GDS Disclosure Game Plan" indicated that NCR recognised the difference between cancelling purchase orders, and terminating the contract: a "Note" at the bottom of the slide set out proposed wording if NCR decided to terminate the contract. The slide pack also confirms that NCR's focus was on their contractual obligations in the light of termination, rather than upon any potential liabilities arising from their misleading forecasts.

172. The reference in the slide to "30 + 30 days" shows that, by this time, NCR had given some thought to the position that it would take as to what its contractual obligations were. The slide identified the "Liability" in respect of "Finished Goods required to fulfil the delivery schedule for 30 days following GDS receipt of the termination notice": the period being 14 January to 13 February, and the liability being US$ 4.86 million. The liability in respect of "WIP at GDS to the extent required to fulfil an additional 30 days of deliveries to NCR", during the period 15 February to 16 March, was US$ 3.38 million. This 30 + 30 day timeframe was taken not from the Purchase Agreement, but rather from the terms which were alleged to have been incorporated in the purchase orders themselves. The parties' opening written arguments addressed the question of incorporation, but in my view NCR had no effective answer to GDS's argument that the Purchase Agreement was the governing contract, rather than any terms allegedly incorporated via the purchase orders themselves. Any contrary terms contained in the purchase orders themselves can therefore be disregarded. This point is, however, of

little significance in relation to the issues which were ultimately argued and the description of the relevant events.

173. What is clear is that, whether contractually justified or not, NCR was going to take the position that they were entitled to cancel whatever they cancelled. On 15 January, Mr. Kaparis prepared a "GDS Call Key Points/ Script" for the call that was about to be made to GDS. The points to cover started with NCR's decision vertically to integrate the design and manufacture of its display portfolio that historically had been supplied by GDS. The script included that upon exit NCR would be cancelling GDS open orders and taking the forecast to zero. It continued:

> "A detailed file of what material we will be taking will be sent shortly
>
> …
>
> NCR welcomes discussions with respect to our respective obligations and commitments arising from this change in our display sourcing strategy.
>
> …
>
> We appreciate your support over the years."

174. At the foot of the document containing the script was a "Check/ Action List". This stated:

> "**From January 16th +30 days is the 15th of February. +60 days is March 17th**
>
> **Purchase Orders:**
>
> **Craig to mastermind & Holly to execute (Production Orders):**
>
> - Craig will provide a file to Holly detailing which receipts to leave open and which to cancel. The game plan is for GDS and BENCHMARK:
>
> - Part 1: Leave in tact receipts that are due by February 15th (30 days)
>
> - Part 2: For materials with dock dates between February 16th through March 17th
>
> - Keep the receipts open that are in transit (NCR owns that)
>
> - Keep intact materials we need (5965, thermally managed) that are NOT in transit

- …Craig will keep track the part 2 value and shipments qty in order for us to negotiate our 60 days WIP contractual commitment with GDS

- Part 3: Cancel all receipts with dock dates beyond March 17th that are NOT in transit."

175. It is apparent from this document, as Mr. Mannion appeared to accept in evidence, that NCR intended to cancel materials during the second 30 day period if NCR did not need those materials. The plan was then to "negotiate our 60 days WIP contractual commitment with GDS". It is clear from a spreadsheet that Mr. Mannion prepared at that time that some purchase orders were indeed to be cancelled, even though they did fall within the second part of the 60 day window. Those orders in due course featured on the list of cancelled purchase orders. I reject Mr. Mannion's evidence that NCR intended to stand by all the contractual commitments that it believed that it had undertaken. Even if I make the assumption, favourable to NCR, that it genuinely believed that its commitments were limited to the 60 day window, it is nevertheless clear that, contrary to Mr. Mannion's evidence, there was an intention to cancel (and an actual cancellation) of purchase orders with deliverable material during that window, and an intention to negotiate with GDS about that material. [1]

176. Mr. Kaparis in his witness statement also sought to emphasise NCR's willingness to adhere to its contract. I regard his evidence in that respect as equally unreliable and inconsistent with the documents to which I have referred.

D4: 16 January

[1] Following the provision of the draft judgment to the parties, Mr. Gledhill e-mailed on 28 April 2021 inviting reconsideration of the findings in paragraphs 173-176 and the related finding in paragraph 228 of the draft. The substance of the argument was that NCR did, contrary to my findings, intend to comply with all its contractual commitments as it understood them to be, in the light of clause 16 of the Purchase Orders. I considered that this was an attempt to reargue an issue of substance, which is generally impermissible: see *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, paras [49] – [51] referred to at 40.2.1.2 of the White Book. GDS had argued, during the trial, that NCR's cancellations of purchase orders went further than its (alleged) understanding of its contractual entitlement. The point was squarely put to Mr. Mannion in cross-examination at Day 6/60-68. The issue was then addressed in GDS's written closing, paragraphs 53, and 97 -100. In its closing submissions, NCR did not respond to this point, and therefore did not put forward the arguments advanced in Mr. Gledhill's e-mail. I do not consider it appropriate for NCR to seek to advance its present arguments at this stage. I have nevertheless looked again at the point in the light of Mr. Gledhill's e-mail, and see no reason to change the relevant fact findings. The analysis of the position advanced in Mr. Gledhill's e-mail was not put forward by Mr. Mannion in the course of his cross-examination (or, as I have said) in argument at trial. Mr. Mannion accepted that the document, about which he was asked at Day 6/61:4-13, said that NCR would cancel the goods that it did not need: see paragraph [175] above. When NCR cancelled on 16 January 2013, it made no attempt to ascertain, prior to cancellation, which orders reflected "work-in-progress inventories required to fulfil an additional thirty (30) days of deliveries". If it is right (as Mr. Gledhill submitted) that Mr. Mannion would not know the supplier's work in progress at any given time, then a party which was seeking to comply with its contractual obligations under clause 16 (assuming that clause to be applicable) would need to take steps to understand the position prior to cancellation. This is not what happened: NCR simply cancelled orders falling within the 30-60 day window if it did not need the goods. In any event, the relevant findings are not in any sense critical to my overall judgment, which would remain the same even if I had made the findings for which NCR now contends.

177. On 16 January 2013, NCR announced its decision to GDS. There was no material dispute as to what was said, and it is reflected in an e-mail sent by Mr. Kaparis to Mr. Cariolato, Mr. Bisognin and Mr. Swetman later that day:

> "As we discussed in our conference call today, NCR has vertically integrated the design and manufacture of its display portfolio which includes the displays that have historically been supplied by GDS.
>
> As a result, NCR is cancelling open purchase orders for material to the extent set out in the attached spreadsheet. Furthermore, NCR is amending the forecasts to zero for all the products GDS supplies to NCR.
>
> We understand this change in sourcing strategy will have a significant impact to GDS's operations and employees. Being sensitive to that and in order to enable you to manage your company effectively through this transition we have agreed on today's call that all communications between our two companies are to be funneled through Luca and I.
>
> The attached file contains all the open orders NCR will be cancelling. Please note that both NCR factory and NCR Services orders are included in this file in two separate tabs.
>
> My recommendation as to the next steps is to review the file I am attaching and advise how you would like to proceed. I am standing by to discuss next steps, engage in good faith commercial discussions either by phone, email or face to face. NCR welcomes discussions with respect to our mutual obligations and commitments arising from this change in NCR's display sourcing strategy."

178. The subject-matter of that e-mail was: "NCR-GDS Display Sourcing Transition", and the text of the e-mail itself referred to NCR's involvement in enabling GDS to "manage your company effectively through this transition". The word "transition" appears with some regularity in subsequent e-mails.

D5: 17 January until the New York meeting on 28 January

179. Between 17 and 27 January there was correspondence between the parties which led to a meeting in New York on 28 January. The meeting was requested by GDS, and the correspondence shows a degree of reluctance on NCR's part in agreeing to meet. The principal correspondence was as follows.

180. On 17 January 2013, Mr. Cariolato e-mailed Mr. Ciminera to express GDS's reaction to the events of the previous day. Mr. Cariolato wrote:

> "To the say that we are disappointed with the news delivered by Evan yesterday would, of course, be an understatement. We are, however, equally disturbed by the process that has been followed

> in the last year and is now being followed to close out in a hard stop and without warning.
>
> Regardless of contracts and costs, the over-arching objective of GDS in its 25 year relationship with NCR has been never, ever to stop NCR's production lines. We have always said to NCR and often repeated among ourselves that, no matter how difficult the circumstances and no matter what commercial dispute may arise, we would never abuse our position as the sole display supplier to our largest customer and our record is evidence that we have been true to that principle even, for example, when NCR owed us millions of dollars in overdue payments. The relationship has been symbiotic and the dependency mutual and this has been its strength. Since the single source has worked for NCR for so long, despite so many challenges that GDS has always risen to meet, the change of philosophy now to in-source is a legitimate one that we respect but it is not one that follows logically from what has gone before.
>
> Our immediate concern is that the relationship has been one-sided causing GDS to absorb many costs and risks that should rightfully have been NCR's. We consider that NCR is now abusing its dominant position to the potential detriment of one of its most dependable and loyal suppliers. NCR has evidently deliberately misled us in recent months by delivering demand forecasts that it knew it would not fulfil and also by blocking all dialogue, preventing us from investigating plans for the future. NCR has even stood by and allowed us to make a last time buy for parts it did not intend take and knowing we would invest in the associated engineering effort that would secure NCR's supplies.
>
> We will do everything we can to minimise the pipeline but, since NCR has elected not to facilitate the gradual transition that our support over the years deserves, the minimum we would ask you to support is to procure the outstanding material that has been committed in good faith for NCR according to customs and practices established over entire careers not just in the current NCR era. I am, therefore, writing to you personally now to ask for your broad support of this principle; the detailed information will be provided in the coming days."

181. The request, in the last paragraph of this e-mail, for NCR to provide support by way of procuring the outstanding material that had been committed in good faith by GDS, is in my view important and sets the scene for the discussions which followed. The discussions which then ensued focused on the amount of material which was in GDS's pipeline, and the volume of that material (including finished goods) that NCR was prepared to take.

182. Mr. Bisognin was cross-examined, at some length, on the basis that the parties' discussions were aimed at resolving all matters which were in dispute between NCR

and GDS. Mr. Bisognin disagreed. His evidence can be summarised by his answer: "We wanted to deliver products. Our point was to find a commercial agreement to deliver".

183. Indeed, at times the questions asked in cross-examination recognised that the purpose of the New York meeting and the discussions was indeed, as Mr. Bisognin maintained, to reach agreement on the amount of material that NCR was prepared to take:

> Q. The point of the meeting from your perspective, from GDS perspective, was to come to an agreement about this material pipeline.
>
> A. To find a way to deploy that, yes. To find NCR available to procure, to continue the shipment, because obviously there was the issue about the fact that they cancelled unilaterally the POs, and so one of the points was to understand on which basis they did so, and secondly, because of all these cancellations, what we could have done with all the materials that in god faith we procured for them.
>
> Q. Was it your understanding that NCR understood that you wanted a solution for the materials ordered because of the forecasts?
>
> A. Certainly. We made it clear to NCR that the materials were the biggest, let's say, the value item at which were looking to find a resolution".

184. The debate in cross-examination is encapsulated in the following exchange:

> Q. And the idea coming out of this meeting on your side is to try to get a fair resolution of the issues in light of NCR's actions. That's what you wanted, wasn't it?
>
> A. What we wanted was to find a way to deliver the products …. Our priority was to ship products and to cover GDS costs.

185. The contemporaneous documentation in my view supports Mr. Bisognin's evidence, which I accept. There are a number of features of the documentation, including communications between the parties, prior to the draft of the Letter Agreement which was provided on 20 February 2013, which I consider to be important in that context.

186. First, there are no communications where NCR clearly state that they were seeking a full and final settlement of all disputes between the parties, or a full and final settlement of all NCR's claims arising out of the forecasts. The explanation for this, in my view, is that NCR was not in fact thinking about matters in those terms. NCR's focus was on the contractual position, and in particular the question of whether and to what extent it was entitled to cancel purchase orders or at least claim to be entitled to cancel those orders. When it came to the discussions with GDS as to the amount of material that it was prepared to take, NCR's focus was on the materials that it needed in order to continue production and obtaining the lowest price for those materials.

187. Secondly, there is no indication in the internal NCR disclosed documents, or in the witness evidence served by NCR, that anyone in NCR gave any consideration to any potential liabilities relating to the false forecasts which had been given for a considerable period of time. GDS certainly did complain about the forecasting, and how this had the consequence it had been left with a very large pipeline of materials. But this did not prompt any recognition within NCR that there were potential liabilities arising out of their deceitful conduct. This was a point that appears to have been overlooked. Nor was NCR thinking of the proposed agreement as providing compensation for potential wrongdoing in relation to forecasting. Rather, it was viewing the proposed agreement as (to use the language in the first draft of the Letter Agreement) a "last time buy", whereby it would obtain materials it needed at the lowest price.

188. Thirdly, these matters explain why, when NCR came to draft the Letter Agreement, it was drafted by reference to a release of claims relating to the orders, rather than the projections. This reflected NCR's focus on the contractual position.

189. Fourthly, there is nothing in the communications which indicated that GDS was seeking a full and final settlement of all disputes. GDS was, as Mr. Bisognin and Mr. Cariolato said in evidence, in a terrible position as a result of the "brutal" (as Mr. Cariolato described it) approach which NCR had taken and the very large amount of materials in the pipeline in which GDS's working capital had been invested. The survival of GDS was in doubt. GDS was simply looking, as Mr. Bisognin said in evidence, to try to get NCR to take as much material at the best possible price in order to alleviate the position and allow GDS to survive.

190. In explaining why I have reached these conclusions, it is not necessary to refer to each communication between the parties or each internal document. Instead, I will focus on those which appear to me to be the most significant.

191. Following Mr. Cariolato's email of 17 January, Mr. Ciminera e-mailed Mr. Cariolato on 18 January. He described GDS as having been a valuable supplier, and said:

> "Evan is waiting for your proposal to work with GDS to discuss the commercial issues related to this change in sourcing strategy and he has my full support in this endeavour. I hope that our two companies can manage the transition in the same spirit of cooperation that has been demonstrated during the course of our relationship."

192. This concept of managing a transition – rather than resolving all disputes between the parties by way of a compromise (as suggested in the questioning of GDS's witnesses) – recurred in the correspondence which followed.

193. On the same day, Mr. Kaparis e-mailed Mr. Ciminera and other colleagues to provide an update on where they were. The subject line of the email was: "GDS Day 2 Picture Not looking good for them". He said:

> "Wanted to give you a quick update on where we are as a "Day 1" with GDS. Haven't had their response yet but here's what they

> are now reacting to. In summary they are toast. See attached slide.
>
> As of the day of the announcement we had Open PO's with GDS for a total $13.05M including WCS.
>
> As of this morning I am confirming that all GDS orders that needed to be cancelled (including WCS) has taken place. Total value of cancellations $4.65M.
>
> That leaves GDS with open orders with us to cover our contractual obligations with $8.4M of which $6.15M is in stock or in transit (NCR owns it now). That leaves GDS to make and ship to us $2.25M worth of displays.
>
> Giovanni should pick his next words to us very carefully. His company can and most likely will go belly up in less than 30 days. We have all the aces in our sleeves and the deck is stacked to our favor. That was not an accident. That was engineered."

194. The slide attached to this email was headed: "GDS Contractual Obligation on Exit", and set out information as to the value of open purchase orders for periods of 30 days after termination, and 30-60 days after termination. At the time that this e-mail was sent, Mr. Kaparis and his senior colleagues had already received Mr. Cariolato's email sent on the previous day, in which the point had been made that NCR had misled GDS in recent months by delivering forecasts that it knew it would not fulfil. However, it is clear from this e-mail that Mr. Kaparis's eye was firmly on the contractual ball. There is nothing at this stage to indicate that he was giving any thought to possible extra-contractual liabilities arising from the misleading forecasts which had been provided and to which Mr. Cariolato had referred. Mr. Kaparis's e-mail strikes a tone of triumphalism and self-congratulation at the desperate situation in which he believed that GDS now found itself (the company "can and will most likely will go belly up in less than 30 days") and that he had engineered. There is in my view nothing in the correspondence thereafter which suggests that NCR gave any consideration to, let alone had any concerns about, the possible legal consequence of the misleading forecasts to which GDS had already referred.

195. Mr. Ciminera's e-mail of 18 January had asked for GDS's proposal in relation to the transition, and this had not been received at the time Mr. Kaparis sent his 18 January email ("Haven't had their response yet but here's what they are now reacting to"). A PowerPoint set of slides was sent by Mr. Bisognin on 21 January to Mr. Kaparis. The opening page of the PowerPoint set out the "Principles" that GDS considered should be applicable. The three bullet points were:

> - GDS' requirement is a fair transition that consumes all the materials in stock and that have been committed for NCR on the basis of NCR's POs, Forecasts and the associated Safety Stocks deemed essential to assure NCR's factory needs in the light of material lead times, MoQs, experience, custom and practice etc.

- The formal NCR-GDS purchase agreement has never been sufficient to secure NCR's supplies and NCR's factory continuity has depended on GDS' goodwill and trust to make the necessary commitments on behalf of NCR's Managers who have always assured GDS re such matters. We expect this good faith to be respected and reciprocated during the phase out.

- GDS cannot accept unilateral PO cancellations inside lead time, but we are open to discussing all aspects of the pipeline

196. The slides then gave details of the stock of finished goods that GDS was holding "in different locations, per NCR demand"; the GDS Manufacturing Plan "based on NCR demand"; and remaining materials "Based on the Build Plan provided". These comprised the "pipeline" and amounted to just over US$ 22 million of goods and materials.

197. Mr. Kaparis then organised a conference call with Mr. Ciminera and Mr. Delamater. His state of mind and attitude to GDS, and lack of concern as to the consequences of his prior conduct, can be seen in the subject-heading of the email organising the meeting: "before I drop the hammer to them".

198. Following this internal call, in an e-mail to Mr. Bisognin, Mr. Kaparis set out NCR's lack of interest in the figures which had been given in the GDS presentation.

- As I indicated on my transition note to you last week, we have cancelled all orders with GDS and Benchmark for displays we are not obligated to purchase from GDS. To that extent have instructed our logistics partners not to pick up any material from GDS that is on our order cancellation file that was included in last week's communication.

- We are open to consider taking additional displays from GDS and for us to do that we will need a revised quotation—your current offer in your email below has yielded zero 'take' interest from our side. We will advise our 'take' position once we had a chance to review your offer.

- We are open to meet with you at any time. It might make sense to do so after we had a chance to review your revised offer. I also believe we can make a lot of progress via phone and email.

199. Mr. Kaparis is again here focused on the contractual position (ie that NCR had cancelled displays that they were "not obligated to purchase from GDS"), and the question of what NCR might now be interested in as their "take" position. This is also clear from the e-mail which Mr. Kaparis sent to GDS on 22 January which set out how NCR intended to approach a possible meeting in New York which would take place on the following week:

> "For our upcoming meeting my advise will be to proceed in 4 sequential stages – in fact I will insist we follow this sequence as I am used to orderly and organized fact based good faith commercial discussions. I will need to receive your responses to items 1 & 2 below at a minimum one business day ahead of our meeting to allow us to prepare.
>
> 1. Agree what NCR will be purchasing from GDS in line with our contractual obligation. NCR has kept open purchase orders for materials it is obligated to take and for the materials that it's not we have cancelled the orders accordingly. If GDS believes that NCR has additional contractual material obligations please articulate what those are and why
>
> After Agreement is reached on item #1 we move to item #2
>
> 2. For materials that NCR is not obligated to purchase from GDS, NCR will review GDS's proposal. We will consider your proposal and we'll go from there. As it stands today NCR is not prepared to take any material from GDS that we are not contractually obligated to.
>
> After Agreement is reached on item #2 we move to #3
>
> 3. What is GDS position for the spares and repair of displays for NCR WCS needs after items 2 & 3 have been settled?
>
> After we understand #3 we move to #4 which is a GDS request
>
> 4. What role can GDS play in NCR's future strategy after the transition of the display portfolio has been completed.
>
> Looking forward to your feedback and meeting. I think only #4 needs a face to face meeting. I think items 1-3 can be resolved quicker via email and conference calls. You are insisting on a face to face and we will honour your request. Please come prepared. Thanks as always for your support."

200. It can be seen that Mr. Kaparis was again looking at the contractual position: if GDS thought that NCR has "additional contractual material obligations", then it should articulate what those were. But NCR's position was that, as at that time, it was not prepared to take any material from GDS that it was not "contractually obligated" to take. There is nothing here which indicates that NCR was thinking that there might be any extra-contractual liabilities, or that it was looking for a final settlement of potential claims by GDS including forecasting claims.

201. Mr. Bisognin's response, on 22 January, was to refer to a number of contractual clauses in the context of NCR's cancellation rights. The e-mail went on:

> "If only the terms of the contract are applied (and we think the true obligation exceeds this) most of the cancelled PO + additional forecasts are inside such terms.
>
> There is much more to discuss and there is great urgency to resolve all matters because of the impact is massive. You expressed a willingness to meet and we would like to do so, travelling tomorrow. We think this is essential. Can we please confirm this plan?"

202. In the meantime, there was further correspondence between Mr. Cariolato and Mr. Ciminera. Picking up on Mr. Ciminera's reference to managing the transition, Mr. Cariolato said in his email of 21 January 2013 that he echoed his "desire to complete the transition in the same spirit of cooperation that has been demonstrated in all of our dealings". Mr. Ciminera told Mr. Cariolato that NCR was willing to meet, and in the meantime asked to have GDS's team work with Mr. Kaparis on the transition.

203. On 22 January, Mr. Kaparis confirmed the time of the meeting as 1 pm on 28 January. Upon notification of the time, Mr. Delamater told Mr. Kaparis: "I am not looking forward to this". This is an unsurprising comment which in my view was directed towards Mr. Delamater's likely discomfort at a face to face meeting with a long-established supplier which had just been treated in a brutal fashion by NCR. Mr. Kaparis's response was: "Me neither – but I do want to put this behind me". Although this response was relied upon by NCR as showing Mr. Kaparis's intention and desire to conclude a full and final settlement with GDS, I read it as no more than saying that Mr. Kaparis wanted the meeting to be over and done.

204. There is in my view nothing in the internal correspondence which suggests that, at this stage, NCR was looking for a full and final settlement of all actual or potential legal disputes. Mr. Ciminera was looking for an orderly transition. Mr. Kaparis's mindset was expressed in his email to Mr. Ciminera on 22 January 2013 in relation to the proposed meeting:

> "Can I call you? I was thinking to beat them up from 9-12 and then you can go in for the kill at 1 pm? Or I can have them at 1 pm and grind them for 1 hour and kick them out at 2 :-)"

In fact, as described below, the meeting was more polite and professional, and NCR was willing to contemplate purchasing some additional goods, albeit that this was a willingness which derived from NCR's self-interest in maintaining the continuity of its production rather than a desire to help GDS.

205. In the following days, each side began preparing for the meeting in New York. GDS took advice from Mr. Michael Frisby of S&B. The individual at GDS who primarily dealt with Mr. Frisby, and legal advice, was Mr. Richard Swetman. One point identified, amongst many, concerned possible TUPE (Transfer of Undertakings (Protection of Employment)) liabilities, and this led to Mr. Swetman e-mailing Mr. Kaparis and Mr. Mannion on that issue on 25 January.

206. For his part, Mr. Kaparis was interested in ascertaining, from within NCR, what goods and materials NCR wanted and needed. He sent an e-mail to his colleagues indicating

that there would be a "special SRT core team meeting". He advised those colleagues that GDS would be "in our NYC offices to negotiate the final exit and delivery figures". He therefore viewed the meeting, consistently with his prior e-mails, as a meeting which would discuss how much material NCR would take. He was not looking at it as a settlement meeting to discuss a resolution of actual or potential disputes. In order to know how much material NCR should take, he asked his colleagues to consider various matters such as the "latest run out date from GDS displays (ie the date when NCR would "run out" of the displays that it had ordered) and the risks associated with the ramp-up of Project Dynamo ("Any delays in schedule, anything that makes you nervous etc").

207. In his 22 January 2013 e-mail setting out the sequence of the meeting, Mr. Kaparis had asked for responses to "Items 1 & 2 below" at least one day ahead of the meeting. On 25 January 2013, Mr. Bisognin sent his response:

> "You have asked us to respond to your points ahead of the meeting but we do not want to hamper the discussion which must first address a fundamental issue.
>
> We have been placed in a very difficult position by your actions. You have sought to cancel most of your purchase order: with us and amend all forecast to zero and wish to terminate our long established working relationship without any notice. We have a factory working full time on servicing your orders and have in good faith geared up to service the forecast demands you have given us by placing orders with our suppliers. We have to make urgent decisions about how we deal with this and the purpose of our meeting with you is to understand fully what your position is and what are you are proposing to do. Make no mistake Evan, as it stands, this action will have a catastrophic impact on GDS, its staff and suppliers. We do not understand why we were given no warning at all.
>
> You talk in your email at points 1 and 2 about what you say NCR is contractually obliged to take. GDS does not believe that NCR can cancel its orders and forecast peremptorily; we believe you are obliged to take all scheduled product during the period to June 30th. We do not understand why you say NCR can do what it has and we would like you to explain this to us at the meeting.
>
> We look forward to meeting you on Monday and hope to resolve all the issues quickly."

208. NCR drew attention in its submissions to the references in the e-mail to the forecasts, the cancellation, and Mr. Bisognin's expression that he hoped "to resolve all the issues quickly", in support of the argument that both parties were looking for an overall settlement of the issues in dispute. In relation to this e-mail, Mr. Bisognin was cross-examined on the basis that the purpose of the meeting was to "try to resolve all of the issues between you and NCR. All of the issues included your complaints about forecasts". Mr. Bisognin's response to this line of cross-examination was that the purpose of the meeting was to deploy the material, namely the material in the pipeline:

> " … for me it wasn't a question to resolve issues. It was a question to find a way to deliver, to invoice. That was the only objective that we went to, and to understand why NCR had that position."

209. I accept Mr. Bisognin's evidence. It is consistent with the way in which Mr. Cariolato had described his objective in an e-mail to colleagues on 23 January:

> "… our main objective is to deliver as more as possible at the highest price, while we cannot stop them to terminate the contract for any reason, what is important is to force them to such termination in a correct way according and not by breaching the contracts and long term agreements and how we commonly operated".

210. It is also in my view consistent with the correspondence as a whole, which contains no statement by NCR (or indeed either party) that its intention was to seek to resolve all disputes between the parties. Mr. Bisognin's e-mail of 25 January did not cause Mr. Kaparis to consider that there might be potential liabilities flowing from the misleading forecasts. Instead, he cast aside what was said by Mr. Bisognin, telling his colleagues:

> "Once again, GDS is not listening to what we have asked them to prepare. No surprises. That's their SOP [standard operating procedure]."

211. However, it does appear that by that time NCR had recognised that the forthcoming meeting might result in "offers to settle", albeit without any definition or description of what exactly was to be settled. A PowerPoint was prepared, dated 25 January 2013, and headed "GDS Exit Negotiation Preparation Material". The first slide said that it should be clearly stated at the beginning of the meeting that the discussions should be on a "without prejudice" basis. This would "allow open negotiations and any offers to settle cannot be used against NCR in subsequent litigation as an admission of liability". The PowerPoint shows that NCR was focused on its contractual obligations, and was likely thinking that any settlement would resolve disputes relating to those obligations. The second slide was headed: "Contractual Obligation Summary". A number of further slides addressed the information which Mr. Kaparis had previously requested as to NCR's need for goods and materials.

212. A slide also addressed the price that NCR was prepared to pay: any "takes" from GDS on material that NCR was not obliged to purchase "must be discounted by at least 30% off the current price". That slide showed that a 30% reduction would mean that GDS would not cover its material and labour costs, let alone providing a contribution to overheads and profit.

213. There is nothing in the slide presentation that indicates that NCR was giving any consideration to potential liabilities in respect of false forecasting. The focus was again on the contractual position. The "Back Up Material" slide contained the Purchase Agreement itself (labelled "GDS Contract"), and a Microsoft Word document called "GDS Contract Summary". The latter, which appears to have been a document prepared with the benefit of legal advice, contained a contractual analysis of various contractual provisions. The slides did identify various "off balance sheet liabilities that NCR is

responsible for PRIOR to the exit". The relevant amounts (US$ 1.157 million) were unrelated to forecasting liabilities, but principally to various stranded components. Another slide indicated that these liabilities could be reduced by US$ 632,159 relating to various NCR costs that GDS had declined to reimburse. The most significant items in this figure concerned the costs of reworking a number of displays, and certain units that had been affected by corrosion.

D6: The New York meeting

214. The meeting took place in New York on 28 January 2013. It was attended by Messrs. Cariolato, Bisognin and Swetman for GDS, and Messrs. Ciminera, Delamater and Kaparis for NCR. Mr. Mannion attended by phone. Mr. Swetman sent an e-mail on the same day describing the meeting to various interested GDS parties including Mr. Frisby. Mr. Swetman's e-mail recorded that at the start of the meeting, Mr. Ciminera asked Mr. Cariolato what he hoped to get from the meeting. Mr. Cariolato said (consistent with my conclusion as set out above) that the "priority was consumption of the material – to avoid a catastrophe". Mr. Bisognin agreed in cross-examination that he wanted the outcome of the meeting to be that NCR would agree to use up all the material in the GDS pipeline.

215. Mr. Swetman then described the outcome of the meeting:

> "Cutting to the end, they have declared that they want to work with us, and work with us fast, to plan a use-up / cancellation of the parts. We will provide all the detailed data they want within the next 48 hours.
>
> We suspect that they will then make 'an offer'. Who knows whether it will be fair and reasonable one.
>
> The main thing is that we are talking.
>
> Bob's closing words were "you have our commitment to do the very best that we can under the circumstances". Make of that what you will.
>
> Once the materials plan has been agreed they are open to continuing to work with us on support to WCS and to consider us as a second source EMS possibility.
>
> We should have a better idea by the end of this week what NCR will do for us on the parts and Finished Goods but it is fair to say that we can expect it to be more than the zero that we were facing when we arrived here."

216. Mr. Swetman's reference to the "materials plan" is also consistent with the evidence of Messrs. Cariolato and Bisognin as to the intended purpose, from their perspective, of the meeting.

217. Mr. Cariolato, in an e-mail sent on the following day, summarised the meeting by saying that basically NCR recognised the problem of the material in stock or on order,

although not all of it and not the margin that GDS would have made by assembling it. Mr. Cariolato said that NCR would make GDS an offer which they hoped would not be too abysmal.

218. Evidence as to the meeting was given by Mr. Cariolato and Mr. Bisognin in their witness statements and in cross-examination. Mr. Kaparis's statement covered the meeting in some detail. Mr. Mannion, who had joined by phone, had little recollection of the meeting. Having considered that evidence, I find that the relevant features of the meeting were as follows.

219. The meeting lasted for approximately 2 hours, although for half an hour the parties were in separate rooms. The discussion focused on the amount of material that GDS had left on its hands in the pipeline, and whether and the extent to which NCR would be willing to take that material. A range of matters was discussed. There was reference to and brief discussion of the misleading forecasts. GDS complained about the fact that they had a huge problem to resolve; a problem arising because the forecasts were false. NCR explained to GDS that it had provided misleading forecasts because they needed to protect their supply chain from retaliation or lack of cooperation by GDS. As recorded in an email sent by Mr. Cariolato on 30 January, Mr. Kaparis made the point that forecasts are not binding. This comment confirms, in my view, that he was not thinking that any liability resulted from the forecasts, and that his focus was on his perception of the contractual position and the non-binding nature of the forecasts.

220. Mr. Cariolato agreed in cross-examination that from his perspective the big issue at the meeting was that GDS had bought material and planned production according to NCR's forecast, and that that it would be catastrophic for GDS if GDS could not deliver the material and get paid. He said that the objective of the meeting from his perspective was to have some assurance that the material was consumed. Mr. Cariolato did not view the meeting as a "settlement meeting". He said that he went to the meeting to understand the basis on which NCR had cancelled the order; to understand why NCR had not given any notice and decided to stop everything "brutally".

221. The parties briefly discussed the contractual position including rights of cancellation, but they did not spend very much time on this. When GDS sought to draw NCR's attention to the 2006 amendment to the Purchase Agreement, NCR shut down the conversation, saying that they were not lawyers and did not want to discuss legalities. Mr. Ciminera said that NCR was not there to follow a legal process, and they were there to see what they could do to help GDS. He said if GDS believed that lawyers should join the meeting, then they would be happy to go down that route. Mr. Cariolato said no. He said this because his main objective was to reach a commercial deal and he was concerned that the involvement of lawyers might provoke NCR to close down the discussion. Mr. Bisognin was also reluctant to discuss legalities, because he could not see how that would assist in reaching a commercial deal. Accordingly, as Mr. Bisognin said, "we didn't discuss any legal in the New York meeting". NCR told GDS that it was receiving legal advice, but the upshot was that neither side wished to involve lawyers in their discussions.

222. GDS did not mention the possibility of GDS bringing claims against NCR, whether in relation to the forecasts or otherwise. Mr. Cariolato therefore made no reference in the meeting to the possibility of bringing claims or litigation. As Mr. Bisognin said, they did not wish to raise the temperature in a meeting which was already tense. GDS's aim

and priority was to reach a commercial agreement. In cross-examining Mr. Cariolato, Mr. Gledhill said that he was not suggesting that anyone on GDS's side told NCR that GDS was going to take legal action.

223. As reflected in the contemporaneous e-mails of Mr. Swetman and Mr. Cariolato, which I consider to be accurate, NCR made no offer at the meeting, but held out the prospect that it might purchase some material at a discounted price after further information had been given by GDS as to what exactly was in the pipeline. Mr. Ciminera said that he would do his best to consume the material. On the GDS side, there was a hope that an offer would be forthcoming, although Mr. Bisognin for his part was not optimistic. Mr. Swetman expressed the view on 30 January that NCR currently thought that they had "no obligation to us and so any offer they make is likely to be derisory". GDS was given what Mr. Cariolato described as "homework": to provide information as to products and materials within the pipeline, on the basis of which GDS hoped that NCR would make a proposal.

224. There was no threat made by NCR at the meeting. Mr. Bisognin referred to the "psychological threat" of sitting on US$ 26 million of working capital, but he agreed that there was no direct threat.

225. At the end of the meeting, by which time Mr. Ciminera and Mr. Delamater had left, Mr. Kaparis said that he was sorry about what had happened, and that he had simply followed orders from those two individuals.

226. The above findings are based upon the documentation and the evidence of Mr. Cariolato and Mr. Bisognin. I have considered the evidence of Mr. Kaparis. To the extent that it differs, I see no reason to accept that evidence. Indeed, the unreliable nature of his evidence is apparent from some of the things that he says about the meeting in his statement. For example, he says:

> "We said we would buy as much as we could, even stock we were not obliged to take, but we were not willing to pay the huge profit margin. We were more than willing to pay for the labour and factory overheads for those items".

227. In fact, the slide prepared by NCR in advance of the meeting, headed "GDS Cost Breakdown (According to GDS Quotes/Disclosure)" itemised the material and labour cost for various displays, and made it clear that NCR would require a discount of at least 30% off the current price. This meant that material and labour would not be covered, let alone factory overheads.

228. Secondly, Mr. Kaparis said that NCR "took what we were obligated to take and made it clear that we would do so". However, NCR had perceived its obligations as extending to goods to be shipped within 30-60 days of 16 January, and it had nevertheless cancelled 8 purchase orders for goods to be shipped within that period.

229. Thirdly, Mr. Kaparis's evidence was that he had printed out the contract to go over with GDS, but that Mr. Cariolato did not want to have a contractual discussion. However, Mr. Cariolato's email of 30 January to his colleagues and Mr. Frisby shows that Mr. Cariolato was more than willing to have a contractual discussion: he presented the 2006 contract amendment. What then happened was that:

> "At that point Bob refused to enter into the discussion of the legal contract and insisted they are not following a legal process as they are not lawyers but they are there to see what they can do. He also offered that if we believe that lawyers should participate to the meeting they are ok with it, and we said no".

230. Fourth, Mr. Kaparis statement presents NCR as seeking to assist GDS: "NCR did a last time buy, mainly to assist GDS. We did not even need the extra products we bought from them". NCR's internal documentation, both prior and subsequent to the meeting, shows that NCR was not at all focused on assisting GDS, but rather on the products which they did indeed need bearing in mind their stock levels and "run out" dates, and the need to maintain continuity as Project Dynamo was introduced. This is illustrated by the slides in the 25 January 2013 pack, for example that headed: "Proposed Incremental GDS Take (Risk Mitigation)". At that time, before further work was done at NCR, this total cost to mitigate the risk on Dynamo was US$ 6.936 million: this was a figure very close to the amount which was ultimately paid.

231. In his oral evidence, Mr. Mannion also sought to portray a picture of NCR taking more material in order to help GDS. I do not accept that this was NCR's approach. There are many internal documents which show NCR trying to ascertain how much material it needed, with some individuals being concerned that not enough was being ordered. For example, an internal exchange on 5/6 February records the wish list of Mr. Lisecki, including products which were "critical to ensure continuity of ATM production". There are no internal documents recording NCR's intention to help GDS as much as it could. Mr. Kaparis's e-mail of 22 January, referring to going in for the kill and grinding GDS, fairly reflects his attitude.

D7: Correspondence and internal discussions following the New York meeting

232. GDS considered sending an e-mail to Mr. Ciminera on 30 January in relation to the contractual position. The draft e-mail opens by saying that there was "something that we did not make explicit to you during the meeting in NY as we all became so focused on pragmatic commercial matters and ultimately were time-constrained". I accept that the meeting was focused on pragmatic commercial matters rather than the legalities, still less on a full and final settlement of all disputes. Mr. Cariolato was, however, not particularly keen on the draft. In his e-mail to colleagues concerning the meeting (which I have already quoted in part), Mr. Cariolato described having followed "the commercial route putting on the table the big issue", namely:

> "GDS has procured material and planned production according to your forecast and it would be catastrophic in case we would not consume such material. Our scope for the meeting was exactly to agree a transition that allow to consume the material and to ramp down the factory in a reasonable way for GDS."

233. In its submissions, NCR placed great emphasis on this description of the big issue, and in particular its reference to procurement and planning according to forecast. NCR sought to contend that the parties were therefore looking for a settlement or resolution of issues arising from false forecasting. I do not accept that this is so. The passage, when read as a whole, shows that (as both Mr. Cariolato and Mr. Bisognin said in their evidence) the big issue from GDS's perspective was the large pipeline, and the need to

try to get NCR to take goods and materials. Equally, NCR's focus was not on the resolution of potential claims, but upon the amount of material it was willing to take.

234. The correspondence between NCR and GDS over the following 3 weeks was thus concerned with the amount of material from the pipeline that NCR was prepared to take. On 29 January, Mr. Kaparis sent a lengthy e-mail requesting information as to GDS's finished goods inventory, the quantity of displays that GDS could build with material GDS would have on hand by 7 February, a costed bill of materials for each display purchased by NCR, and a full list of all open purchase orders with component suppliers. In an MSN conversation between Mr. Bisognin and Mr. Kaparis on 31 January, Mr. Bisognin referred to his hope that they would "find the right fair solution over the stock as discussed in NYC". Mr. Kaparis referred to doing his best to send an offer in two working days after receipt of the information that he had requested. On 1 February, Mr. Bisognin sent Mr. Kaparis various electronic spreadsheets containing the information requested. On 2 February, Mr. Kaparis said that he would revert with a "without prejudice good faith proposal towards the end of next week".

235. In an internal email sent on 4 February addressed to his colleague Mr. Don Gaspari, Mr. Kaparis said that he would like to present to GDS a proposal, without prejudice and in good faith, to take US$ 5.8 million of "heavily discounted GDS displays and get a $ 2.3 million PPV out of it". Mr. Mannion agreed (rightly) that this proposal was not being put in terms of a settlement of legal liabilities. Rather, Mr. Kaparis was looking at the issue in terms of what material NCR wanted, and how much it was prepared to pay. Contrary to the suggestion in his evidence that he was seeking to assist GDS, the majority of the items listed in the email were regarded as "High Priority" for NCR. He also expressed the need to make an offer quickly "before they close their doors due to a lack of liquidity on their part". The reference to a US$ 2.3 million "PPV" was to "Purchase Price Variance". This was in essence an additional profit beyond that which had previously been anticipated, resulting from the downward adjustment on the price that had been expected to be paid. Later that day, Mr. Kaparis circulated dial-in details for a meeting to discuss "One more GDS final Buy QTY review". Again, this reflected Mr. Kaparis's perception that a proposal to GDS would concern how much product NCR was willing to buy, rather than a settlement for a general compromise of legal liabilities.

D8: NCR's offer and subsequent correspondence

236. On 6 February 2013, NCR made an offer to GDS in an e-mail from Mr. Kaparis to Mr. Bisognin. The subject line of the email was: "WITHOUT PREJUDICE: NCR Proposal for GDS Displays". That subject line in my view reflects Mr. Kaparis's thinking. This was not, and was not expressed to be, an offer in settlement of actual or potential claims for false forecasting. Rather, it was an offer to purchase goods. There was an attachment to the e-mail, namely: "NCR GDS Finished Goods Proposal 2.6.13.xlsx". This was an Excel spreadsheet which identified various items, the "Maximum Quantity NCR could take (Units)", and the price offer per unit. The total value was US$ 7.682 million.

237. The text of the e-mail was brief:

> "Dear Luca,

> Having given due consideration of the information you provided, attached please find NCR's without prejudice, non-binding, good faith proposal valued at $ 7.68 million
>
> Acceptance or rejection of this proposal by GDS needs to be received by close of business Friday February 8th eastern standard time. Should GDS decide to accept this offer, your response must be accompanied by a detailed shipment schedule by part number".

238. Although this was (as Mr. Ritchie argued), an offer to purchase goods, in my view it went somewhat further. The offer was "Without Prejudice", and in my view is related to an actual or potential dispute between the parties. However, the relevant dispute was not spelt out in the e-mail. The intention clearly was, however, that in the event of a failure to reach agreement on the terms proposed, the offer could not later be referred to in the context of any litigation between the parties. If there had been a clean acceptance of the offer, it is not clear that any concluded contract would have resulted: the offer was expressed to be non-binding. It is not necessary, however, further to examine what the position would have been if the offer had been accepted. It was not accepted, and in any event the parties' discussions moved on thereafter.

239. Mr. Bisognin responded to the offer, in an e-mail headed "without prejudice" sent on the evening of 7 February 2013. The text of that e-mail was as follows:

> "Our aim is to reach a satisfactory commercial agreement.
>
> Our position is that the notice period on the current contract ends June 30th 2013. During the notice period, NCR should consume all the materials it has included in the forward forecasts that were issues up to date of giving notice and should do so at the currently agreed prices. Our pipeline of finished goods stock and materials was ordered by GDS in good faith against NCR'S POs and regularly issued forecasts that we now understand were published by NCR in the full knowledge that NCR had no intention at all of taking those parts or of honouring its POs. This is not acceptable.
>
> A satisfactory commercial agreement would be one that uses up all materials ordered uniquely for NCR with, as a minimum, no loss to GDS. In volume terms your offer to take 33.796 pcs achieves only about 50% of what is needed relative to the pipeline. In price terms, while as gesture of goodwill we can accept not to make any profit during the transition, this does not mean selling finished displays for the cost of the material; that would cause significant losses to GDS. The material BoM cost should be increased at least to cover actual factory costs incurred (e.g. labour). On this basis we append your 'offer' updated to include minimum acceptable pricing and two increased volume off-take scenarios. In summary:
>
> Scenario A:

- Total volume 47,944 displays, value $16,405,534
- Includes conversion and sale to NCR of 2,000 kits of materials imported into Brazil (duty already paid)
- Leaves $2.5m of unused parts for which we need NCR's proposal
- Assumes cancellation, or absorption by NCR, of open POs for LCD panels and touch-screens (total value approx. $2.3m)

Scenario B:

- Total volume 61,398 displays, value $16,405,534
- Includes conversion and sales to NCR of 2,000 kits of material imported into Brazil (duty already paid)
- Leaves $2m of unused parts for which we need NCR proposal
- Uses all committed panels and touch-screen

We look forward to your early response."

240. NCR's offer naturally provoked discussion within GDS, including with Mr. Frisby. Mr. Swetman, who was primarily dealing with Mr. Frisby, pointed out that the offer was (contrary to Mr. Kaparis's evidence) basically for material at cost; ie including no labour element or other direct industrial overhead. Mr. Frisby advised that whilst the offer was an improvement on NCR's initial position, there were good grounds for beginning a claim which might result in a higher recovery. Mr. Frisby was keen to explore the legal position with counsel. There was discussion within GDS as to whether litigation was a preferable option. As matters developed, however, Mr. Cariolato was not attracted to litigation, and ultimately considered that GDS should accept the proposal. Counsel was, therefore, never consulted.

241. On Friday 8 February, Mr. Bisognin spoke to Mr. Kaparis on two occasions. The former recorded the calls, and transcripts were contained in the hearing bundles. In the shorter conversation that afternoon, Mr. Bisognin asked NCR to take more product. Mr. Kaparis told Mr. Bisognin that his offer "doesn't fly". This was also the message conveyed in the longer conversation. Mr. Kaparis said that he was being honest and not negotiating: he did not care whether GDS shipped another display tomorrow. He said that he had tried to find something which did not crush GDS, and had taken the maximum amount of material. GDS had a US$ 20 million problem, and NCR had taken around US$ 7.5 million off their hands. Mr. Bisognin made the point that, leaving the "legal aside":

> " … this has been entirely driven by NCR forecasts. I mean, if we have so much material it's not because we invented the materials or we invented the demand. That is what, what we are

> saying. I do understand that your legal, since your legal says is a business decision, make that a fair business decision, Evan".

242. This, and other points made by Mr. Bisognin, cut no ice with Mr. Kaparis. He pointed out that time was on his side, and that NCR had all the leverage and GDS had none. Mr. Kaparis was not trying to take advantage of him, but was trying to put something together which worked internally at NCR. Mr. Bisognin suggested NCR taking US$ 15 million of material, and Mr. Kaparis pointed out that US$ 7 million was better than zero. The discussion continued with Mr. Bisognin trying to persuade Mr. Kaparis to take more product ("we need to find an agreement for all the volumes, ok. So let's say that …"), and Mr. Kaparis indicating that any agreement could not be based on Mr. Bisognin's proposal ("Take your proposal you put together and put it in the garbage, ok?"), but suggesting some ideas based around his proposal. These ideas seem to have concerned the timing of deliveries, rather than the taking of additional quantities. Towards the end of the discussion, Mr. Bisognin referred again to the problem generated by the forecast, with GDS having been told as late as 14 January 2013 that the "forecast is ok". The upshot was that Mr. Bisognin would talk to Mr. Cariolato, but that Mr. Kaparis did not know what else to offer although he would speak to Mr. Ciminera.

243. The nature of the debate was, in essence, that Mr. Bisognin wanted Mr. Kaparis to take more material and Mr. Kaparis was saying "no".

244. Mr. Kaparis reported to Mr. Ciminera and Mr. Delamater on that day. He said that he has spent 2 hours that morning trying to knock some sense into GDS "to accept my offer or a slightly modified one". But Mr. Cariolato and Mr. Bisognin were saying that the only option was for NCR to accept their counter-offer of 7 February: "Amazing but true". He said that GDS was marching down the path of bankruptcy, and that he did not plan on talking to them any more, because there was nothing more that he could offer. He had tried giving them some "reasonable avenues" but they did not want to listen. Mr. Ciminera told Mr. Kaparis that NCR should "sit and see what they come back with".

245. This was reiterated in an e-mail sent on the morning (US time) of Monday 11 February, stating that NCR did not accept GDS's proposal of 7 February.

246. Later that day, Mr. Bisognin spoke to Mr. Kaparis again, and again the call was recorded. The conversation was a short one. Mr. Bisognin asked whether there was any possibility of NCR taking more materials. Mr. Kaparis told him (apparently repeating what had been said in an earlier conversation) that NCR's offer contained what NCR could do, although "[w]e are trying, Luca". As with much that Mr. Kaparis said, this was not true. There is no evidence that NCR was trying at all: NCR's decision, conveyed by Mr. Ciminera on the previous Friday, had been to sit tight. Mr. Kaparis said that NCR had made basically the best offer that they could make, and that there was nothing to do.

247. On 12 February, Mr. Cariolato set out his thinking in an e-mail to various colleagues. He told them that he was inclined to accept NCR's offer as this was "more prudent to GDS financially than to take the risks of fighting in return for a higher compensation". On the same day, Mr. Marco Cohen (a shareholder in GDS and an employee) asked Mr. Cariolato whether, even though it is not "very professional", it was possible to receive

US$ 10 – 12 million from NCR as soon as possible and then take legal action once received. Mr. Cariolato's response was:

> "I think they will protect themselves, all the discussion has been done "without prejudice" so I am sure that the settlement will not allow us to proceed with a future legal case".

248. On the evening of 12 February, Mr. Swetman e-mailed Mr. Frisby to confirm a conversation on the phone "just now". He said that Mr. Cariolato preferred to "close matters as fast as possible to enable the business to continue, to keep cash flowing and to allow management to focus on the future, rather than litigation". Mr. Swetman asked for Mr. Frisby's comments on a proposed communication from GDS to NCR concerning the acceptance of the previous NCR proposal.

249. Mr. Swetman subsequently spoke to Mr. Frisby again that evening, and relayed the substance of the call to Mr. Cariolato and Mr. Bisognin. Mr. Frisby thought that GDS had a strong case based on NCR misleading GDS with forecasts that it did not intend to honour. This was the cause of action rather than repudiatory breach of contract. He also thought that the "current settlement is very low", and that GDS was being intimidated unduly to accept it. Mr. Swetman commented that he thought "we agree and accept that". Mr. Frisby thought that a strong stance would/could quickly bring NCR to renegotiation and better settlement.

250. On the following morning, 13 February, Mr. Frisby e-mailed Mr. Swetman with an amended draft of the text of the proposed acceptance message. He said that his draft ensured that there was no settlement of the claim until the settlement terms are fully documented, agreed and signed off by each side. His email also referred to the potential for a good claim for damages for misrepresentation and the tort of deceit. He advised that GDS should receive counsel's advice before making a final decision.

251. Mr. Frisby's amendments resulted in some internal exchanges. Mr. Bisognin expressed a concern that the proposal involved "moving toward a legal perspective instead of commercial". He therefore tried to modify the proposed e-mail "commercially" whilst maintaining as much as possible the guidelines of the lawyer.

252. Later that morning, Mr. Swetman thanked Mr. Frisby for his inputs, but said that the decision was "not to proceed further down the possible litigation route". Their preference was to take some cash now and move on.

253. In the early afternoon (early morning US time), Mr. Bisognin communicated GDS's acceptance of the proposal. His email stated:

> "Under the circumstances, without prejudice to our position, GDS will accept NCR's proposal, subject to appropriate finalization"

The e-mail identified a number of points on which GDS asked for confirmation/clarification.

254. Mr. Delamater's internal response to the acceptance was: "Its like … magic … love it". Mr. Kaparis said:

> "That's what happens when you have them by the ….ls… ;-). I will pull us together to go over our game plan. I already spoke to don G, and we're checking on inventory at the corporate level (non displays of course)."

255. Mr. Kaparis received congratulations from various colleagues for his achievement in, for example, mitigating risk "on some pretty tight timescales".

256. On 14 February 2013, Mr. Kaparis gave Mr. Ciminera and Mr. Delamater the "final GDS numbers". This set out the total savings which NCR had made (US$ 3,680,792) compared to the "Standard" spend in Q1 and Q2. Mr. Ciminera passed on the e-mail to another colleague, with the message: "Here is the summary of GDS offer".

257. Similar, but not identical, figures had been given by Mr. Kaparis to various other colleagues in an email sent on 13 February 2013:

> "Attached please find the factories + WCS proposed inventory purchase plan aimed to de-risk dynamo NPI and bring in significant savings to NCR. We have an opportunity to bring in $11.4M of inventory for $3.7M PPV. In PPV % terms this equates to 26% discount for factories and 44% for WCS. The proposed breakdown by quarter and by factory/WCS is below"

258. The position was, therefore, that internally the agreement with GDS was being presented as a saving against anticipated expenditure, and as a way of de-risking Dynamo. There are no documents which present it as a settlement of potential legal liabilities relating to forecasting.

259. Various points, such as the position in relation to certain Brazilian products, had been raised in Mr. Bisognin's acceptance. These were the subject of further communication with Mr. Kaparis. During the course of an MSN conversation on 15 February 2013, Mr. Kaparis expressed the desire never to talk to Mr. Swetman again, although he was happy for Mr. Bisognin or Mr. Cariolato to call him at any time.

D9: The first draft of the Letter Agreement

260. On 14 February 2013, Mr. Kaparis advised his colleagues that NCR's attorney, Ms. Louise Middleton, was preparing the specific language that needed to accompany their offer to GDS plus the subsequent purchase orders that would follow.

261. On 20 February 2013, Mr. Kaparis sent Mr. Bisognin an email attaching the "GDS-NCR Letter of Agreement". He described this as NCR's offer, and asked that it should be signed and sent back. Once signed, NCR would release orders in accordance with the agreement.

262. About 15 minutes after sending the "offer", Mr. Kaparis and Mr. Bisognin had an MSN conversation:

> "*Kaparis*: also I decided not put any FRO language in this contract.
>
> I am trying to keep it simple.

> I am also working on clearing out AP.
>
> *Bisognin*: got it and reading now. I will feedback asap.
>
> *Kaparis*: self explanatory."

263. The reference to "FROs" was to "Field Rework Orders", and the reference AP was to "Accounts Payable". FROs concerned potential claims which NCR would put forward from time to time relating to issues with GDS displays. As described above, they had been referred to in the NCR internal slide presentations, but Mr. Kaparis had decided not to include any "FRO language" in the proposed agreement. The reference to the accounts payable was to a balance of more than US$ 5m that NCR owed GDS in respect of products that had already been delivered and invoiced. NCR was late in paying some or all of these invoices. One of GDS's concerns, ventilated in prior internal communications, was that a rejection of NCR's offer would lead to a delay or refusal to pay the accounts payable, and thereby further significant financial pressure on GDS. This was a factor which lay behind Mr. Cariolato's decision to accept the offer. The accounts payable were not addressed in the proposed agreement sent on 20 February, with Mr. Kaparis saying that he was working on clearing them out; in other words, paying them. The GDS internal correspondence shows that Mr. Bisognin was not unduly concerned at the absence of any reference to accounts payable in the proposed agreement, and it was common ground that these were not addressed in either the draft or the final version of the agreement. The accounts payable were in due course paid by NCR, albeit after a degree of further delay.

264. The document sent on 20 February 2013 was headed "Letter of Agreement, Release and Waiver". It was only one page. Its overall drafting and language (for example the use of legal concepts such as release and waiver) indicated that it had been drafted with the benefit of input from a lawyer. It provided as follows:

> "On January 16th 2013 NCR announced to GDS that it has vertically integrated the design and manufacture of the display portfolio used in NCR's self-serve products. Pursuant to the terms and conditions in the Purchase Agreement PA04.016 between NCR and GDS, NCR cancelled open purchase orders with GDS for material to the extent set out in the attached Exhibit 1. Furthermore, NCR amended the forecast to zero for all products GDS supplies to NCR.
>
> In an effort to alleviate the impact that the aforementioned announcement to GDS's operations and employees, NCR in good faith and without prejudice is making the following offer to make a last time buy purchase of displays from GDS set out in the attached Exhibit 2.
>
> Global Display Solutions Group Ltd and its affiliates (GDS) and NCR corporation (NCR) agree that the amounts set forth in this offer are in full and final settlement of any claims, damages or losses whatsoever that GDS has or may have, arising directly or

> indirectly from all orders placed by NCR pursuant to the Purchase Agreement (PA04.016, as amended) between NCR and GDS on or before 16 January 2013 ("Orders"), and the termination of Orders pursuant to the Purchase Agreement. In consideration for payment by NCR of the amounts set out in this offer, GDS waives and releases NCR from all claims, liabilities, demands and causes of action, known or unknown that GDS has or may have against NCR relative to the Orders.
>
> GDS will supply the products as detailed on Exhibit 2 at the prices indicated, subject to the terms and conditions in the Purchase Agreement PA04.016 between NCR and GDS, including but not limited to quality, warranty and support.
>
> This settlement offer will become binding upon signature by the authorised representative of the parties."

265. The draft was the subject of internal discussion at GDS on 20 and 21 February including discussion with Mr. Frisby. Mr. Cariolato asked his colleagues whether it was necessary to "confront with our lawyer" or whether it was OK to confirm the document as presented by NCR. It is apparent from the correspondence that he was inclined simply to sign, and certainly not to enter into any real negotiation. This reflected his view that agreement to the terms proposed by NCR was GDS's only practical option. This view had resulted in GDS's decision to accept NCR's proposal in the first place. Mr. Cariolato on 20 February also preferred to deal with matters by email, since he was at home with a strong cough.

266. Mr. Swetman then e-mailed Mr. Cariolato on the afternoon of 20 February as follows:

> "I think you have already decided to go ahead without lawyers but it does no harm to ask if there is anything particular we should log and, for the sake of a quick look, I would recommend that. Since writing that I have also just spoken with Emmanuel, who has not seen this because he is on his way to a funeral, and he definitely thinks we should run it past Michael Frisby – not for an in depth analysis but a quick opinion. So I will forward it if you agree?
>
> Also, if I may, there is one other thing I would like to know: if we have been forced into accepting unreasonable terms in order to get at least some cash to survive, that would include signing whatever contract terms NCR issues. We do this, effectively with the metaphorical gun held at our heads, in order to get them to pay us some cash in the short term to survive. They may say this is "in full and final settlement" but I wonder if we would still have some rights (unbeknown to NCR) as a result of the WAY they have behaved which has effectively blackmailed us into giving them material below cost and accepting other losses that they have triggered by their unreasonable behaviour. Extortion? You might not be interested in this course of action but I'd be curious to know if we can sign this document and STILL

> consider action in a month or two when some cash has come in. Probably the answer is 'no', but worth asking?"

267. Mr. Cariolato approved Mr. Swetman's asking for an opinion on his questions, adding: "As you say we have no choices".

268. Mr. Swetman then asked Mr. Frisby for a quick opinion on the draft agreement. In the second paragraph of his e-mail, he said: "I am curious, since we have little choice is there some extortion?" Having posed that question, he largely copied and pasted the text of the issue which he had identified in his email to Mr. Cariolato earlier that afternoon.

269. Mr. Bisognin also looked at the draft Letter Agreement, and he suggested adding something to indicate that NCR's offer was non-cancellable. He thought that if they simply referred to the parties' existing contract, GDS could be put in the same position as before with the orders being abruptly cancelled. Mr. Swetman passed this on to Mr. Frisby, describing it as important. In due course, this suggestion was incorporated into GDS's response to the draft Letter Agreement, and ultimately the signed version.

270. On the morning of 21 February 2013, there were further exchanges at GDS, some of which were copied to Mr. Frisby. Mr. Bisognin was clearly unsure as to the effect of the proposed agreement. He asked: "In few words is the "execution of the deliveries of existing POs and the LTB annexed" that constitute the settlement". The reference to "LTB" was to "last time buy" – an expression used in the draft Letter Agreement itself. Mr. Cariolato responded:

> "That is how I understand it
>
> because a settlement is binding for both: they take the products and pay those prices, and we deliver them and no longer have anything else to claim. However, we remain responsible for the products and warranties and other things under the agreement".

271. Mr. Bisognin's e-mail to Mr. Cariolato indicates that he remained uncertain as to the effect of the agreement, and did not necessarily agree with what Mr. Cariolato had said:

> "I tried giving it another read. In fact, there is a part that talks about the payment. Let's see what Michael says and then sign it".

272. Mr. Bisognin's evidence was that at this stage he was focused on the commercial aspects of the deal rather than the legalities. I accept that this was so, and that he assumed that once Mr. Frisby had signed off on the letter, GDS would proceed to sign it.

273. Mr. Frisby by this time had a number of issues which had been raised with him. At 13.10 on 21 February, he wrote to Mr. Swetman (copying in Mr. Bisognin, Mr. Cariolato and Mr. Grodzinski) as follows:

> "There are dangers in signing this agreement, let me highlight a few points before speaking to you:

> 1. It is expressed to be in full and final settlement of all claims which GDS may have. In answer to your question of whether you can subsequently claim economic duress and escape the consequences of signing this, that would be very difficult. This is a complex area but even if you could, you would have to sue them as soon as you were released from the operation of the duress. I would not advise you to rely in this, you must assume that if you sign this you will be bound by it and will have waived all claims. I wanted to explore your options with the barrister but did not do so in view of your instructions.
>
> 2. The underlying contracts remain in place and I have not identified how this would operate within these structures and for example whether or not there would be anything to stop NCR from cancelling the orders and so you would not get the money you are expecting. This is certainly a risk as the draft currently appears.
>
> 3. NCR Corporation is said to be entering into this agreement but that is not the party to the underlying agreements. This needs to be resolved and you should be clear on what the status of the other contracts is; for example can you be called upon to perform these in future?
>
> 4. It does not address the TUPE issue that arises as a matter of law. This means GDS may be left with TUPE claims.
>
> I am sure we could cover off these points in a fuller draft agreement.
>
> Can we speak at 2.30pm?"

274. Mr. Bisognin's evidence was that a phone call indeed took place that afternoon on which he and Mr. Swetman attended. Mr. Frisby produced a detailed attendance note of the call, and I consider that this accurately reflects the discussions that took place. To some extent, the substance of the discussion was repeated in an email sent later that evening by Mr. Frisby. Various topics were discussed, and it is clear from the attendance note that Mr. Frisby was thinking clearly and carefully about the issues which might be of concern to his clients. The final 4 paragraphs of the attendance note, reflecting the discussion in the call, were as follows:

> "We also talked about whether or not they wanted to leave any claims open, we discussed at some length why they were accepting this comprise. Essentially they feel that they have got no choice and they need the money urgently to continue to run the business. I asked if it was not possible to obtain funding elsewhere so they could pursue a claim and possibly get a much better return but that seems to be out of the question.
>
> I said the compromise as it stands, is a release of waiver of claims "relative to the orders". That left open a possibility of bringing

> any claims that were not "relative to the orders" say for example it might very well be arguable that claims relating to forecasting were left open and could be pursued separately. The problem with that of course is that we don't know how strong that claim is and it may be affected by compromising the claims around the orders. We would need to look at that. (Emphasis supplied)
>
> I explained to Richard that as he had asked in his email if he signed this agreement could they then resile from it. I explained that economic duress was an argument that we sometimes used but in most cases it fails and I did not hold out much hope that it would work here. I said it was critical that the oppressed party should register its protest and make any payment under protest and then immediately issue proceedings as soon as the duress ceased to take effect. If he wanted to keep that possibility alive he would need to reserve rights or register the protest at this stage. That could be done in relatively light way but Richard said "forget it". They simply do not want to antagonise NCR.
>
> We discussed amendments; they do not want any lengthy amendments to this agreement. They said a few extra works here and there will do and Luca marked up the agreement with what he thought would suffice and sent it to me. They cannot go back with anything more than that single page agreement and need to be very careful about it. They want me to produce a draft. I said I was just about to go on a conference call but could look at it this evening if they wanted me to do that. We agreed that I would get something to them by 8pm of thereabouts."

275. Accordingly, in the underlined passage, Mr. Frisby identified the central issue of construction which has been raised in argument before me.

276. Following the telephone call, Mr. Bisognin put forward a few changes to the draft Letter Agreement, describing them in the subject line of his email as: "Changes I would make commercially". Mr. Cariolato was fine with the proposed changes, but reminded his colleagues (and Mr. Frisby) that GDS was not in a condition to stand up for a long negotiation and that NCR knew that very well.

277. It appears from Mr. Swetman's email at 4.06pm that GDS was working on the basis that Mr. Frisby would be producing a revised version of the draft Letter Agreement by 8 pm that evening. He advised Mr. Frisby that "we have committed internally (Luca, Giovanni, me) to reviewing and acting on your input in the 8pm – 10pm time slot as to get something off to NCR today". It is apparent from this message that the plan was for Mr. Cariolato to be involved in considering Mr. Frisby's work and views. It was suggested in cross-examination of Mr. Cariolato that he did not in fact read through the advice which Mr. Frisby sent later that evening, in the e-mail described below. I accept Mr. Cariolato's evidence that he did so. The email was only one page or thereabouts. Mr. Swetman's email indicates that Mr. Cariolato would be among the people reviewing Mr. Frisby's input, and it would be very surprising if he were not to have read through what Mr. Frisby was saying. As Mr. Cariolato pointed out in evidence, he

was the CEO of the company and he would read what his colleagues were saying to him.

278. Mr. Swetman's email also told Mr. Frisby that any changes must be "light". He thought that things were moving in the right direction with NCR, and referred to the fact that orders as per Appendix 2 of the draft Letter Agreement were already starting to come in and also that Mr. Kaparis had "dropped the FRO request from the agreement letter".

279. At 5.17pm, Mr. Swetman reassured Mr. Cariolato that Mr. Frisby was committed to supporting the process of getting something off to NCR that night. He reported briefly on the discussion with him that afternoon, and referred in that connection to the existing accounts receivable and open purchase orders. Two e-mails followed in which Mr. Cariolato and Mr. Swetman discussed issues concerning the open (ie non-cancelled) purchase orders and the accounts receivable.

280. At 8.20pm, Mr. Frisby sent his suggested amendments to the draft Letter Agreement. He then set out the fundamental concerns that he had tried to address, and these were set out under 7 bullet points. In the last three paragraphs, he said:

> "I hope this is what you wanted. I am sorry that I cannot guarantee that it will give you the protection you really need but it would take a much longer document to do that. If I have missed any point or issue that you feel should be covered off, do let me know.
>
> I should add that as this stands, it only waives any claims you have "relative to the Orders". It might therefore be arguable that claims around the forecasting and a failure to forecast in good faith (if that can be proven) are still open. There is no doubt that this settlement would affect the damages claim but it at least leaves a possibility open of bringing a claim that you might want to consider, as we discussed. (emphasis supplied)
>
> We discussed whether you might be able to claim economic duress and seek relief from this agreement at a later date. I think that it very difficult and would need to investigate the position further. I have suggested that you might want to say in a covering email to them words to indicate that this is being entered into under duress if you wanted to keep alive any possibility of claiming duress but I understand you do not want to do so. Duress is a difficult argument and does require protest and to take legal action as soon as the duress ceases to operate. Let me know if you want me to suggest some words that might help keep this possibility open."

281. The e-mail was sent by Mr. Frisby to Mr. Swetman alone. However, Mr. Swetman promptly forwarded it to Mr. Bisognin and Mr. Cariolato. Mr. Swetman said that he would try to call Mr. Bisognin at around 10.15pm his time. There was then an exchange of emails between Mr. Bisognin and Mr. Swetman (copied to Mr. Cariolato) concerning the accounts payable in respect of invoices already issued, and they both agreed that this need not be specifically addressed in their response to the draft Letter Agreement.

282. Following receipt of Mr. Frisby's e-mail and proposed changes to the draft Letter Agreement, Mr. Swetman responded to Mr. Cariolato on the question of the open purchase orders and accounts receivable which they had discussed earlier. It is clear that, consistent with Mr. Frisby's advice, Mr. Swetman appreciated that it was drafted by reference to the cancelled purchase orders. He expressed a view to Mr. Cariolato and Mr. Bisognin as to how this impacted open purchase orders and accounts receivable:

> "Reading the letter carefully it clearly tries to reference the cancelled POs but, in fact, it actually refers in the third paragraph to all POs issued before Jan 16th (not just the cancelled ones) and asks us to relinquish all related claims in return for the new POs (the settlement agreement). Since open POs and AR all relate to POs issues before Jan 16th they need to be addressed in the agreement as well as the cancelled ones.
>
> I think our revised letter seeks only to achieve clarification and is not contentious."

283. Mr. Cariolato's evidence in his witness statement was that he remembered having a call with Mr. Bisognin at some point in the evening to discuss Mr. Frisby's advice. He did not remember what had been discussed, but recalled that Mr. Bisognin did most of the talking because Mr. Cariolato was unwell and it was uncomfortable for him to speak. In his oral evidence, Mr. Cariolato maintained that there was indeed a call. Mr. Bisognin said in his witness statement that it was likely that he spoke to Mr. Cariolato that evening to update him on the advice from S&B, but he did not remember doing so. I think that it is inherently probable that there would have been a call between Mr. Bisognin and Mr. Cariolato that evening in order to bring matters to a conclusion following Mr. Frisby's redraft and advice, and I therefore accept that a call took place. Whilst it is correct that no call is referred to in the documents, there is equally no documentary record of Mr. Cariolato giving his assent to Mr. Frisby's proposed redraft. It is again inherently probable that Mr. Bisognin would have sought that assent, by speaking to Mr. Cariolato, prior to sending GDS's proposals back to NCR.

284. On the following morning, 22 February 2013, Mr. Bisognin sent a redrafted Letter Agreement back to Mr. Kaparis. He said that the adjustments were "only clarification and do not change the meaning or sense". NCR itself made some comparatively minor changes to the draft, including the deletion of the reference to a "last time buy purchase of displays from GDS".

285. Both parties then executed the final version of the Letter Agreement on 22 February 2013.

D10: Subsequent events

286. On 28 February, Mr. Frisby wrote to Mr. Swetman saying that he was pleased to see that they had managed to reach agreement with NCR, and invoicing for work done. Mr. Swetman thanked Mr. Frisby, saying that he would have been intrigued to see "where this could have gone but short term survival took precedence (and still does)". Mr. Frisby then offered to look into the question of whether or not any claims "remain open to you, particularly arising out of the forecasts". Mr. Swetman's response was that he

knew that Mr. Frisby would be happy to do that, but "the process would cost us and I do not have that mandate".

287. Following the agreement, Mr. Cariolato then advised various interested parties on the GDS side as to the outcome. The tenor of the message was that GDS could and should now move on. There was no reference to the possibility of litigation with NCR. The evidence at trial did not address or explain GDS's delay thereafter in starting proceedings. Proceedings were in due course commenced shortly before the expiry of the limitation period.

Section E: Construction of the Letter Agreement

E1: The issue

288. The Letter Agreement signed between the parties provided as follows:

> **"Letter of Agreement, Release and Waiver**
>
> On January 16th 2013 NCR announced to GDS that it has vertically integrated the design and manufacture of the display portfolio used in NCR's self-serve products. Pursuant to the terms and conditions in the Purchase Agreement PA04.016 (as amended) between NCR Global Solutions Group Limited and GDS Group Limited, NCR cancelled open purchase orders with GDS for material to the extent set out in the attached Exhibit 1. Furthermore, NCR amended the forecasts to zero for all the products GDS supplies to NCR.
>
> In an effort to alleviate the impact that the aforementioned announcement has on GDS's operations and employees, NCR in good faith and without prejudice is making the following offer to purchase the displays from GDS set out in the attached Exhibit 2 and Exhibit 3.
>
> GDS and NCR agree that the amounts set forth in Exhibits 2 and 3 attached to this offer are in full and final settlement of any claims, damages or losses whatsoever that GDS has or may have, arising directly or indirectly from all orders placed by NCR pursuant to the Purchase Agreement PA04.016, (as amended) between NCR and GDS on or before 16 January 2013 ("Orders"), and the termination of Orders pursuant to the Purchase Agreement. In consideration for and upon payment by NCR of the amounts set out in this offer, GDS waives and releases NCR from all claims, liabilities, demands and causes of action, known or unknown that GDS has or may have against NCR relative to the Orders.
>
> GDS will supply the products detailed on Exhibits 2 and 3 at the prices indicated, subject to the terms and conditions in the Purchase Agreement PA04.016 between NCR and GDS (as amended) including but not limited to quality, warranty and

> support, save that none of the orders on Exhibits 2 and 3 can be cancelled or reduced.
>
> References to NCR mean NCR Corporation and its associated or affiliated companies. References to GDS means Global Display Solutions SpA and its associated or affiliated companies. NCR Corporation and Global Display Solutions SpA by signing this agreement confirm that they have the authority to bind their respective associate or affiliate companies to the terms of this agreement.
>
> This settlement offer will become binding upon signature by the authorized representatives of the parties."

289. In the Particulars of Claim, GDS has advanced a claim for various heads of loss and damage suffered by reason of the (i) the purchase of components for use in the "Products" which were to be supplied to GDS (such "Products" defined as being screen displays and components) and (ii) the incurrence of expense including in relation to staff, premises and facilities to carry out current and anticipated manufacturing, associated engineering and research and product development and the making of investments and the continuation and making of other commitments.

290. The particularised damages claimed, which were potentially subject to adjustment depending upon the length of the period of the deceit, are:

> a. US$ 962,000 for employee, premises, facility and engineering costs incurred by the First and Second Claimants;
>
> b. US$ 17.08 million of losses suffered by the Third Claimant, comprising:
>
> i. US$ 251,000 in respect of wasted Products;
>
> ii. US$ 9.49 million in respect of costs which would not otherwise have been incurred including in relation to staff (employees, consultants, travel and accommodation), premises and facilities (including rental and services, communications, IT and office expenses), engineering, research and product development, investment and other commitments;
>
> iii. US$ 3.34 million in respect of discounted sales value of Products released to NCR under the Letter Agreement;
>
> iv. US$ 1.9 million in discounts which it granted to NCR in 2012 which it would not have done if the Defendants had not acted unlawfully;

v. US$ 2.1 million in respect of increased financing costs.

c. US$ 1.86 million of losses suffered by the Fourth Claimant in wasted Products and US$ 521,000 in employee and other overhead costs.

291. In addition, GDS advances a claim for exemplary damages, but this does not give rise to any separate issues of construction.

292. The central issue of construction is set out in paragraph 81 in the approved List of Issues:

> "On the true construction of the February 2013 Letter are all claims in the Claim Form finally compromised thereby"

293. The allied point on rectification is set out in paragraph 83:

> "If the February 2013 Letter does not on its true construction so provide, ought it to be rectified on the basis of common or unilateral mistake".

294. The proposed rectification sought would, if granted, have the effect of finally compromising all GDS's forecasting claims: ie all of its claims except intimidation. NCR submitted that there were many ways in which this could be done. One way would be to add the following underlined words:

> "GDS and NCR agree that the amounts set forth in Exhibits 2 and 3 attached to this offer are in full and final settlement of any claims, damages or losses whatsoever that GDS has or may have, arising directly or indirectly from all orders placed <u>or forecasts given</u> by NCR pursuant to the Purchase Agreement PA04.016, (as amended) between NCR and GDS on or before 16 January 2013 ("Orders"<u>, "Forecasts"</u>), and the termination of Orders pursuant to the Purchase Agreement. In consideration for and upon payment by NCR of the amounts set out in this offer, GDS waives and releases NCR from all claims, liabilities, demands and causes of action, known or unknown that GDS has or may have against NCR relative to the Orders <u>or Forecasts</u>."

295. Accordingly, NCR's case, whether based on construction or rectification, is in essence that the Letter Agreement prevents any and all claims based upon "Orders", as defined therein, and Forecasts given prior to 16 January 2013, and hence that none of the claims advanced in the Particulars of Claim are maintainable (save insofar as a case based on intimidation succeeds).

296. The effect of the order for a split trial is that there has been no examination of the details of the various heads of loss claimed by GDS. This is because the issue – whether GDS has suffered the loss and damage claimed in consequence of the alleged unlawful conduct – has been reserved for further determination.

297. A further consequence is that there has been no examination of issues that may arise as to whether, even on GDS's interpretation of the Letter Agreement, the various heads of loss allegedly suffered by GDS are recoverable. In the course of his closing submissions, Mr. Ritchie acknowledged that such issues may in due course arise.

298. The essential construction issue for resolution at the present trial, therefore, is whether the terms of the Letter Agreement preclude all claims based on forecasts given prior to 16 January 2013. If so, then the consequence would be that all the claims made in the Particulars of Claim are precluded by the Letter Agreement. Those claims would, in those circumstances, only be maintainable if GDS's claim based on intimidation succeeded, or there was a route by which the effect of the Letter Agreement could be negated. The only relevant route identified by GDS, in the absence of a case to set aside the Letter Agreement for duress, was an argument that the Letter Agreement was itself a consequence of deceit, intimidation or conspiracy.

299. If, however, the Letter Agreement on its true construction does not have the effect of precluding all claims based on forecasts, then (subject to rectification) issues may in due course arise as to the extent to which it does preclude aspects of GDS's claim.

E2: The parties' arguments

300. GDS contends that its claims arising out of false forecasts were not compromised. They rely upon the natural meaning of the words used, and say that taken alone and in context the claims brought are not excluded by the compromise or release. NCR's case was based on the false premise of the Letter Agreement containing a general release.

301. GDS emphasised the importance of giving effect to the words actually agreed. Ultimately, GDS accepted that the fact that it was making complaints as to false forecasting did form part of the admissible factual matrix. Whilst pre-contractual negotiations were generally inadmissible, they could be relied upon to establish an objective fact known to both parties or to show the genesis or aim of a transaction. It did not follow from the existence of a complaint that the aim of any subsequent agreement was to settle that complaint.

302. GDS also drew attention to other aspects which were in the background and which formed part of the factual matrix, subject to the care that needs to be taken when reliance is being placed on pre-contractual negotiations in the context of contract interpretation. This wider matrix included NCR's response to the complaints about forecasting, and the fact that the parties' discussions were by no means confined to false forecasting. Thus, the parties also discussed their contractual obligations including notice periods. They also discussed claims threatened by NCR in respect of FROs, possible TUPE liabilities, and unpaid accounts payable, as well as the possibility of an ongoing relationship. The parties in their discussions also distinguished between orders and forecasts, recognising that there was a distinction between the two concepts.

303. GDS identified the "big issue" as being the commercial problem facing GDS: it had a considerable amount of stock and other materials in the pipeline which it would not be able to shift. The parties thereafter were effectively negotiating a purchase and sale agreement to deal with that commercial problem, and this ultimately led to a commercial solution. Whilst it is true that various issues described in the previous

paragraph were raised, none of them were thoroughly debated and the legal framework around them was not articulated.

304. GDS submitted that the language of the Letter Agreement, even when construed against the wider factual matrix relied upon by NCR, could not be construed as a compromise of all potential claims relating to NCR's forecasting. This would distort the natural meaning of the words used, which focused on orders placed. The parties were not seeking to draw a line under their relationship or to provide for a general compromise or release of claims. The Letter Agreement made sense on its natural construction: NCR obtained displays at heavily discounted rates as well as a compromise of claims arising from the "Orders" as defined in the document. And in any case, even if the Letter Agreement could be said to lack commercial sense or was ill-advised from NCR's perspective, it should not be rewritten.

305. NCR identified the key issue as being whether the third paragraph of the Letter Agreement excluded claims arising from NCR's forecasting. It submitted that all of the claims based on NCR's actions up to and including 16 January 2013, including the cancellation of purchase orders and the amendment of forecasts to zero, were finally compromised by the Letter Agreement, including claims arising out of forecasts provided by NCR. NCR accepted that the Letter Agreement did not settle the intimidation claim to the extent that that claim is based on NCR's actions after 16 January 2013; ie after the cancellation of purchase orders and the amendment of forecasts to zero.

306. NCR submitted that whilst there are no special principles applicable to the interpretation of settlement agreements, a key aspect of the factual matrix in relation to a settlement is usually the nature of the dispute between the parties. Here, the key point was that GDS was complaining, repeatedly, that by the forecasts NCR had deliberately misled GDS. This complaint was intertwined with GDS's complaint that NCR had cancelled purchase orders. During the course of the parties' discussions, GDS was asking NCR to pay for its pipeline of material. It was therefore asking for far more items and far more money than was represented by the cancelled purchase orders. The cancelled purchase orders involved approximately 16,000 pieces which were valued (in the slides sent to NCR by Mr. Bisognin on 21 January) at US$ 5.1 million. GDS wanted NCR to take far more material than that. Even the Letter Agreement as signed involved NCR paying for many more items and paying much more money than represented by the cancelled purchase orders: Exhibit 2 to the Letter Agreement involved around 33,000 items for a price of just under US$ 7.7 million. The discussions which led to the Letter Agreement were all part of settlement discussions in relation to a potential legal dispute arising from the matters announced on 16 January 2013. By the time of the New York meeting, those discussions were expressly without prejudice. The parties were therefore concluding a settlement, not simply entering into a commercial agreement for the purchase of goods.

307. As far as concerns the language of the Letter Agreement, NCR submitted that the key points were that (i) it is clear from the first and second paragraphs that the third paragraph was intended to provide compensation towards the overall impact on GDS of the in-sourcing decisions announced by NCR on 16 January 2013 and not just the impact of cancelling purchase orders; (ii) the drafting is aimed at a comprehensive settlement; (iii) the words used were, in context, more than capable of referring to claims based on forecasts; and (iv) there is no attempt to "carve out" of the settlement

claims based on forecasts. Furthermore, only NCR's construction makes commercial sense. Claims based on orders and claims based on forecasts were too closely intertwined, as regards the underlying facts and the alleged losses, for it to have made sense to settle one but not the other.

308. NCR emphasised the closeness of the connection between forecasts and orders. They submitted that there was a lack of commercial sense in settling claims based on one and not the other. There was an obvious overlap between a claim in respect of cancelled orders and a claim in respect of deliberately inaccurate forecasts. The cancelled purchase order loss was a subset of "forecast" loss, because purchase orders were supposed to reflect the latest forecasts. Furthermore, GDS's complaints all related to the same overall alleged losses – arising from products built, or that GDS had planned to build, and commitments GDS said that they had entered into, in reliance on forecasts and orders.

309. NCR's written and oral submissions discussed each paragraph of the Letter Agreement, so that the important third paragraph was viewed in the context of the earlier paragraphs. The opening words were, it was submitted, suggestive of an effort to wipe the slate clean. This was a comprehensively drafted settlement agreement.

310. NCR recognised that the nub of the dispute on construction turned on the meaning to be given to the words in the third paragraph: "arising directly or indirectly from all orders placed by NCR pursuant to the Purchase Agreement PA04.016 … on or before 16 January 2013 ('Orders'), and the termination of Orders" and "relative to the Orders". NCR sought to link the concept of "orders placed" with NCR's forecasts in a number of ways. NCR submitted that "orders placed" were orders that were supposed to be placed to reflect NCR's needs, as estimated in NCR's forecasts, and might cover a period as long as the forecasts themselves. The forecasts were estimates, and were subject to change. Forecasts for more distant periods were known to be inaccurate as predictions of amounts that would actually be taken. But under the Purchase Agreement, and as a matter of the parties' dealings, the forecasts were supposed to be and were updated. When the time came to issue orders, the expectation was that orders would reflect forecasts as updated. Forecasts were therefore closely connected to and were directly or at least indirectly related to orders placed.

311. Against this background, NCR submitted that a claim may arise, directly or indirectly, from an "order placed" if the order is deliberately placed in line with a forecast that did not reflect NCR's genuine estimate of its need for Products and is thus subsequently cancelled. In the current context, claims based on orders actually placed are essentially also claims based on forecasts, because orders were, or were supposed to be, based on NCR's forecasts as amended over time. GDS alleged in January/February 2013 that orders placed by NCR without intent to take delivery were placed to match the forecasts, which did not reflect NCR's true demand from NCR, in order to continue to conceal Project Dynamo from GDS.

312. NCR therefore submitted that the words "orders placed" are also apt to include orders not placed. Orders placed should be read, against the factual matrix, as referring to the "placement of orders", which would clearly include orders placed and also those not placed. A claim may also arise, directly or indirectly, from an order that is not placed when an order not placed would, in the ordinary course, have been placed had the forecasts accurately reflected NCR's demand. This is also no different in substance

from a claim based on a forecast. In other words, a claim based on an order not placed is also a claim based on a forecast when, if forecasts were accurate, an order would have been placed.

313. There was therefore no need to have used the word forecast in the third paragraph, because orders were expected to be based on the latest forecasts. Claims based on orders placed that were based on knowingly inaccurate forecasts, which orders NCR therefore cancelled in January 2013, are covered by the settlement. So are claims based on orders not placed that were expected to be placed, had the forecasts been genuinely-estimated forecasts. Claims based on orders placed or not placed are thus also essentially the same as claims based on forecasts. What NCR did wrong in the present case, and which the parties were seeking to address in the Letter Agreement, was not ordering pursuant to the forecasts as well as placing orders in line with forecasts but with intent to cancel.

314. NCR also submitted that there was no sensible commercial reason for the parties to want to compromise only some of GDS's potential claims arising out of NCR's in-sourcing decision, and leave other claims based on the same facts and alleged losses available for GDS to pursue at its leisure, up to 6 years later. A compromise of all claims arising from NCR's deliberate concealment of its in-sourcing plans, and all claims intimated by GDS in relation to them since 16 January 2013, in order to wipe the slate clean, makes obvious commercial sense. There was an analogy with the presumption of one-stop adjudication in the construction of arbitration clauses. The Letter Agreement settles unknown claims, and it would be surprising if there was no intention also to settle known claims that arose from the same subject-matter and the same announcement.

315. NCR submitted that, applying the principles in the judgment of Lord Hoffman in *ICS v West Bromwich*, the process of construction can be "robust and make it happen"; ie in the present case it is right to treat orders as equated with forecasts. Alternatively, if the position was not clear on the language of the letter of release, there had been an obvious drafting mistake which could be corrected as a matter of interpretation.

E3: Legal principles

316. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 33rd edition paragraph 13-047:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court

> is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

317. This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24.

318. In *Rainy Sky*, Lord Clarke described the exercise of construction as being essentially a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Where the parties have used unambiguous language, the court must apply it: *Rainy Sky* paragraphs [23] and [25].

319. Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in *Arnold v Britton*. He said at paragraphs [15] – [22]. At paragraph [20], Lord Neuberger said:

> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his

> imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".

320. In *Wood v Capita,* Lord Hodge set out the applicable principles following *Rainy Sky* and *Arnold v Britton* as follows:

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen – Tangen)* [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> [11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> [12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions

> of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> [13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions."

321. There is discussion in the case-law as to the circumstances in which consideration of the factual matrix or context may lead to an interpretation of words which is not, according to conventional usage, an "available" meaning of the words or syntax which the parties had actually used, and the correction of an obvious drafting mistake by interpretation. I consider that argument in context below.

E4: Discussion

322. Subject to one qualification, it was common ground that ordinary contractual principles of interpretation applied to the construction of the Letter Agreement, including the release.

323. The qualification was that NCR submitted that the court should start from a presumption that the parties intended to wipe the slate clean or to resolve all matters in dispute between them. I do not accept the validity of this approach, and in my view ordinary principles of contractual interpretation apply: see the leading work on settlements, *Foskett on Compromise* 9th edn para 5-02 and (in relation to the construction of a release) *BCCI v Ali* [2002] 1 AC 251 at [8].

324. There is no relevant analogy between the situation where the court is interpreting the terms of a settlement agreement following the articulation of actual disputes between the parties, and in many cases the commencement of proceedings, and the question as to whether a dispute resolution agreement covering future disputes between the parties should apply to all such disputes. In the latter case, there is a presumption in favour of one-stop shopping for the reasons given in *Fiona Trust v Privalov* [2007] UKHL 40. In the former case, the question is the extent of the rights which a party has actually relinquished in order to obtain the benefits of the settlement agreement. Since a settlement agreement requires a party to give up existing rights, and since such agreements are (unlike dispute resolution clauses) usually the subject of careful and sometimes intense negotiation, their interpretation cannot commence with a presumption that one party or the other intended to relinquish all of his existing rights in order to wipe the slate clean. In very many cases, the settlement and release will be drafted comprehensively, so that this is indeed the effect of the settlement agreement: see the discussion in *Foskett*, paragraphs 5-22 to 5-23. But that is not a consequence of a presumption that settlement agreements are comprehensive resolutions of disputes. It is a consequence of the language that the parties have used in describing the disputes which have been settled.

325. The need to interpret the terms of the agreement actually concluded by the parties, and the possibility that a settlement agreement will not involve a complete relinquishment of rights, is clear from the discussion in *Foskett* of "Matters Left out" at paragraphs 6-07 – 6-08:

> "Not infrequently the analysis of the appropriate materials will disclose that the parties expressly or by necessary implication compromised certain matters of dispute but not others. In some cases it will be clear that certain matters were expressly or by implication not made part of the compromise. However, there may be cases where, on any objective view, the parties could and should have dealt with a particular matter but neglected to do so. To what extent will they be permitted by the court to litigate that matter on some future occasion?
>
> There is, at least in principle, a distinction between a compromise of a dispute achieved before the commencement of proceedings and one achieved thereafter. In the former situation (which will be governed solely by the law of contract), unless the court can imply a term that a particular matter was compromised, the agreement as construed must stand: the court will not rewrite the parties' bargain. It may be possible for the agreement to be effective without the matter in question having been embraced within it."

326. The equivalent passages in an earlier edition of *Foskett* were referred to with approval in *Dattani v Trio Supermarkets* [1998] ICR 872, to which both parties referred in their submissions. (This analysis of the legal position is unaffected by the need, noted by *Foskett* in footnote 26 of the current edition, to read a different aspect of the decision in *Dattani* in the light of subsequent authority).

327. Accordingly, as *Foskett* states in paragraphs 6-03 – 6-04 (also cited in *Dattani*), an important aspect of the whole subject of compromise is the need, which may arise subsequent to the making of a compromise, for a court to identify precisely the disputes which have been settled. To that end, there will be a variety of materials to examine. These include "first and foremost" the agreement itself. As Foskett then notes:

> "However, an agreement's phraseology may not always yield the answer to the question in hand. As observed previously, in the normal course of events the parties' negotiations are inadmissible as an aid to construction of an agreement. However, they are relevant and admissible to assist in resolving any ambiguity of phraseology in the agreement or to identify the disputes the parties intended to resolve. It is axiomatic that the analysis of these materials is an objective one, the subjective intentions of each party being irrelevant. An objective analysis of the "factual matrix" that formed the background to the compromise is required to enable the disputes settled to be identified."

328. I start by considering the language of the Letter Agreement itself. This is a permissible starting point provided that the indications given by the contractual language are then considered in the balance in conjunction with the factual matrix and commercial considerations: see *Wood* at [12].

329. The first two paragraphs of the Letter Agreement set the contractual scene for the critical third paragraph which follows. Indeed, those two paragraphs contain a succinct statement of the aim and genesis of the Letter Agreement and therefore its factual matrix, or at least very important aspects of the factual matrix.

330. The first paragraph thus identified the announcement on 16 January 2013, and the consequent cancellation of a number of "open purchase orders" which were listed in Exhibit 1. That exhibit set out a listing of a very large number of specific purchase orders that were cancelled. There were 8 columns to Exhibit 1, and these included the reference number of each relevant purchase order and the quantity of goods that remained "open". There were 92 different rows in the spreadsheet in Exhibit 1, each row representing a separate cancelled purchase order. One column identified the "Dock Date", which essentially represented the delivery date. These showed that the delivery dates were throughout most of 2013, mostly in April – June but with some cancellations with earlier delivery dates (as early as January) and a handful as late as August and September 2013. The total value of the cancelled orders was not set out in Exhibit 1, but for the purpose of the argument on construction NCR indicated that it was prepared to proceed on the basis of GDS's position that it totalled approximately US$ 5.1 million.

331. The first paragraph also referred to the amendment of the "forecasts to zero for all the products GDS supplies to NCR". There was, therefore, express reference to the

forecasts, and the fact that – additionally to the cancellation of open purchase orders – those forecasts had been amended to zero.

332. The second paragraph of the Letter Agreement set out NCR's "good faith and without prejudice" offer to purchase displays set out in Exhibit 2 and Exhibit 3. Exhibit 2 contained a listing, with 25 rows, of products to be supplied, including their purchase price and whether they were to be delivered in the first or second quarter of 2013. The total price to be paid for the goods was not set out, but it was common ground that it totalled approximately US$ 7.7 million, and that this represented a substantial (30%) discount on the price that NCR would have paid if the goods had been supplied pursuant to the terms on which the parties were operating prior to 16 January 2013.

333. Exhibit 3 was a spreadsheet containing a listing of purchase orders which were "open" and which had not been cancelled as at 16 January 2013. Exhibit 3 had not formed part of the draft Letter Agreement first sent to GDS, probably because NCR considered that these purchase orders were unaffected both by the original cancellation and by the Letter Agreement itself. In other words, they would remain to be fulfilled. But the uncancelled open purchase orders had been listed by GDS and included as Exhibit 3. Apart from making it clear that these orders remained to be fulfilled and paid for, the listing in Exhibit 3 was subject to the provision in the fourth paragraph of the Letter Agreement that: "none of the orders on Exhibits 2 and 3 can be cancelled or reduced". That sentence provided protection for GDS against the possibility that the open purchase orders, as well as the orders for the Exhibit 2 products, would be subject to the same abrupt cancellation as had occurred (in relation to the Exhibit 1 purchase orders) on 16 January 2013.

334. It was common ground that the listing in Exhibit 3 did not include the accounts receivable (or from NCR's perspective, accounts payable), totalling approximately US$ 5 million, for goods which had previously been supplied and invoiced by GDS in the past, and where payment was by now overdue. There had been some discussion between the parties as to these accounts receivable, and Mr. Kaparis had indicated that he was working on getting these paid.

335. The critical issue of construction is whether the third paragraph excludes all claims arising from NCR's forecasting. NCR contends that, on its true construction, all claims based on NCR's actions up to and including 16 January 2013, including both the cancellation of purchase orders and the amendment of forecasts to zero, were finally compromised by the Letter Agreement. This included claims arising out of forecasts.

336. In my view, this argument is not supported by the language that the parties have used in the third paragraph of the Letter Agreement, giving such language its ordinary and natural meaning. The settlement and release are both drafted by reference to "Orders", which are defined as "all orders placed by NCR pursuant to the Purchase Agreement PS04.016 (as amended) between NCR and GDS on or before 16 January 2013". There is therefore no reference either to forecasts, or to the reduction of forecasts to zero, still less to all claims based on NCR's actions up to and including 16 January 2013.

337. The concept of an order is very different to that of a forecast, both as a matter of ordinary language and specifically in the context of the parties' contractual relationship and dealings. A forecast is, and was in context of the parties' dealings, an estimate of future requirements, but would not ordinarily be treated as giving rise to a commitment to

purchase or "order". This obvious point is made explicit in clause 6.1 of the Purchase Agreement which it is convenient to set out again. This clause provided:

> "Forecast demand schedules will be issued to the Supplier on a regular basis or by exception in the event of major schedule changes. These forecasts will cover a forward period of up to twelve (12) months, updated at least on a monthly basis. Subject to clause 6.2, the forecast demand schedules are non-binding forecasts, can be amended by NCR at any time, and do not constitute the commitment of NCR to purchase the forecasted quantities, or any Product whatsoever. NCR will issue a blanket purchase order to the Supplier for each JIT Product. Such order will cover the supply of that Product covering a period of up to a year. The blanket order will give a projected Product quantity requirement for each period, however such quantity will be subject to amendment by NCR. The blanket purchase order does not constitute the commitment of NCR to buy the stated quantity of Product, or any Product whatsoever. NCR may cancel any outstanding blanket order for Product forthwith provided that any such cancellation shall not affect any outstanding Product orders under then issued 'call-off' documentation (see clause 6.4 below)."

338. The clause therefore expressly provided that the forecast did not constitute the commitment of NCR to purchase the forecasted quantities. The clause also contemplated that the forecast would be followed by a "blanket purchase order", although this too would not constitute the commitment of NCR to buy the relevant products. In the event, blanket purchase orders were not generally issued. The practice was instead for NCR to place purchase orders which specified the quantity of product required and the date required. The placement of purchase orders was provided for in clause 6.4 of the Purchase Agreement, which provided:

> "NCR will be committed to purchase of JIT [Just in Time] Products and the Supplier will be committed to deliver such Products, only upon the Supplier's receipt of NCR's "call off" documentation for a specific quantity of the Product".

339. As the evidence of Mr. Kendell on behalf of GDS confirmed, it was the purchase orders which constituted the "call off" documentation which resulted in contractual commitments on both sides. The distinction between orders and a forecast was clearly explained in the evidence of Mr. Kaparis:

> "Forecasts … are not a commitment from a customer, like NCR, to buy anything. The commitment comes after we have issued a PO when (as with GDS), we have a contract that says what you can and cannot do from the point a PO is issued".

340. The Letter Agreement and its exhibits recognise both the nature of purchase orders and the obvious distinction between purchase orders and forecasts. Thus, the first paragraph refers specifically to the cancellation of the open purchase orders set out in Exhibit 1. That exhibit identifies each purchase order by number, as well as providing for example

details of the relevant goods and the delivery dates. The first paragraph of the Letter Agreement then goes on to refer, additionally ("Furthermore"), to the amendment of the forecasts to zero. Exhibit 3 is similar to Exhibit 1 in that it too refers to orders rather than forecasts: it lists the detail of those purchase orders which were not being cancelled, and which therefore remained as contractual obligations. The additional quantities to be taken pursuant to the Letter Agreement, as listed in Exhibit 2, were also described (in the fourth paragraph of the Letter Agreement) as "orders".

341. The critical third paragraph refers not to forecasts but to orders. Whilst it can be said that the orders were the culmination of a process that started with the giving of forecasts, there is in my view no basis for seeking to equate forecasts with orders. The parties clearly had in mind the termination of the contractual commitments which had been created by the purchase orders: hence the express reference to "the termination of Orders pursuant to the Purchase Agreement". It would be strange to speak of the "termination" of forecasts which had been made in the past, and the language actually used cannot be read as referring to that unusual concept.

342. Furthermore, the third paragraph does not simply refer to orders in the abstract, but specifically "all orders placed by NCR pursuant to the Purchase Agreement between NCR and GDS on or before 16 January 2013". These words therefore refer to orders which were actually placed pursuant to the Purchase Agreement. I accept that claims relating to orders placed on or before 16 January 2013 could encompass a claim in respect of an order which was not placed in that period. For example, it might well cover a claim that a particular order or series of orders placed before 16 January 2013 should have been for a larger volume of goods, and in that sense it would be a claim for an "order not placed". (I do not actually understand GDS to be making any such claims in these proceedings). However, the language cannot in my view be read as referring very generally, as NCR submitted, to orders which were not placed, and thereby as a reference to forecasts. Even if the contractual language is interpreted to mean "the placement of orders" (as NCR submitted), this makes no difference of substance: the placement of orders pursuant to the Purchase Agreement means the same as "orders placed pursuant the Purchase Agreement". It refers to orders actually placed rather than to orders which were not placed.

343. The temporal reference in the third paragraph shows that the attempt to equate the contractual language with forecasts is unsustainable. The settlement relates to orders placed by NCR on or before 16 January 2013. The period covered by the forecasts is different to the period covered by purchase orders. The former looked ahead for a period of approximately one year, so that the latest forecast prior to the 16 January cancellation covered the entirety of 2013. The purchase orders generally did not look so far ahead: as shown by the list of cancelled orders in Exhibit 1, these were concentrated in the period up until June 2013, and with relatively few orders in August and September and none thereafter.

344. The temporal reference also highlights the difficulty of interpreting the words "orders placed by NCR" as including "orders not placed by NCR" so as to produce the result that the Letter Agreement covered all claims based on forecasts. This was relied upon by NCR as a staging post in the argument that the language of the third paragraph can be read as referring to forecasts. Even if the words can be read as referring to orders not placed, there would be no basis for divorcing those words from the remainder of the text. The language would therefore be, in full, "orders not placed by NCR pursuant to

the Purchase Agreement … on or before 16 January 2013". So read, the difficulty of treating the language as referring to forecasting claims is revealed. Claims in relation to orders not placed on or before 16 January 2013 cannot be a reference to claims in relation to forecasts which, during 2012 and 2013, covered a period well beyond that date, essentially up to the end of 2013. A claim arising from those forecasts would therefore relate to the consequences of orders "not placed" in the months after 16 January 2013, rather than those which were "not placed" in the period prior to that date.

345. I have hitherto considered the question of whether the language of the Letter Agreement can be read as excluding all claims relating to NCR's forecasting. The case for so construing the agreement would be enhanced if it could be said, for example, that it was difficult to see why the parties would have wanted to settle claims relative to, or arising directly or indirectly from, the orders placed on or before 16 January 2013, or that such a settlement would be devoid of substantial content. I do not believe that this can be said. On the contrary, if the language of the Letter Agreement is applied in accordance with its natural meaning, it does nevertheless result in a considerable relinquishment of the rights that GDS would or might otherwise have had.

346. It is not appropriate here to explore the full extent of the impact of the settlement, since (in the event that it does not exclude all of GDS's claims) its precise application to the claims made by GDS is to be determined hereafter. It is, however, clear that the settlement, even if interpreted so as not to exclude all claims relating to forecasting, does have very real and substantial content. There is on any view a settlement of all contractual claims arising from the January 2013 cancellation of a significant volume of purchase orders. The settlement does not, however, simply relate to the cancellation of orders, but precludes any claims arising directly or indirectly from all orders placed by NCR at any time prior to January 2013; in other words, during the entire history of the relationship. It seems (without finally deciding the point) that this would prevent claims being made on the basis that NCR should have paid more for products that were supplied pursuant to pre-January 2013 purchase orders; for example, it would cover the claim that GDS would have increased their pricing for goods actually supplied if they had not received false forecasts. The language which excludes claims "arising directly or indirectly from all orders placed by NCR" prior to the relevant date is also wide. The connection between the claims or losses and the orders need therefore be no more than indirect. It may be (and again I express no final view) that this language is sufficient to exclude or at least impact upon GDS's proposed claim for losses comprising investment and development costs, in so far as the orders actually placed, but without real intent to take delivery, were one of the causes of those losses.

347. The important point for present purposes is that there is nothing inapt or inappropriate or uncommercial in drafting a settlement using the language that was used. Hence, NCR's construction argument does not seek to delete any of the words actually used, and replace them with other language. Rather, and as can be seen from their proposed agreement as rectified, NCR seeks to supplement the existing language by the addition of words which add to the scope of the existing settlement.

348. I have started by considering the language of the Letter Agreement, because I consider that this is the most significant factor in the unitary exercise of construction. The Letter Agreement is clearly a document drafted with the benefit of legal advice. It uses terminology and expressions with which a commercial lawyer would be familiar: release, waiver, full and final settlement, "claims, damages or losses whatsoever that

GDS has or may have, arising directly or indirectly …", "waives and releases NCR from all claims, liabilities, demands and causes of action known or unknown" and so forth. It was a fact known to GDS prior to the conclusion of the settlement agreement, as a result of the discussions in New York, that NCR was receiving in-house legal advice. Furthermore, apart from NCR's submission that the failure to refer expressly to forecasts was an obvious drafting error, NCR did not identify any other errors or suggest that the Letter Agreement was, apart from that omission, not well drafted. In these circumstances, and given that the identification of the disputes which have been settled depends first and foremost upon the language which the parties have used, I consider that this is a case where the agreement can and should be successfully interpreted principally by textual analysis: see *Wood* at [13].

349. However, it is still relevant to consider the impact of the factual matrix as part of the unitary exercise. This is a case where it is not easy to draw the line between inadmissible evidence of pre-contractual negotiation and admissible evidence of background facts which became known to the parties as a result of those negotiations. That may be so in many cases involving settlement agreements, because the complaints and positions taken by each party in the course of negotiation for the settlement agreement are, as *Foskett* indicates, potentially relevant factual matrix evidence in resolving issues as to what disputes the parties were settling.

350. There can be no doubt that both parties knew that GDS was making complaints as to the falsity of NCR's forecasts, and specifically that this had resulted in GDS having a very large amount of stock or materials in its pipeline. I did not think, however, that this fact materially assisted NCR's argument that the critical third paragraph was to be read as encompassing GDS's claims concerning forecasting. In fact, as GDS submitted, the opposite conclusion could equally, and perhaps more appropriately, be drawn. The Letter Agreement refers specifically, in the first paragraph, both to the cancellation of orders and the zeroing out of forecasts. This shows that the parties themselves, being alive to GDS's complaints about forecasts, distinguished between orders and forecasts, and then – in the critical third paragraph – referred only to orders.

351. It is also important to note that the complaints and positions of GDS, as known to NCR, were not confined to the issue of forecasting. The "big issue" was indeed the very substantial pipeline which GDS had on its hands, and which it said was the result of false forecasting. However, there were other issues that were discussed between the parties, including contractual rights of cancellation, applicable notice periods, TUPE liabilities, unpaid accounts as well as FRO's (a potential liability of GDS to NCR), the possibility of a continuing relationship and ongoing liabilities for products sold (an issue which is to some extent addressed in the fourth paragraph of the Letter Agreement). The range of issues which were in play, and which form part of the overall factual matrix, serves to underline the prime importance of the language which the parties have actually used when defining what has been settled and the rights that GDS has relinquished in the release.

352. This range of issues also demonstrates that the Letter Agreement cannot reasonably be construed as a contract in which the parties were seeking to wipe the slate clean. Whilst the agreement does use comprehensive language of settlement and release, the subject-matter of that settlement and release are "the Orders". There is no language which can be construed as settling all actual or potential claims of whatever nature between the parties, or which provides for a wiping clean of the slate.

353. I also consider that NCR's argument seeks to give a meaning to the relevant language which it cannot reasonably bear: for all the above reasons, forecasts and orders placed under the Purchase Agreement prior to 16 January 2013 are very different. In that regard, *Lewison: The Interpretation of Contracts* 7th edition, paragraphs 3.167 – 3.168, states:

> "Fourth, reliance on background must be tempered by loyalty to the contractual text. It is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear.
>
> ...
>
> Fifth, the background should not be used to create an ambiguity where none exists. The court must be careful to ensure that the background is used to elucidate the contract, and not to contradict it".

354. NCR referred to the seminal judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. He stated, as his fourth proposition, that the relevant background "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax". However, I see no reason to conclude in the present case that the parties used the wrong words or syntax. NCR's construction argument does not postulate that any of the words used in the Letter Agreement were wrong. As already explained, those words do bring a substantial benefit to NCR and do result in a very real and significant relinquishment by GDS of its rights. Rather, NCR's case is that the words used were not as comprehensive as they should have been, and should therefore be extended by additional words so as to produce the result that GDS's relinquishment of rights was more complete. Whilst that result might be achieved through NCR's claim for rectification, I do not consider that it can be achieved by a process of construction. In reality, it invites the court to rewrite the settlement agreement rather than to interpret the agreement which the parties have actually made.

355. In short, I do not consider that there is anything in the factual matrix which weighs significantly in the balancing exercise and which assists in leading to the conclusion for which NCR contends.

356. As part of the unitary exercise, I must also pay regard to the commercial sense of the rival interpretations. I agree with GDS's submission that the Letter Agreement makes commercial sense on its natural construction. GDS relinquished substantial rights, the extent of which will be determined hereafter, in return for the payments and commitments contained in the Letter Agreement. The Exhibit 3 commitments were already in existence, and the effect of the 16 January announcement was that NCR wished those commitments to remain in place. The Exhibit 2 commitments were new. They benefited both parties, in that GDS were able to supply some of the goods in the pipeline, and NCR was able to obtain goods at heavily discounted prices compared to those which had previously been payable. There is nothing in this agreement which lacks commercial common-sense, bearing in mind that all settlements are in the nature of compromises which strike a balance between the rights which parties are prepared

to forego and the benefits that they would ideally obtain. Nor is there anything which leads to the conclusion that NCR's approach to construction, which involves a significant departure from the natural meaning of the words used, is preferable.

357. NCR made various points in support of its argument as to commercial sense. One prominent argument was that the settlement makes no sense, or at least less sense, as a settlement of the claims relating to the cancellation of orders, bearing in mind the relevant values of the cancelled goods in Exhibit 1 when compared to the new commitments in Exhibit 2. The basic point was: why should NCR agree to pay US$ 7.7 million for the Exhibit 2 goods when the total value of the cancelled orders in Exhibit 1 was only US$ 5.1 million. I do not consider that there is any substance in this argument.

358. First, I do not regard the settlement as being confined to a settlement of actual or potential claims concerning the cancellation of the orders in Exhibit 1. It clearly includes that, as is clear from the express terms: "and the termination of Orders pursuant to the Purchase Agreement". However, it is a wider settlement since it covers any claims, damages or losses whatsoever arising directly or indirectly from all orders placed prior to 16 January 2013. It therefore covers all prior orders, whether cancelled or not.

359. Secondly, the argument pays insufficient regard to the fact that the payment of US$ 7.7 million was not an outright payment of money in return for a settlement of GDS's cancellation claims. NCR would be receiving valuable goods in return for that payment, and moreover would be doing so at heavily discounted rates. Accordingly, even though the US$ 7.7 million may have exceeded the value of the cancelled purchase orders, there was obvious commercial benefit to NCR in making that payment in return for the Exhibit 2 goods, even leaving aside the benefit achieved by the relinquishment by GDS of the rights specified in the Letter Agreement. This is illustrated by the fact that NCR's initial offer, on 6 February 2013, was simply for the purchase of displays valued at US$ 7.68 million, without any proposed terms relating to the relinquishment of rights.

360. The commercial and economic value to NCR of the transaction is also shown by Mr. Kaparis's internal email of 4 February 2013. In that email, he refers to the purchase of what he described as "heavily discounted GDS displays". He describes the financial benefit of the purchase, which significantly improved performance against anticipated results, albeit that this internal calculation would not have been known to GDS at the time and cannot be regarded as part of the factual matrix. It does, however, further illustrate the commercial good sense of the Letter Agreement from NCR's perspective, even on the basis that it does not effect as broad a relinquishment of GDS's rights as that for which NCR contends.

361. Another theme in NCR's argument on commercial sense is that GDS's interpretation means that the settlement is not comprehensive. If it is interpreted as only a partial settlement of GDS's rights, then there is inevitably scope for argument as to how the settlement applies to the various claims which GDS now seeks to bring. In this way, a partial settlement creates issues and the scope for later argument, whereas a comprehensive settlement does not. NCR therefore submitted that when the commercial common-sense of the rival interpretations are compared, NCR's interpretation is to be preferred.

362. It is obvious that a settlement which was drafted in more comprehensive terms, whereby GDS gave up all of its claims relating to forecasting, would be more beneficial to NCR and simpler. It would certainly have been commercially rational for NCR, who were the authors of the Letter Agreement, to have sought to achieve a comprehensive settlement and one which gave them wider protection. However, as *Foskett* shows, it is far from unusual for settlements to leave matters out, and to compromise some matters but not others. The commercial good sense of a more comprehensive settlement, from the perspective of one party, is not in my view a reason to interpret the Letter Agreement in a manner contrary to the natural interpretation of its language. It involves equating orders with forecasts and, at a wider level, construing the settlement as wiping the slate clean, neither of which is supported by the terms of the Letter Agreement. The effect would be to rewrite the parties' agreement. Bearing in mind the judgment of Lord Neuberger in *Arnold v Britton* as to the approach to arguments based on commercial sense, I do not consider that this is the appropriate way in which to construe the Letter Agreement.

363. Finally, NCR submitted that if the court considered that the position was not clear on the language of the Letter Agreement, read in context, there has been an obvious drafting mistake which can be corrected as a matter of interpretation. Reliance was placed upon Lord Hoffmann's fifth proposition in *ICS*:

> "(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

364. Lord Hoffmann expanded upon this principle in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, paragraphs [14] – [24]. He said that it required a strong case to persuade the court that something had gone wrong with the language. In that case, he considered that the interpretation of the relevant clause in accordance with the ordinary rules of syntax made no commercial sense. The judgment also makes clear that: the fact that a contract may appear to be unduly favourable to one party is not a sufficient reason for supposing that it does not mean what it says; that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context; and that the exercise of correcting mistakes as a matter of construction is part of the single task of contractual interpretation.

365. This topic receives extensive treatment, and a full citation of more recent authority, in *Lewison* Chapter 9, in particular paragraphs 9.01 – 9.39. At paragraph 9.06, the author states:

> "In order to invoke the principle it is necessary that something should have gone wrong with the language of the contract rather than with the bargain. The mistake must be one of language or syntax, the court has said on numerous occasions that the process of contractual interpretation cannot be used to rectify a failure to

> think through the financial consequences of the operation of a clause."

366. Thus, the typical case where the principle applies is where the relevant clause is an obvious nonsense: see *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437. As Lord Neuberger said in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 para [20]: "one is normally looking for an outcome which is "arbitrary" or "irrational", before a mistake argument will run".

367. In *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd*, [2018] EWCA Civ 1556; Lewison LJ said:

> "What is necessary to bring this principle into play is (a) that it should be clear that something has gone wrong with the language and (b) that it is clear what a reasonable person would have understood the parties to have meant: *Chartbrook* at [22] and [25]. The first problem with this argument is that if anything has gone wrong with the rent review provisions, as Mr Dutton suggests, it is a failure to think through the consequences of what the parties agreed, rather than any deficiencies in drafting. A failure of that kind cannot be solved by the process of interpretation."

368. I do not consider that these principles can be applied so as to produce the contractual interpretation for which NCR contends. I do not consider that anything has gone wrong with the language in the third paragraph of the Letter Agreement. As I have already concluded in the context of another aspect of NCR's argument, none of the words used in the third paragraph of the Letter Agreement is in any sense wrong. Their result is that there is real and significant relinquishment of GDS's rights. There is no obvious mistake in the language, and the clause is not an obvious nonsense and does not produce a result which is irrational and arbitrary. Indeed, NCR seeks to preserve that language in full in its rectification case.

369. What NCR therefore seeks to do is to extend the settlement so as to cover an additional source of potential liability, whilst maintaining the effect of the settlement as drafted. Whilst this result might be achievable via rectification, I do not consider that it can be achieved through contractual interpretation.

370. In my view, if anything has gone wrong with the relevant clause, it is a failure by the draftsman to think through the potential consequences, in terms of NCR's exposure to claims and liabilities, of the dishonest forecasts which were given over a very considerable period of time. The focus of the third paragraph of the Letter Agreement is upon the orders which were placed and their termination. The likely reason for that is that Mr. Kaparis and NCR's in-house legal adviser were themselves focusing on the contractual position: see Section D above. Any failure was, therefore, or was akin to a failure to think through the financial consequences of the terms agreed. It is clear on the authorities that a failure of this kind cannot be corrected by contractual interpretation.

371. I therefore reject NCR's case on construction.

Section F: Rectification for mutual mistake

F1: Legal principles

372. The test for rectification has very recently been clarified by the decision of the Court of Appeal in *FSHC Holdings v GLAS Trust* [2020] Ch 365, and is summarised in the passage at [176]:

> "it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention."

373. Paragraphs [80] – [87] of the judgment, under the heading "Tacit Agreement", make it clear that the concept of an "outward expression of accord" does not require that the parties' common intention should be declared in express terms. The shared understanding may therefore be tacit. It may therefore include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words. The Court of Appeal emphasised, however, that the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an "officious bystander" test: see [87]. The concept of a tacit agreement is to be contrasted with uncommunicated intentions which happen, without the parties knowing it, to coincide. It is therefore "fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other".

374. As far as intention is concerned, the effect of the judgment in *FSHC*, albeit strictly obiter, is that the intention of the parties is to be assessed subjectively, not objectively. NCR drew attention in its opening submissions to passages in *Chitty on Contracts*, 33rd edn, paragraphs [3-082] – [3-088] which express some doubt as to whether this is always the case. However, I did not think that any of the situations discussed by *Chitty* were applicable on the facts of the present case, and by the end of the trial both parties' arguments focused on the subjective intentions of the parties.

375. Whilst the standard of proof is the balance of probabilities, the cases refer to the need for "cogent" evidence or (see *FSHC* at [46]): "convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed".

376. The case-law has addressed the nature of the evidence that a party needs to adduce in order to establish that a mistake was made by a relevant individual. In *George Wimpey v VI Construction Limited* [2005] EWCA Civ 77, Peter Gibson LJ (with whom the other judges agreed) said:

> "it is important to identify the person who is the decision-taker in the corporate body which entered the contract and to see

> whether he was making a mistake. Prima facie a person who enters a contract intends to be bound by all its terms. The fact that the contract has been negotiated by a person who is not the decision-taker and has made an error is irrelevant unless it can be shown that the decision-taker shared the intention of the negotiator; but that requires evidence."

377. This principle, including later Court of Appeal authority, was analysed in some detail by Mann J in *Murray Holdings Ltd. v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) paragraph [198]. He summarised the position as follows:

> "(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.
>
> (b) In the case of the company that person will usually be the person with authority to bind the company.
>
> (c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.
>
> (d) The intention of a "mere negotiator" may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.
>
> (e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator's intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator."

F2: The parties' arguments

378. GDS submitted that there was no shared consensus between the parties at any time prior to 22 February 2013 (when the draft Letter Agreement was returned by GDS and then signed on that day by the parties) as to the scope or terms of any release or as to the effect, in terms of compromise, of any agreement as to the purchase of product. There had been no discussion between the parties on that issue, and such discussions as had taken place were commercial discussions focusing on commercial terms not legal claims.

379. As far as their own intention is concerned, the essence of GDS's argument was that they had no intention of contracting on anything other than the terms of the Letter Agreement. They had been focusing on this as a commercial deal for the sale of products. They did not understand that it would amount to a full and final settlement of

all claims which they might have, nor did they understand that was necessarily the end of the commercial relationship. They took legal advice as to the meaning of the terms of the draft letter of agreement and release and that legal advice indicated that the settlement was limited to claims relative to orders, and that there may be claims open to GDS in respect of forecasting. The negotiator (Mr. Bisognin) heard that advice in teleconference and read it in e-mail. The decision-maker (Mr. Cariolato) likewise read it, and understood it to confirm his own view that the agreement was limited to settlement of claims relative to orders.

380. As far as NCR's intention was concerned, GDS relied upon the absence of any evidence from the decision-maker, Mr. Ciminera, as to his intention when he concluded the Letter Agreement. Such evidence as was given by both Mr. Kaparis (in his written statement) and Mr. Mannion could not fill that gap. In any event, their evidence was unreliable. At the time, NCR's focus was on the commercial terms of the purchase of products for which it had a critical need and was able to obtain at a heavy discount. The need to obtain supply continuity and cost reduction were NCR's enduring twin concerns. NCR perceived that there was only potential exposure in respect of purchase orders placed before 16 January 2013, and they wished to settle any claims or liabilities in connection therewith. Whilst NCR understood that GDS was complaining about NCR's forecasts, NCR did not consider that GDS had any claims in respect thereof. NCR therefore intended to settle claims and losses arising out of purchase orders, because, on their view, settlement of such claims extinguished all risks they perceived.

381. In summary, GDS submitted that, as at 22 February 2013: (i) GDS believed that they might have a forecasting claim but did not have any intention to settle the same under the Letter Agreement; (ii) NCR did not believe that GDS had any claim in respect of forecasting and therefore did not intend to settle any such claims; (iii) all risks that NCR perceived arose out of obligations pursuant to purchase orders (whether total exposure or 30+30 day exposure).

382. NCR invited the court to find that NCR intended to settle all claims arising from the 16 January 2013 announcement, including forecasting claims.

383. In relation to GDS's intention, NCR submitted that it was primarily Mr. Cariolato's intention that mattered, although the three senior GDS people (Messrs Cariolato, Bisognin and Swetman) all had the same intention. That intention was the same as that of NCR: to settle all claims arising from the announcement including forecasting claims.

384. This mutually shared intention was the result of the communications between the parties.

385. If, however, the intention was not mutually shared, then rectification should be ordered for unilateral mistake because GDS knew, or wilfully shut its eyes to the obvious fact, that NCR intended to settle forecasting claims. This aspect of the case is considered in Section G below.

386. In support of its case on rectification (as on construction), NCR placed reliance on the complaints made about forecasting: the "big issue" was the dispute as to NCR's obligations arising out of its forecasts and that deliberately incorrect forecasting. The

loss caused by GDS's alleged reliance on the forecasts were at the forefront of GDS's complaints to NCR from 17 January 2013 onwards.

387. The purpose of the New York meeting, and the subsequent discussions (principally between Mr. Kaparis and Mr. Bisognin) was to try to settle all issues arising as a result of NCR's announcement. When GDS responded (on 7 February 2013) to NCR's prior offer, GDS put forward two scenarios involving payment of over US$ 12.5 million or over US$ 16.4 million. Figures in this region could not be explained merely as an offer to settle a cancelled purchase order claim for US$ 5.1 million, which would then leave GDS free to sue in respect of forecasts after receiving payment. Following the impasse which emerged from the discussions between Mr. Bisognin and Mr. Kaparis, GDS reconsidered its position. It knew that the alternatives being considered were accepting NCR's offer, or litigation. GDS recognised that it could not take the money and litigate afterwards. The decision was made to accept the offer. Neither GDS nor NCR could have understood that the settlement would exclude the very claims which had been the subject of the "big issue" at the NYC meeting.

388. In support of its case that NCR intended to settle all claims arising out of its announcement to GDS on 16 January, NCR submitted that the court should accept the evidence of Mr. Kaparis: it was his intention to settle "all GDS's complaints". Whilst Mr. Mannion was less involved than Mr. Kaparis, he said that it was "blatantly obvious to everyone" that the settlement resolved all the loose ends. It was, he said in evidence, a final termination of the relationship: "everything decided and we would walk away and go our separate ways". Whilst Mr. Ciminera had not provided a statement, Mr. Kaparis had given evidence as to his intention. It was also inherently plausible that Mr. Ciminera was aware of and shared Mr. Kaparis's intentions in relation to the Letter Agreement, including to settle GDS's forecasting complaints. The court should therefore not hesitate to find that NCR believed that the Letter Agreement settled forecasting claims.

389. In relation to GDS's intention, NCR submitted that if one considered the position before Mr. Frisby's second e-mail on 21 February 2013, it would be clear that GDS also understood the settlement to include forecasting claims. Mr. Frisby's initial advice on the Letter Agreement, in the early afternoon of 21 February 2013, was that it was a full and final settlement of all claims which GDS may have. If it was signed, then GDS would be bound and will have waived all claims. The subsequent call and e-mail did not materially change that position. Mr. Frisby was only suggesting that it was arguable that forecasting claims were not covered by the settlement. It was doubtful that Mr. Cariolato even read the relevant paragraph of the e-mail where Mr. Frisby addressed that issue. He did not pay it any attention. Even if he did read it, it would not have changed his mind that the settlement would not leave GDS free to make forecasting claims.

390. Accordingly, GDS did share NCR's intention to settle forecasting claims. That shared intention was derived from the communications between the parties during the relevant period.

F3: Discussion

391. I do not consider that any of the necessary requirements for a successful claim of rectification for mutual mistake have been established, with the necessary degree of convincing proof, in this case.

392. *Outward expression of accord*. I start with the requirement– since this is a case where it is not alleged that there was any prior concluded agreement – for an outward expression of accord. The question is whether, as a result of communication between them, the parties understood each other to share the intention that there should be a settlement and release of all of GDS's claims in relation to forecasting. This is the effect of the proposed rectification sought.

393. I do not consider that there is any evidence which would support the conclusion that there was an outward expression of accord to that effect. I have traced the course of the parties' discussions in detail in Section E above. Subject to one reservation described below, I accept GDS's submission that there was no shared consensus, either explicitly or tacitly, as to the scope or terms of any release or the effect, in terms of compromise, of any agreement as to the purchase of product.

394. The position in summary was that GDS had a very substantial pipeline of goods and material, and indeed was complaining that this was a consequence (at least in substantial part) of the false forecasting. However, there was no shared consensus on anything prior to or at the New York meeting. The upshot of that meeting was that information would be provided by GDS with further details of the pipeline which would be requested by NCR, with NCR indicating that it would do what it could. GDS did not know whether any offer would in fact be forthcoming, and NCR itself at that stage had not decided to put forward an offer. There was certainly no discussion or consensus that any proposal would be in full and final settlement of all complaints including forecasting.

395. NCR sought to characterise the "big issue" for discussion at the New York meeting as the dispute as to NCR's obligations arising out of its forecasts, and its deliberately incorrect forecasting, and the loss caused by GDS's reliance on the forecasts. I do not accept that this is an accurate description of the "big issue". The New York meeting was not a meeting aimed at the resolution of a claim for false forecasting, and both parties at the meeting wished to avoid discussion of the legalities and the involvement of lawyers. The big issue was the large pipeline of goods and materials which GDS had on its hands, and whether or not NCR would take any of that material. Both parties viewed that as a commercial question. Whilst it is true that GDS was making the point that the pipeline was to a significant extent the consequence of the false forecasts, the focus of the parties – and certainly GDS – was upon seeing whether there could be a commercial resolution of this big problem. I accept that, at least in theory, there was a possibility of litigation between the parties: at NCR's request, the meeting was held on a "without prejudice" basis, so that any statements made could not be used against them at a later stage. Litigation was, however, very far in the background, and the parties did not discuss it. This was, not least, because Mr. Cariolato was not seriously contemplating litigation and GDS did not want to antagonise NCR. Instead, GDS was focused on whether there was a commercial agreement which might address the problem of GDS's pipeline. Mr. Bisognin's statement, in his MSN conversation with Mr. Kaparis on 31 January 2013, captures the essence of what was being discussed and what GDS was hoping for: "I hope obviously to find the right fair solution over the stock as discussed in NYC".

396. Matters then moved forward in the correspondence set out in Section E. When NCR made its offer on 6 February, this was a without prejudice offer to take a certain volume of goods, but without any terms attached. Any acceptance of the offer was to be accompanied by a detailed shipment schedule. There was, however, no indication that any terms were to be attached to that offer, or what those terms were. There had not been any prior discussion or communication on the question of terms which would apply in the event that the parties were to reach agreement on the quantities that NCR wished to take and their proposed price. In fact, that remained the position until 20 February 2013, when the terms of the draft Letter Agreement were sent by NCR.

397. NCR's offer of 6 February was not attractive to GDS, and Mr. Bisognin sought to put forward alternative figures for the quantity of goods that NCR should take. These were not acceptable to NCR and the lengthy call on 8 February was rightly described by Mr. Gledhill as an impasse. At this stage, therefore, the parties were very far apart on the question of how much material in the pipeline NCR should be willing to take. The transcript of the call does not suggest that was any consensus as to the applicable terms if the parties were able to reach agreement on quantities to be taken by NCR. There was no discussion that this would be a final resolution of all disputes between the parties including any claims by GDS for false forecasting. It is in my view apparent from some of the somewhat belligerent comments made by Mr. Kaparis in the call, to the effect that he was not in the slightest concerned about GDS's problems, that he had given no thought to the possibility that deceitful forecasts could give rise to a liability on the part of NCR.

398. Following this call, NCR decided to sit tight, in the knowledge that GDS was in a difficult if not impossible position. Within a few days, and without any further relevant discussion, GDS accepted NCR's proposal. The proposal so accepted was that which NCR had made on 6 February: this was the straightforward proposal for the purchase of particular goods at prices set by NCR, without any other terms being specified.

399. The next material development was that NCR sent the draft Letter Agreement to GDS on 20 February. This was, as GDS correctly submitted, the first time that NCR had articulated the scope or terms of any release, or the effect in terms of compromise of any agreement as to the purchase of product. Those terms were set out, principally, in the third paragraph of the draft Letter Agreement. The material terms of the release and settlement in that paragraph were not materially altered thereafter. This was, therefore, the first express outward expression of accord by the parties as to the terms of settlement and release. There is therefore nothing on which NCR can found its proposed case of rectification for mutual mistake.

400. I have indicated above that I had one reservation as to whether there was any shared consensus, either explicitly or tacitly, as to the scope or terms of any release or the effect, in terms of compromise, of any agreement as to the purchase of product. I can see that it could be argued, based on the communications between the parties, that there was a tacit consensus that the quantities of goods to be taken by NCR, if agreement could be reached, would be the limit of their responsibility for goods and materials in the pipeline. The discussion between Mr. Kaparis and Mr. Bisognin on 8 February was concerned with the question: how much of the material in the pipeline will NCR take, and at what price? In the end, the parties were able to reach agreement on those issues in the Letter Agreement. Furthermore, when the first draft of the Letter Agreement was sent, the quantities in Exhibit 2 were described as a "last time buy purchase". When the

Letter Agreement was sent back to NCR, GDS made no change to that wording. Indeed, Mr. Bisognin in his oral evidence referred to the parties negotiating for a "last time buy". Curiously, NCR then omitted these words in the final version of the Letter Agreement. It seems likely that this was a consequence of the inclusion of the list of open purchase orders in the new Exhibit 3: it might have been thought that since these orders had been placed previously, and had not been cancelled, the expression "last time buy" was no longer appropriate.

401. Although an argument in support of a tacit consensus to this effect might be possible, it was not in fact the argument for rectification that was advanced. There is no claim for rectification other than a case whose effect is that all claims based on forecasts are precluded. NCR has not therefore advanced a more limited case for rectification whose effect would be to preclude some aspects of the damages claim advanced (eg for the balance of pipeline that was not purchased under the Letter Agreement), if not precluded on the true construction of the Letter Agreement. As discussed in Section E above, I am only presently concerned with the question of whether the effect of the Letter Agreement, whether by construction or rectification, precludes all claims in respect of false forecasts. The question of whether particular aspects of the damages claim are precluded, on the true construction of the Letter Agreement, is for later determination.

402. *The subjective intention of GDS*. The question here is whether or not there is convincing proof that GDS intended to settle all claims arising from the 16 January 2013 announcement, including forecasting claims. The evidence of Mr. Cariolato and Mr. Bisognin was, in substance, that this was not their intention. They had both been advised that the terms of the Letter Agreement put forward by NCR left open the possibility of claims based on forecasting, and they did not intend to contract on terms which closed off this potential right. In short, their intention was to contract on the terms set out in the document which they signed.

403. In approaching this evidence, and more generally the issues relating to the intention of both parties, I apply the well-known guidance of Robert Goff LJ in *Armagas Ltd v Mundogas S.A. (The Ocean Frost),* [1985] 1 Lloyd's Rep. 1, 57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

404. Robert Goff LJ's judgment was described as the "classic statement" in *Simetra Global Assets Ltd. v Ikon Finance Ltd.* [2019] EWCA Civ 1413, where Males LJ said at [48]:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

405. In the present case, there was a fair amount of internal e-mail traffic (described in Section D above) before and after NCR's draft Letter Agreement had been provided, and there has been full disclosure of communications with GDS's legal advisers, S&B, at the time. It is reasonably clear from the exchanges how the various individuals at GDS were thinking, and what their intentions were.

406. In my view, the important exchanges are those which followed GDS's decision to accept NCR's proposal, and in particular the exchanges between the receipt of the draft Letter Agreement on 20 February and its signature by GDS on 22 February. GDS's decision to accept the proposal was made because Mr. Cariolato considered that this was the only practical way in which GDS might survive. GDS had very significant sums invested in its pipeline, with commitments to banks and suppliers. The advantage of NCR's offer was that it would provide around US$ 7.7 million of revenue, as well as (as Mr. Cariolato and Mr. Bisognin saw it) avoiding any dispute or non-payment of a further US$ 5 million plus of unpaid accounts receivable. If NCR's offer were turned down, GDS would have to take its chance in litigation, on which Mr. Cariolato was not keen, but in the meantime would not be paid the US$ 7.7 million and ran the risk that NCR would play hardball on the accounts receivable notwithstanding that the money was owed. Mr. Cariolato's thinking was set out in his e-mail to Mr. Marco Cohen (a GDS shareholder and employee) on 13 February:

> "So, as a conclusion, if we do not consider the benefits of the possibility to recover more money thanks to a legal action and in a quite s[h]ort terms, it would be preferable to accept their offer and put NCR behind our history and move on to the future of GDS on the existing business".

407. Similarly, Mr. Swetman told Mr. Frisby on the same day that the potential upside from litigation was "regarded as less important now than being able to survive and move on quickly, which we think we can with the offer on the table".

408. Within GDS there was, clearly, very considerable unhappiness at the way that they had been treated, including the amount to be paid by NCR for additional goods. On 12 February 2013, Mr. Cohen complained to Mr. Cariolato that NCR had acted unprofessionally, and that he wished that GDS was in a stronger position. But "as much as it hurts me to say this I think it best to get as much out of NCR as possible, even if it

means appealing for their support/ help for our survival". Acceptance of the NCR offer provided some hope for the future, but it is clear that there was no great enthusiasm on the part of GDS for what NCR had proposed. Mr. Cariolato thought, however, that there was no real alternative.

409. Against this background of an unhappy and forced acceptance of NCR's proposal, it is in my view inherently probable that GDS would have wished to retain any rights to claim against NCR if they possibly could. Thus, on 12 February 2013, Mr. Cohen asked whether they could take the "$ 10 - $ 12m ASAP and then once we receive all of it, could we then take legal action? This is no worse than what they have done to GDS". At the time that this question was asked, GDS had not received any terms for the agreement, beyond those in NCR's original 6 February 2013 offer. Mr. Cariolato's response to Mr. Cohen reflects this:

> "I think they will protect themsel[ves], all the discussion has been done "without prejudice" so I am sure that the settlement will not allow us to proceed with a future legal case".

410. I do not consider that this e-mail shows that it was GDS's intention that there would be a settlement that precluded a future legal case. Rather, it was Mr. Cariolato's view as to what he thought it likely that NCR would propose. He thought that if this what was proposed, GDS would have no practical option but to agree. He described this email as, in essence, seeking to prevent Mr. Cohen thinking that that there was any alternative to accepting NCR's proposal, and therefore that they had to live with that reality. In my view that evidence was realistic.

411. The same desire to preserve rights, if possible, is apparent from Mr. Swetman's e-mail to Mr. Cariolato on 20 February 2013, after the draft Letter Agreement had been received. The substance of that e-mail then formed the subject of Mr. Swetman's request to Mr. Frisby for advice on that day, when Mr. Swetman asked if GDS "can sign this document and STILL consider action in a month or two when some cash has come in. Probably the answer is 'no', but worth asking".

412. When Mr. Frisby responded at 13.10 on 21 February, he advised that the settlement was "expressed to be in full and final settlement of all claims which GDS may have". He then went on, in the same paragraph, to advise as to the difficulties of a case of duress, advising GDS that if the Letter Agreement was signed "you will be bound by it and will have waived all claims". NCR place considerable reliance upon this e-mail as reflecting GDS's understanding and intention.

413. In my view, this e-mail might have been of greater significance if it had not been followed by subsequent advice on that day, both orally and in writing, as to the effect of the settlement agreement. The subsequent advice, rightly in my view, made it clear that the Letter Agreement was not a full and final settlement of all claims which GDS may have, but was drafted in a more restrictive way and arguably left open the possibility of forecasting claims. The first paragraph of Mr. Frisby's email sent at 1.10pm should in my view be read as a whole: he was there focusing on the duress claim rather than issues of interpretation of the Letter Agreement. But even if that is wrong, it was not long afterwards on that day that he specifically focused on the interpretation of the Letter Agreement, and gave clear advice to GDS that the possibility

of a forecasting claim remained open. In any event, the relevant question in relation to rectification does not concern Mr. Frisby's intention, but the intention of GDS.

414. On that question, there were some internal exchanges on the morning of 21 February, in which Mr. Cariolato expressed his view that "because a settlement is binding for both, they take the products and pay those prices, and we deliver them and no longer have anything else to claim". However, Mr. Bisognin's emails show that he was unsure as to the effect of the Letter Agreement, although his focus at that time was not on forecasting claims but other issues. He said: "Let's see what Michael [Frisby] says and then sign it". Mr. Frisby then did advise, both orally (as recorded in his attendance note) and subsequently in writing (in his e-mail that evening) that it was arguable that forecasting claims were still open.

415. The advice that forecasting claims were arguably still open was initially given by Mr. Frisby to Mr. Bisognin and Mr. Swetman in a lengthy telephone call on 21 February. The advice went no further than indicating that there was a possibility of bringing claims, but also that it may be "affected by compromising the claims around the orders". S&B would need to look into that. There is nothing in the attendance note which indicates that Mr. Bisognin or Mr. Swetman told Mr Frisby that the possibility of leaving open the possibility of a claim was contrary to their intentions, or even that this advice took them by surprise. Mr. Bisognin had always been looking at the discussions with NCR as being directed towards a commercial agreement to take products. For example, in his email to Mr. Swetman on 13 February 2013, prior to GDS communicating its acceptance of NCR's original proposal, he had expressed a concern that GDS was "moving toward a legal perspective instead of commercial". I do not think that he had previously given any thought to the question of whether forecasting claims might remain possible, but was no doubt pleased to hear Mr. Frisby's view that they might be.

416. Mr. Cariolato did not participate in that call, and he was not a direct recipient of Mr. Frisby's e-mail sent later that evening in which the advice, that the agreement left a possibility open of bringing a claim, was repeated. However, Mr. Swetman did pass the e-mail to Mr. Cariolato and Mr. Bisognin. It is inherently probable that Mr. Cariolato would have read through the entire e-mail, which was relatively short. I accept his evidence that he did so.

417. I do not think that he would have regarded the advice that a claim might remain open as particularly important. At this time, his focus was on trying to save the company and put the agreement with NCR to bed, and his original decision to accept NCR's proposal was made because he had no real appetite for litigation. Even after the agreement had been concluded, GDS had no immediate appetite for litigation: on 1 March 2013, Mr. Frisby's offer to explore the issue of whether or not any claims remain open was politely declined by Mr. Swetman because "the process would cost us and I do not have that mandate". However, none of this leads to the conclusion that Mr. Cariolato's intention was to enter into a more comprehensive agreement, which excluded all possibility of forecasting claims, notwithstanding the advice from Mr. Frisby that such claims might remain open. It would be strange, in the light of the advice received, for Mr. Cariolato or others in GDS to have intended to give up rights which, on advice, might remain open. I do not consider that either Mr. Cariolato or his colleagues did so intend. Their intention was to conclude an agreement on the terms proposed, subject to certain

amendments of a relatively minor nature which were sent to NCR on the following morning.

418. In conclusion, there was in my view no intention on the part of GDS to relinquish any rights beyond those stated in the Letter Agreement itself, and therefore there is no basis to rectify the Letter Agreement for mutual mistake.

F4: NCR's intention

419. Before considering the detail of NCR's evidence as to its intention, I make some general observations.

420. It is important in a rectification case for the party seeking rectification to provide sufficient proof of its intention. In paragraph [74] of *FSHC*, Leggatt LJ said:

> "An illustration of how a claim for rectification may fail at the first hurdle for want of proof that the written contract was contrary to the actual intentions of the parties can be found in *Lloyd v Stanbury* [1971] 1 WLR 535, a case decided very shortly after *Joscelyne v Nissen*, in which the judge (Brightman J) observed that his approach was laid down for him by the Court of Appeal. The issue was whether a particular plot of land had been included through a common mistake in a written contract for the sale of land. On the facts the court found that, when negotiating the contract, the buyer had not given any thought to the matter and had no positive intention that the relevant plot either should or should not be included. Brightman J saw reason to suspect that the seller intended the plot not to be included but considered the evidence insufficient to make a finding to that effect. Accordingly, no common intention to exclude the plot from the land sold had been established and the claim to rectify the written contract therefore failed."

421. In *Lloyd v Stanbury*, Brightman J drew attention to the absence of satisfactory evidence to explain how the relevant agreement came to be drafted as it was, including (in a case where the agreement has been drafted by a lawyer) the absence of evidence as to the nature of the instructions given:

> "I speculate that he did intend to exclude it. Its exclusion is consistent with the events which occurred during the second and third visits of Mr. Lloyd [the buyer], and it is consistent with the fact that the bank would form a convenient boundary of the property being retained by Mr. Stanbury [the seller]. I feel, however, in a difficulty in the absence of any evidence as to the nature of the instructions given by him to his solicitor and in the absence of any explanation of the reason for his supposed mistaken inclusion of 1428 [the plot]. I hold that the evidence before the court falls short of a convincing proof of the intention of Mr. Stanbury to exclude 1428."

422. Rectification is also unavailable, as stated in *Chitty* paragraph 3-058, "if a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all".

423. For the reasons that follow, the evidence adduced by NCR is in my view insufficient to establish, to the necessary degree of proof, that its intention was to contract in any wider terms than those expressly set out in the Letter Agreement which it drafted, and in particular that it had a positive intention fully and finally to settle potential forecasting claims.

424. As far as the documentary evidence is concerned: whilst there has been disclosure of a large number of non-privileged internal documents, there is in my view nothing in those documents which evidences an intention to settle potential forecasting claims, or to contract in any wider terms than NCR itself proposed. My conclusion from the review of the evidence in Section D is that the focus of Mr. Kaparis, who was the individual responsible for leading the discussions with GDS, was upon the contractual position rather than any possible liability for dishonest forecasts. He had no relevant intention in relation to the latter, because the point was overlooked by him and his colleagues, all of whom were principally focused on the question of how much product they needed and could buy from GDS at an advantageous price. In my view, this is the likely explanation as to why the Letter Agreement was drafted in the way that it was. But whether or not that is so, I remind myself of the evidential burden that lies upon a party seeking to displace the cogent evidence that the signed document does indeed represent the mutual intention of the parties. That evidence has not been provided by NCR in this case. As in *Lloyd v Stanbury*, there is here no evidence as to the nature of the instructions given by Mr. Kaparis to the legal adviser responsible for drafting the Letter Agreement, and no explanation at all of the reason why the Letter Agreement was drafted as it was.

425. In NCR's written closing submissions, NCR referred to a large volume of documentary material in support of the proposition that it was the intention of Mr. Ciminera as the NCR signatory that the Letter Agreement should settle all GDS claims arising from the January announcement, including forecasting claims. Having considered those documents, including those said to support Mr. Kaparis's similar intention, I am unpersuaded that any of them provide evidence to support the proposition. Whilst they show, for example, Mr. Ciminera's involvement in the process leading to settlement, none of them are in my view addressed to or deal clearly with the important question as to the nature of the claims to be compromised under the Letter Agreement.

426. For example, the first document (and one of those relied upon as "more important") said to shed light on Mr. Kaparis's intention to settle all GDS's complaints is an e-mail dated 23 January 2013 from Mr. Kaparis. This was prior to the New York meeting. As described in Section D, the e-mail string begins with Mr. Kaparis confirming the date and time of the meeting. Mr. Delamater then comments: "I am not looking forward to this". Mr. Kaparis then says: "Me neither – but I do want to put this behind me". I do not read that comment, in context, as reflecting an intention to compromise all claims including forecasting claims. It is simply Mr. Kaparis recognising that the face-to-face meeting will be uncomfortable for NCR, and that Mr. Kaparis will be pleased when it is over. There is nothing here which indicates any intention to compromise any claims at all, and indeed no offer of compromise was made at the New York meeting. Indeed, Mr. Kaparis's attitude at that time was reflected in his email sent on the previous

morning to Mr. Ciminera where he had referred to beating GDS up, going in for the kill, and grinding them. In fact, the position taken by NCR at the meeting was less hostile and offered hope of a way forward. But the point is that the 23 January 2013 e-mail provides no support for the rectification case.

427. The other documents relied upon, and which were said to be "more important" within a wider list of documents, include the list of information requested by Mr. Kaparis following the New York meeting. This document says nothing about the scope of any proposed settlement, and was simply a preliminary step towards NCR deciding what goods it might offer to purchase. NCR also relies upon Mr. Kaparis being very happy when GDS accepted its original proposal: ("That's what happens when you have them by the ….ls… ;-)"). This document takes matters no further forward.

428. NCR also referred to Mr. Kaparis's exchange with Mr. Bisognin on 20 February, where the former referred to trying to keep the settlement simple. He also said that he had decided not to put any FRO language into the contract, and was working on clearing out the accounts payable. There is nothing here that indicates an intention to settle forecasting claims, or anything beyond the simple terms that Mr. Kaparis had just put forward in the draft.

429. In summary, none of the documents relied upon, either individually or collectively, provide the convincing evidence required in order to prove the intention which NCR needs to establish.

430. In addition, NCR rely upon witness evidence from Mr. Mannion and Mr. Kaparis. Given that the contemporaneous documentation does not provide support for NCR's case as to its wider intention, I would be disinclined (applying the approach in *Armagas v Mundogas*) to accept written or oral evidence from these two witnesses which sought to establish what the contemporaneous documentation did not. However, there are in my view other significant problems with this evidence.

431. First, it is not evidence from the decision-maker, Mr. Ciminera. This is not in itself fatal, since it is possible for that evidential gap to be plugged by evidence from others that Mr. Ciminera shared their intention. However, it is not a promising start.

432. Secondly, for reasons which have been explained in the course of my discussion of the evidence, I do not regard either Mr. Mannion or Mr. Kaparis as reliable witnesses. They were party to significant deception of GDS over a considerable period of time and I would only be inclined to accept their evidence on disputed issues if supported by the contemporaneous documents, or was otherwise inherently probable even if unsupported. Here, the contemporaneous documents do not support their evidence as to intention (discussed further below), and there has been no explanation as to why the Letter Agreement was drafted as it was and how the alleged mistake came to be made. There is also another inherently probable explanation for this, namely (as discussed in above and in more detail in Section D) that NCR's focus was on the contractual position and the volume and price of heavily discounted goods to be acquired from GDS.

433. Thirdly, the only witness to give oral evidence at trial was Mr. Mannion. He was only peripherally involved in the negotiations for the agreement, and he accepted that he did not discuss the settlement with Mr. Ciminera (the decision-maker). He was therefore in

no position to give evidence as to Mr. Ciminera's intention, despite his attempt to do so in response to questions in examination in chief.

434. There was, however, an even more fundamental difficulty with Mr. Mannion's evidence. In his witness statement, he said:

> "I am clear that the intention on the NCR side was that the [Letter Agreement] would be a full and final settlement of all issues and potential claims between NCR and GDS. From my involvement, including attendance on the calls, it was clear to me that GDS (each of the 3 principals) thought this too. So far as I recall, it was clear to the GDS principals that NCR's intention in entering into the [Letter Agreement] was to settle all complaints and potential claims and to have a clean exit from the relationship".

435. In his oral evidence, Mr. Mannion said that his understanding of the agreement was a complete "parting of our ways". It therefore covered, for example, the outstanding accounts payable by NCR as well as potential claims by NCR for breach of warranty.

436. In its closing submission, NCR accepted that Mr. Mannion did not have an accurate lawyer's understanding as to whether accounts payable or warranty claims were within the settlement, and also that he did not claim perfect recall. In my view, however, this does not meet the difficulty with Mr. Mannion's evidence as to intention. His evidence that the intention on the NCR side was for a full and final settlement of all issues and potential claims between the parties is inconsistent with the contemporaneous documents, and is plainly unreliable. It is clear from, for example, the 20 February exchange between Mr. Kaparis and Mr. Bisognin, that there was no intention to settle (for example) NCR's warranty FRO claims or the accounts payable. It is also clear that other liabilities would potentially remain and were not settled; for example, liabilities on the part of GDS for defects in products supplied previously or which were to be supplied under the Letter Agreement itself.

437. Furthermore, Mr. Mannion in the above passage purported to give evidence as to what was said on the "calls", and that each of GDS's 3 principals (ie Messrs Cariolato, Bisognin and Swetman) thought that the settlement was a full and final settlement of all issues and potential claims between the parties. However, the only call which Mr. Mannion participated in, as an attendee, with the three principals of GDS, was the New York meeting. At that meeting, there was no offer that was even made by NCR, let alone a discussion or expression of intention by either party that there was to be a full and final settlement of all issues and potential claims between the parties.

438. I therefore reject Mr. Mannion's evidence as to NCR's intention as being unreliable.

439. Mr. Kaparis's evidence in paragraph 13.1 of his statement was that his and NCR's understanding and intention was that it settled all possible complaints on the part of GDS, and that it was a full and final settlement of all issues arising and all the complaints that GDS had or might have; and that each side also knew that the other had that intention. He then continued in the same vein as Mr. Mannion:

> "So far as I was concerned, the [Letter Agreement] settled absolutely everything and anything between NCR and GDS;

> forecast/demand for products, orders, orders for goods in transit, orders for goods not in transit, extra inventory: everything. A catch-all to ensure the parties could move on. Both parties wanted that, so there was a walk-away situation at the end.
>
> …
>
> The spirit of the [Letter Agreement] was for NCR to take inventory of products that we were not obligated to take, and in exchange GDS dropped the right to bring any claims concerning anything regarding the relationship, present or future".

440. In his oral closing submissions, Mr. Gledhill accepted that Mr Mannion was wrong in his evidence to the effect that everyone in the company thought that the settlement covered the entire relationship, and also that Mr. Kaparis's similar evidence was an "overstatement of the legal position". In my view, where a party needs to establish a particular intention for the purposes of a rectification case, that party's evidence will lack credibility if its central witnesses overstate the position. That is what has happened here. The reliability of that evidence is also impacted by the absence of any explanation as to how the agreement came to be drafted in the way that it was, and how the alleged mistake arose. I do not consider that Mr. Kaparis's evidence as to his subjective intention is reliable, even leaving aside my assessment of the overall credibility of Mr. Kaparis.

441. It follows that I am left with unreliable evidence from the two witnesses who provided witness statements, no relevant documentary evidence which confirms the relevant intention to contract in materially different terms to those set out in the Letter Agreement, no evidence as to the instructions given to the person who drafted the contract or to explain how the agreement was drafted as it was, and no evidence from the individual who made the decision to contract. In these circumstances, the convincing evidence of NCR's intention has not in my view been provided.

442. In the end, I can well understand why it would indeed have been sensible for NCR to draft the Letter Agreement as set out in the proposed rectified agreement, or something along those lines. It does not follow, however, that this represented NCR's actual subjective intention at the time, in circumstances where in my view the evidence indicates that its focus was on the matters which I have described rather than on any possible liability for false forecasts.

443. For all these reasons, I reject NCR's argument that the agreement should be rectified for mutual mistake.

Section G: Rectification for unilateral mistake

G1: Legal Principles

444. A contract may be rectified for unilateral mistake, that is, where one party to the contract was mistaken about its terms at the time of execution of the contract. The rationale for the doctrine is an extension of that underlying rectification for common mistake in that "it is inequitable … where a party seeks to apply the contract

inconsistently with what that party knew the other party believed to be the common intention of the parties when the written contract was executed": *FSHC* at [105].

445. It was common ground that the requirements for unilateral mistake are those set out in *Thomas Bates and Sons Ltd v Wyndhams (Lingerie)* Ltd [1981] 1 WLR 505:

> (1) One party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;
>
> (2) The other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of A;
>
> (3) B has omitted to draw the mistake to the notice of A;
>
> (4) The mistake was calculated to benefit B .

446. Again, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself: see *Bates* at 521.

447. Whilst "sharp practice" is not required, it is necessary that the party who is opposing rectification should actually be aware that the other party is mistaken: ie there must be actual knowledge. However, actual knowledge extends to the situation where that party wilfully shuts his eyes to the obvious, or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make: see *Commission for the New Towns v Cooper (Great Britain) Ltd*. [1995] Ch 259. 281.

448. It was common ground that where there was actual knowledge, it was not necessary that the relevant party should be dishonest. There was, however, disagreement between the parties as to whether, in a case where it was alleged that a party had wilfully shut his eyes to the obvious (this being the way that NCR put its case in addition to actual knowledge), a finding of dishonesty was required. This was, potentially at least, a significant point because NCR did not allege dishonesty against GDS.

449. In support of the proposition that dishonesty was a requirement, GDS principally relied upon the decision of the Court of Appeal *in George Wimpey v VI Construction Ltd* [2005] EWCA Civ 77, in particular [42] – [45]. In that case, the Court of Appeal held that the trial judge, who had granted rectification for unilateral mistake, had erred in making a finding of dishonesty against the key witnesses of a party when a case of dishonesty had not been pleaded or put to the witnesses: see [34]. On appeal, Wimpey did not seek to rely upon the judge's finding of dishonesty, but argued that it could rely upon a finding (in paragraph 78 of the judgment under appeal, quoted at [25]) as to the requisite knowledge "shorn of any imputation of dishonesty in that reasoning": see [28]. This led the court to consider whether the judge's decision could be salvaged by reliance on paragraph 78 of the underlying judgment (see [34]), and thence to consideration of the question of whether dishonesty was a requirement for rectification in the context of a case where it was said that a party had wilfully shut his eyes to the obvious, or wilfully and recklessly failed to make such enquiries as an honest and reasonable man would make.

450. The authorities were reviewed by Peter Gibson LJ at paragraphs [35] – [44], in particular the Court of Appeal decision in *Commission of New Towns*. In *Commission*, Stuart-Smith LJ had cited with approval the following passage from the judgment of Millett J in *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385, 405:

> "According to Peter Gibson J., a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because "he did not want to know" (category (ii)) or because he regarded it as "none of his business" (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

451. The references in that passage to categories (ii) and (iii) are respectively: wilfully shutting eyes to the obvious, and wilfully and recklessly failing to make enquiries.

452. Gibson LJ in *George Wimpey* then addressed the argument of Wimpey, and he analysed the position as follows:

> "[45] [Counsel for Wimpey] relies on *Commission* as holding that actual knowledge by the non-mistaken party of the mistaken party's mistake is not a requisite of the jurisdiction to rectify for unilateral mistake. He relies on the views expressed in that case that knowledge in categories (ii) and (iii) suffices. But he criticises as illogical the reasoning of Millett J *in Agip (Africa) Ltd*. that knowledge in those categories involves dishonesty, at any rate to the extent that this court adopted that reasoning as applicable to what knowledge of the mistaken party's mistake is needed for rectification. Why, he asks, if rectification can be ordered if the non-mistaken party has actual knowledge of the mistaken party's mistake, but there is neither dishonesty nor sharp practice, should knowledge in categories (ii) and (iii), which is the equivalent in law of actual knowledge, involve dishonest behaviour for the purposes of rectification? I see force in that submission. However, [counsel for Wimpey's] difficulty, as it seems to me, lies, first, in this court's acceptance in *Commission* of the reasoning of Millett J. in the context of rectification for unilateral mistake and this court's application of that reasoning to a case of dishonest conduct, and, second, in the judge's acceptance of the same approach in para. 78 in finding dishonest conduct when concluding that VIC had knowledge (in

> categories (ii) and (iii)) of Wimpey's mistake. I do not accept that it is open to Wimpey to rely on the judge's finding in para. 78 that VIC had such knowledge but to say that such knowledge was without dishonesty or sharp practice where it is plain that the judge's remarks in para. 78 were permeated by his finding of dishonesty, which, because of C*ommission*, he thought was required."

453. Sedley LJ agreed with the account of the law set out by Gibson LJ. Blackburne J also agreed, but also addressed the issue of honesty and dishonesty in paragraph [79] of his judgment. He said that a successful rectification claim based on unilateral mistake will usually if not always call into question the probity of the defendant, and that it was difficult to regard the Court of Appeal's view in *Commission for the New Towns* in relation to category (ii) and (iii) knowledge as "necessarily separate from and not dependent upon the finding in that case of dishonesty". He also regarded it as critical to the appeal that the judge's finding of knowledge could not be divorced from his impermissible finding of dishonesty".

454. In my view, the effect of the two Court of Appeal decisions in *Commission for the New Towns* and *George Wimpey* is that dishonesty is indeed a requirement for rectification for unilateral mistake when category (ii) or (iii) knowledge is alleged. The appeal in *George Wimpey* failed because Wimpey could not salvage the judge's decision by an argument that dishonesty was not required and that there was a sufficient finding of fact to enable rectification to be granted. In paragraph [45], Gibson LJ gave two reasons for that conclusion, the first of which was the approach taken in the *Commission* decision, and the approval of Millett J's analysis in *Agip*. I do not consider that this reason can be described as an obiter dictum, and in any event I would regard it as persuasive in the absence of any subsequent decision to the contrary. The fact that the rectification claim failed on other grounds, discussed later in Gibson LJ's judgment, does not in my view affect the importance to the decision of the full discussion of the present issue.

455. I therefore conclude on the basis of these decisions that dishonesty is a requirement when knowledge in categories (ii) and (iii) is relied upon. This is the view expressed in *Chitty on Contracts* paragraph 3-070 by reference to (in particular) *Wimpey*, and I do not accept NCR's submission that *Chitty* is wrong on this point.

456. NCR referred to the decision of HHJ Behrens in *Palo Alto Ltd v Alnor Estates* [2018] UKUT 231 (TCC). That case is referred to in a footnote to paragraph 16-019 in *Snell's Equity* 34th edition, in support of the proposition that where the defendant does have actual knowledge of the mistake, this will suffice without an additional requirement to establish dishonesty on the part of the defendant. That was indeed the conclusion of HHJ Behrens, following a detailed review of the case-law, in paragraphs [50] – [55] of his judgment. I did not understand GDS to contend that, in a case where actual knowledge of the mistake can be shown, dishonesty is a requirement. However, there is nothing in *Palo Alto or Snell* which suggests that rectification for unilateral mistake can be granted, in category (ii) and (iii) cases, where dishonesty is not shown. Indeed, HHJ Behrens' review of the case-law included reference to passages in the judgments in *Daventry District Council v Daventry & District Housing Ltd [2012]* 1 WLR 1333, which indicate that dishonesty is required in a unilateral mistake case. ("As the law binding on this court presently stands, nothing short of dishonesty is sufficient to found

a claim for rectification for unilateral mistake" – Etherton LJ at para [116]; "I am conscious that there is authority that the test for unilateral mistake rectification is one of honesty …" – Toulson LJ at para [184]).

457. NCR also referred to the decision in *Hurst Stores and Interiors Ltd. v ML Europe Property Ltd* [2004] EWCA Civ 490, and the absence of any suggestion that dishonesty is a necessary ingredient. However, that decision preceded *Wimpey*, and contains no significant discussion of the issue. Nor is there any discussion of the issue in paragraph 8-076 of *Treitel: The Law of Contract 14th* edition, on which NCR also relied.

458. I therefore conclude that unless actual knowledge of the mistake can be shown, dishonesty is on current authority a necessary requirement for a case of rectification for unilateral mistake. Whilst this dichotomy may appear anomalous, in practice (as Blackburne J indicated in paragraph [79] of his judgment in *Wimpey*), a case where one party knows that the other is labouring under a mistake as to the contract terms, but does nothing to alert him, will usually be a case of dishonesty anyway.

G2: The parties' arguments

459. Each side relied principally upon the points developed in support of its case on mutual mistake and summarised above.

460. GDS submitted that each of the participants on the GDS side was concerned to understand the effect of the agreement – an agreement which had been imposed upon them by NCR and which it was for NCR to ensure adequately protected them. No-one at GDS appreciated that NCR had made any mistake in the drafting of the Letter Agreement.

461. NCR submitted that if GDS did not share NCR's intention, GDS knew that NCR thought that the Letter Agreement settled all claims arising from the January announcement, or wilfully shut its eyes to the obvious. Any other intention on NCR's part would have been irrational.

G3: Discussion

462. In view of my conclusion in Section F that NCR has failed to establish the requisite intention, the claim for rectification for unilateral mistake must necessarily fail. The first requirement of a claim for unilateral mistake is to show that NCR erroneously believed that the Letter Agreement contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain. This has not been established on the evidence adduced by NCR.

463. The claim also fails because I am not satisfied that GDS either knew of the alleged mistake or (even assuming that dishonesty is not required) wilfully shut its eyes to the obvious. The effect of the evidence of both Mr. Bisognin and Mr. Cariolato was that they did not know that NCR had made a mistake, and they denied that this was obvious to them or that they had ignored the obvious. I accept this evidence, which in my view is consistent with the contemporaneous documentation.

464. In that regard, an important and relevant feature of the present case is that there was a fair amount of e-mail traffic which arose in the short period of time between the sending

of the draft Letter Agreement on 20 February, and its return on the morning of 22 February. There is nothing in that traffic which indicates that anyone on GDS's side thought that NCR had made a mistake, or that any individual was deliberately shutting his eyes to something obvious. Mr. Frisby had been involved in advising GDS since prior to the New York meeting, and he was not coming fresh to the draft Letter Agreement. When Mr. Frisby advised in the afternoon of 21 February as to the possibility that a forecasting claim was left open, he said nothing to his clients to indicate that he thought that NCR had made a mistake, or that this was an issue which should be queried with NCR. I see no reason why GDS should themselves have drawn some different conclusion. His advice showed that he was uncertain as to the full impact, on potential claims, of a settlement referable to the "Orders". It was an issue which would require further consideration if GDS wished to pursue matters further thereafter, but there was nothing to suggest that it needed to be considered by GDS further at that stage.

465. It is also relevant to consider the context in which GDS's consideration of the draft Letter Agreement took place in that short period of time. The survival of GDS had been imperilled by NCR's conduct and announcement in January. It was obviously a period of considerable stress for GDS's principals, as the witnesses explained. Even with the acceptance of NCR's offer, and the subsequent conclusion of an agreement, there was no guarantee that GDS would survive, although there was obviously hope that it could do so. There is also evidence that Mr. Cariolato was not well at the time, albeit that he was able to work and deal with matters in writing. GDS recognised that it was in a position where it had no real bargaining power, and that in practical terms NCR could dictate the terms of the proposed agreement. In these circumstances, I accept the evidence of Mr. Cariolato and Mr. Bisognin, when asked about what they were thinking about what NCR was thinking, to the effect that this was not something that they thought about. They had major problems of their own, and they were considering what changes they could propose to NCR without disrupting the urgent need to conclude the agreement.

466. It is also important that the relevant events happened quickly, and at a time when GDS was anxious to conclude the agreement which was vital to its survival. The draft came in on 20 February, and the immediate need was for GDS to consider how, if at all, they could protect their position on issues which concerned them. Quite reasonably, they were not considering whether NCR had done enough to protect its own position. Given the background of hard-nosed conduct by NCR which was designed to serve its own interests, together with the fact that NCR had said that it had taken legal advice and that the Letter Agreement was clearly drafted with the benefit of legal input, it would not have occurred to the GDS individuals that NCR were making mistakes in the drafting. The natural assumption and reaction would be and in my view was: NCR had put forward the contract which they want. GDS knew that they had to agree to it without an extensive negotiation. In my view, this context makes it inherently probable that neither Mr. Cariolato nor Mr. Bisognin gave any real thought to the mistake which it is said that NCR made, and that neither shut their eyes to the obvious.

467. In my view, it was only when Mr Frisby advised on the afternoon of 21 February, and then again in the evening, that GDS appreciated the possibility that forecasting claims were not necessarily excluded. NCR contends, rightly in my view, that this advice made no real impact on GDS's decision-making: GDS knew that, essentially, it had to agree

to whatever NCR wanted. NCR's case on rectification for mutual mistake went so far as to suggest that, because Mr. Cariolato was determined to settle, he did not even read the full text of the relatively short e-mail that Mr. Frisby had sent. For reasons already given, I do not accept that this was so. Mr. Cariolato did read it, but his focus was on concluding the settlement as quickly as possible. Indeed, the internal correspondence shows that it had been GDS's intention to send any comments back to NCR that night – hence the late exchange of e-mails. In the event, however, GDS's response was only sent on the following morning. Mr. Cariolato would have noted the possibility that forecasting claims remained open to some degree, but this was not an important point to him since litigation was far from his mind.

468. These facts and the speed of events point against the suggestion that GDS knew of NCR's alleged mistake, or shut their eyes to the obvious. Mr. Cariolato was simply not thinking in those terms: he simply wanted to get the agreement done. Nor was Mr. Bisognin, whose perception of the agreement was that it was basically a commercial contract for the supply of goods in order to solve a major commercial issue.

469. Accordingly, the claim for rectification for unilateral mistake also fails.

Section H: Intimidation

470. GDS advances a claim in the tort of intimidation. The essential target of this claim is the nullification of the settlement and release contained in Letter Agreement. GDS seeks to establish that it was coerced into concluding the Letter Agreement, and therefore that any loss suffered by reason of that agreement is recoverable as damages for the tort. There is no claim, however, to set aside the Letter Agreement for duress. Nor is it alleged that, even in the absence of a claim to set aside for duress, damages are recoverable on the basis that duress itself is tortious.

H1: Legal Principles

471. The legal principles for the tort of intimidation were recently summarised by the Court of Appeal in *Morley v Royal Bank of Scotland* [2021] EWCA Civ 338 at [49] – [52]. As Males LJ describes, the leading case on the tort of intimidation is *Rookes v Barnard* [1964] AC 1129, which held that a threat to break a contract is capable of giving rise to liability. In that case, Lord Devlin accepted (at 1205) the formulation in the 13th edition of *Salmond on the Law of Torts* as an accurate statement of the position when it is the claimant who is intimidated:

> "Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention ..."

472. In *Berezovsky v Abramovich* [2011] EWCA Civ 153, Longmore LJ described the ingredients of the tort as follows:

> "[5] Since the tort of intimidation is at the heart of the Sibneft case it is as well, at this stage, to set out the essential ingredients of that tort as stated by Lord Denning in *Morgan v Fry* [1968] 2 QB 710,724C:
>
> > "there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes; and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the person damnified by the compliance can sue for intimidation."
>
> The parties have agreed that it is implicit in this definition that the threatener must intend that his threats be acted on by the person threatened. They have also agreed, for the purpose of these interlocutory proceedings, that it is arguable that the means to be used need not necessarily be unlawful, if they can be categorised as 'illegitimate' whatever that may precisely mean. (It is pointed out that, in defining the crime of blackmail, section 21 of the Theft Act requires only that there be an 'unwarranted demand with menaces' and it is then said that the law of tort should not be kinder to the defendant than the criminal law). That is a debate into which this court does not need to enter. For the purposes of this case therefore the essential ingredients of the tort of intimidation are:
>
> (1) a threat by the defendant (D) to do something unlawful or 'illegitimate';
>
> (2) the threat must be intended to coerce the claimant (C) to take or refrain from taking some course of action;
>
> (3) the threat must in fact coerce C to take such action;
>
> (4) loss or damage must be incurred by C as a result."

473. Although both parties cited *Berezovsky* in their opening submissions, GDS argued that those ingredients were not a complete statement of the tort of intimidation. GDS submitted that as well as threatened unlawful conduct, actual unlawful conduct used by one or more persons to coerce another to act to their detriment also amounts to intimidation. GDS relied heavily upon statements made in two decisions that "coercion is of the essence of the tort": the decision of the Court of Appeal in *Godwin v Uzoigwe* (Westlaw transcript 16 June 1992) and subsequently of Leggatt LJ in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [291] and [231].

474. GDS therefore advanced its case on intimidation by reference to matters additional to threats or threatened conduct. GDS submitted that since the focus was coercion, it was sufficient to focus on coercion resulting from the fact that that GDS needed cash, had no negotiating position and no other practical option but to conclude the Letter

Agreement. GDS had been placed in such a position because of NCR's unlawful conduct vis-à-vis the forecasts as well as the cancellation of the Purchase Orders. That unlawful conduct had been intended to place GDS in the position in which it found itself, and that NCR's intention all along had been to mask Project Dynamo and then to pull the rug from under GDS.

475. In addition, GDS did advance a case by reference to threats. GDS submitted that it was also coerced into entering into the Letter Agreement by NCR's threats not to comply with their obligations, including their obligation to purchase products under the cancelled POs and their secondary obligation otherwise to pay damages – the latter obligation arising on breach of the primary obligation to perform.

476. By contrast, NCR submitted that a threat, which may be express or implied, was an essential ingredient of the tort of intimidation, and that GDS's contrary submission would contradict all authority.

477. I agree with NCR that, for the purposes of the tort of intimidation, a threat express or implied is indeed an essential ingredient of the tort of intimidation. This is clear from the formulation of the relevant principles in *Berezovsky* and more recently (subsequent to the trial of the present action) in *Morley.*

478. This is unsurprising, since all the speeches in *Rookes v Barnard* refer to threats as being an ingredient of the cause of action. I do not accept that this was, as GDS submitted, because *Rookes* was a case which happened to involve threats. The House of Lords in that case was concerned with the question of whether the tort of intimidation did exist, and if so, what its requirements were and in particular whether it extended to a threat to break a contract. Thus, Lord Reid (at 1167) addressed the argument of the respondents (who were trade union officials) that there was no such tort as intimidation, and said that to cause loss "by threat to commit a tort against a third person if he does not comply with their demands is to use unlawful means to achieve their object". At 1168, Lord Reid described the respondents as using a weapon which they knew would cause loss, namely a threat. He accepted the argument of the appellant that there was no difference in principle between a threat to break a contract and a threat to commit a tort.

479. Similarly, Lord Evershed's summary of the relevant issues (at 1182) referred to threats, and his conclusion (at 1185-6) was that the tort of intimidation was not confined to threats of criminal or tortious acts, but extended to threats to break a contract. His judgment recognises, however, that threats can be express or implied, and he gave the following example at 1188:

> "It seems, therefore, to me that the cases in which the employment of one party is interfered with by a breach of the contract with his employer by another but without any further threats expressed or implied must indeed be rare. Indeed, in practice I conceive a parallel would not be other than close with the case of one who, instead of breaking a contract with his employer, assaulted him, and as a result (intended by the assaulting party) the employer disposed of the services of his servant. As in the case of the broken contract, the inference would no doubt be that unless the employer permanently severed his relations with his servant the third party would assault the

> employer again: and so a cause of action would fairly arise from the implied intimidation rather than from the actual assault."

480. The importance of the threat, and its significance in the context of the tort of intimidation, is clear from the speech of Lord Devlin at page 1205 where, as described above, he accepted the formulation in *Salmond* in relation to the form of the tort sometimes referred to as "two party intimidation", where the claimant himself is threatened. It is also clear from page 1208 and in particular the passages underlined in the quotation below. He there addressed the argument of the respondents that it would be anomalous if a third party could sue in tort for intimidation where he had suffered loss in consequence of a threatened breach of contract between two other parties, but could not sue if all that happened was that the contract between those two parties had been broken. Lord Devlin said:

> "Then it is asked how it can be that C can sue when there is a threat to break B 's contract but cannot sue if it is broken without a threat. This means, it is argued, that if A threatens first, C has a cause of action; but if he strikes without threatening, C has no cause of action. I think that this also is fallacious. What is material to C's cause of action is the threat and B's submission to it. Whether the threat is executed or not is *in law* quite immaterial. *In fact* it is no doubt material because if it is executed (whether it be an assault or a breach of contract) it presumably means that B has not complied with it; and if B has not complied with it, C is not injured; and if C is not injured, he has no cause of action. Thus the reason why C can sue in one case and not in the other is because in one case he is injured and in the other he is not. The suggestion that it might pay A to strike without threatening negatives the hypothesis on which A is supposed to be acting. It must be proved that A's object is to injure C through the instrumentality of B. (That is why in the case of an "innocent" breach of contract which was remarked upon by Sellers L.J., that is, one into which A was forced by circumstances beyond his control, there could never be the basis of an actionable threat.) If A hits B without telling him why, he can hardly hope to achieve his object. Of course A might think it more effective to hit B first and tell him why afterwards. But if then B injures C, it would not be because B had been hit but because he feared that he might be hit again. So if in the present case A.E.S.D. went on strike without threatening, they would not achieve their object unless they made it plain why they were doing so. If they did that and B.O.A.C. then got rid of the appellant, his cause of action would be just the same as if B.O.A.C. had been threatened first, because the cause of the injury to the appellant would have been A.E.S.D.'s threat, express or implied, to continue on strike until the appellant was got rid of."

481. *Rookes v Barnard* is therefore rightly treated in the textbooks as authority for the proposition that the tort of intimidation requires a threat. Thus, *Clerk and Lindsell* 23rd edition, para 23-62 states:

> "In *Rookes v Barnard* Lord Devlin accepted that there are two forms of the tort of intimidation. The first form, often called "two-party intimidation" will be committed by a defendant who intentionally causes loss to a claimant by making a threat that could be phrased "unless you act in this way (that will cause you loss), I will carry out this threat, with the result that the claimant acts in the required way and suffers loss".

482. At para 23-64, the authors discuss the nature of the threat:

> "A threat, for our purposes, is something which puts pressure on the person to whom it is addressed to take a particular course of action, something by means of which that person is "improperly coerced". A threat is an intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like. The threat must be coercive, it must be of the "or else" kind. It must be capable of being effective, to produce the desired result, and be more than "idle abuse", something to be taken seriously. Furthermore, the concept is not limited to express threats; for there may be acts from which a threat can be implied, for example a strike begun without previous negotiation where the implication is clear that unless the employer does certain things the strike will be continued. So too, keeping a person as "virtually a slave", in conditions of coercion as a domestic drudge, has been regarded as "intimidation", perhaps because of the "implied threats of further assaults"."

483. This discussion of the "or else" nature of the threat is explained in the judgment of Lord Denning MR in the Court of Appeal in *J.T. Stratford & Son Ltd v Lindley* [1964] AC 269, 288-289:

> "Another thing that is essential to the cause of action is that the threat should be a coercive threat. It must be coupled with a demand. It must be intended to coerce a person into doing something that he is unwilling to do or not doing something that he wishes to do. It must be capable of being expressed in the form, "I will hit you unless you do what I ask," or "if you do what I forbid you to do." A bare threat without a demand does not to my mind amount to the tort of intimidation. If a man says to another, "I am going to hit you when I get you alone," it is undoubtedly a threat: and an injunction can be obtained to restrain him from carrying out his threat. But the threat itself does not give rise to a claim for damages. It is only when he delivers the blow that it is actionable: and then as an assault, not as intimidation."

484. The subsequent paragraphs in *Clerk & Lindsell* relate to other aspects of the threat, for example: the extent to which the threat needs to be to do an unlawful act (paragraphs [23-66] to [23-68]), and the essential element of the cause of action that the person threatened should comply with the demand (paragraph [23-74]). There is a similar

discussion as to the ingredients of the tort, including the nature of the threat, in Chapter 5 of *Grant & Mumford: Civil Fraud*. Thus, at [5-013] the authors state, after citing Lord Denning MR in *Stratford*:

> "There is thus significant overlap between (a) threat and (b) intention to coerce as key elements of the tort. The touchstone of a threat, as opposed to any other kind of utterance, is improper coercion. It consists in the defendant indicating that the claimant must take a particular step "or else" the defendant will carry out his threatened unlawful act".

485. Mr. Gledhill summarised the relevant principles, colloquially, in his closing submissions as follows:

> "… the threat in order to be a threat has to be coupled with a demand. The defendant has got to say to the claimant: "You've got to do something or else I'm going to do something bad to you", and the bad thing has to be unlawful. And if the defendant merely says that he will do something without coupling it with a demand, it's not a threat. And when the defendant has already done something in the past, it's not a threat either, unless he's impliedly threatening that he might do it again, in which case it could be a threat".

486. Subject only to the question of whether the "bad thing" has to be unlawful, or whether it need only be "illegitimate", I agree with this summary, which reflects the authorities discussed above.

487. GDS relied upon a number of authorities in support of the proposition that coercion, without the need for any threat, is sufficient for the tort of intimidation. In none of those cases was this point the subject of argument or decision, and in my view the cases do not provide support for that proposition.

488. *Godwin v Uzoigwe* was, in chronological terms, the first case relied upon. The case involved a young Nigerian woman who, on the findings of the County Court judge, was kept in conditions of modern slavery by the defendants, to whom she had been sent on the basis that they would look after her. The judge had found the defendants liable for intimidation. The judge had found that by deliberate conduct, including but going beyond physical chastisement, the defendants had controlled the claimant and unlawfully abused her submission as a minor to them as persons exercising parental control. She had been required to work excessive hours, and to go without personal freedom of movement and personal association. The defendants (who appeared in person) unsuccessfully appealed to the Court of Appeal, where ex tempore judgments were given.

489. Dillon LJ said, unsurprisingly, that the tort of intimidation was amply made out by the facts which the judge found. He said that it was not necessary to go into the limits of the tort of intimidation or to try to give a comprehensive definition of the tort. There is nothing in his judgment which purports to extend or even define the tort, or which suggests that a threat is unnecessary.

490. Stuart-Smith LJ defined the tort in conventional terms, as requiring a threat, and referred in that context to both *Rookes v Barnard* and *Morgan v Fry.* He said that the threat may be expressed or implied by conduct. This analysis repeated, more briefly, his earlier analysis of the tort (as Stuart-Smith J) in *News Group Ltd. v SOGAG '82* [1987] ICR 181, 204 - 205. He then referred to the judge's findings that on many occasions the plaintiff was beaten with a stick and slapped. These "assaults and the implied threats of further assaults if she did not behave in the manner required of her are sufficient in themselves to justify the conclusion that the tort was made out". He described the "whole situation in which the plaintiff found herself" as being intimidatory.

491. In a brief judgment, Steyn LJ agreed with the reasons given by the other judges. He said that the case fell into the category of two-party intimidation, but that there was very little guidance in the decided cases on the requirements of this tort:

> "Nevertheless, it seems tolerably clear that coercion is of the essence of the tort. It is true of course that assaults and threats of assault constitute independent torts. But in the circumstances of this case those torts must be regarded as subsumed under the tort of intimidation. After all, in 1992 we must proceed on the basis that England has a coherent, just and effective law of tort.
>
> I interpret the judge's findings of primary fact as establishing a prolonged and systematic coercion, quite apart from the assaults and threats of assault".

492. I agree with Mr. Gledhill's submission that the extreme facts of the case clearly justified a finding of intimidation on any view of the law. There had been both physical chastisement and control and abuse going beyond that. The facts of the case did not give rise to any issue as to the limits of the tort, and there is nothing in the judgments of the court which sought to extend it. Mr. Gledhill submitted that whilst it was true that coercion was the essence of the tort, Steyn LJ was not saying that a threat was not required. I agree with that submission, which is consistent with the fact that Steyn LJ agreed with the judgment of Stuart-Smith LJ who had defined the tort in conventional terms.

493. The next case relied upon by GDS, chronologically, was the decision of Sales J in *Investec Bank (Channel Islands) Ltd. v The Retail Group PLC* [2009] EWHC 476 (Ch) at [122]. That case is of no assistance. The judge's decision in [122] was that there had been no proper plea of the tort of intimidation: it was not sufficient to plead facts which would justify a plea of economic duress, without pleading all the matters necessary to establish the tort of intimidation. Since there was no suggestion that intimidation had been properly pleaded, the judge did not need to address the requirements and limits of the tort.

494. *Dawson v Bell* [2016] EWCA Civ 96 was an appeal from HHJ Havelock-Allan QC, who had rejected a claim by the claimant based upon duress and intimidation. On the latter issue, the judge had defined the tort in conventional terms as requiring proof of a threat to do something unlawful, with intent to cause injury to the person who is threatened, and the submission to the threat by the person to whom it is addressed: see para [125] of HHJ Havelock-Allan's judgment, which was annexed to the judgment of

the Court of Appeal. There is nothing in the Court of Appeal's judgment which casts doubt on that analysis, which is in accordance with the authorities to which I have referred. The claim failed because, as Tomlinson LJ said at [33], the judge did not come close to a finding that the claimant's will was coerced, and the findings which he did make were inconsistent with that conclusion. The claimant had therefore failed to show, on the facts, that the practical effect of the pressure was compulsion or the absence of choice.

495. Finally, and the real lynchpin of GDS's argument, is the decision of Leggatt LJ (at first instance) in *Al Nehayan v Kent.* In that case, Mr. Kent (the defendant) had been induced to enter into an agreement with the claimant Sheikh as a result of both threats of violence and conduct which the judge held amounted to blackmail. At paragraphs [227] – [281], the judge considered whether blackmail gives rise to a liability in damages for the tort of intimidation. The judge considered that it would be a serious defect in the common law if it did not do so.

496. Where a party alleges that he has been blackmailed, he is necessarily alleging that he has been threatened with adverse consequences if he does not do something (usually paying money). The potential difficulty in fitting all blackmail into the tort of intimidation does not arise from the absence of a threat, but rather that what the blackmailer has threatened to do may not in itself be unlawful (eg telling a victim's wife that he has been having an affair). Blackmail may therefore, depending on the facts, give rise to an issue as to whether or not, for the purposes of intimidation, the relevant threat must be a threat of an unlawful act. This is an unresolved legal issue which is discussed in some detail in the textbooks: see e.g. *Grant and Mumford: Civil Fraud* paragraphs [5-015] – [5-029].

497. Leggatt LJ's decision was that blackmail was covered by the tort of intimidation. He said (at [229]) that the simple reason was that the tort encompassed actual unlawful conduct by one person to another, as well as threatened unlawful conduct. He referred in that context to the *Godwin* decision. He then said (at [230]) that conduct "which amounts to blackmail is plainly both coercive and unlawful, even if what the blackmailer has threatened to do is not".

498. I agree with Mr. Gledhill's submission that the relevant discussion relates not to whether threats are an ingredient of the tort, but as to whether it is always necessary for the threat to be of an unlawful act. Where there is blackmail, there is necessarily a threat. The case is therefore no support for the idea that the making of a threat is not an essential ingredient of the tort of intimidation. Instead, it supports the proposition that where the making of the threat is itself unlawful, because it amounts to blackmail, that is a sufficient threat for the purposes of the tort of intimidation.

499. GDS also referred to a number of authorities relating to the circumstances in which a contract can be rescinded for economic duress. I do not consider that these cases are of assistance in determining the requirements for the tort of intimidation. Leggatt LJ held in *Al Nehayan* (at [224]) that conduct which entitled a party to rescind a contract for duress would not necessarily give rise to a claim in tort. He agreed with Sales J in *Investec* that facts amounting to the tort of intimidation would need to be pleaded, unless there was some other basis for claiming damages. *Clerk & Lindsell* say (at [23-69]) that the better view is that economic duress does not itself amount to a tort.

Accordingly, in my view the focus must be on the requirements of the tort of intimidation, rather than upon the requirements for setting aside a contract for duress.

500. Accordingly, I consider that the requirements set out in *Berezovsky*, and applied by the Court of Appeal in *Morley*, represent the legal principles which are applicable in the present case. Whilst there may be room for debate as to whether the threat must be to do something unlawful or "illegitimate", it is not necessary to resolve that debate on the facts of the present case.

501. In addition to the principles summarised in *Berezovsky*, NCR contended that the judgment of Lord Devlin gives rise to the possibility that a defence of justification can be advanced in response to a claim for intimidation. *Clerk & Lindsell* discusses that issue at paragraph 23-76. I proceed on the basis that such a defence is potentially available.

H2: The parties' arguments

502. GDS argued that NCR committed the tort of intimidation by unlawful conduct up to 16 January 2013 and by threats made thereafter. As far as the period up to 16 January 2013 was concerned, GDS could not identify any explicit or implicit threat, or conduct amounting to such a threat. That is because NCR's intentions were hidden from GDS, with the ordering and forecasting process proceeding broadly as normal. However, GDS submitted that NCR's conduct up to that time was unlawful, and intended to place GDS in a position where it had no bargaining power, so that GDS would be coerced into accepting terms offered by NCR, and to cause loss – this being a necessary part of NCR's plan, including as the other side to the coin of NCR's gain in relation to any negotiations. As a result of this unlawful conduct, GDS had no bargaining power in January and February 2013.

503. After 16 January, NCR threatened GDS that if GDS did not accept its terms, then NCR would not purchase (ie would not take or pay for) the Products which it took under the Letter Agreement, and did so with the intention of coercing GDS to accept such terms. These threats were made despite NCR having entered into binding purchase orders in respect of some of the Products which it was not entitled to cancel and also having provided fraudulent forecasts. NCR had previously anticipated that it might be negotiating with GDS following notification, and it was properly to be inferred that NCR intended GDS to have no bargaining power in such negotiations so that GDS would have to accept such terms of purchase as NCR might dictate.

504. GDS referred specifically to the call between Mr. Kaparis and Mr. Bisognin on 8 February 2013. GDS said that Mr. Kaparis had threatened Mr. Bisognin into accepting the offer on the table by reference to GDS's lack of negotiating strength and NCR's leverage. NCR had made it clear that its offer was all that was realistically available at that stage.

505. GDS submitted that it was indeed coerced to enter into the Letter Agreement by the unlawful conduct and/or threats. If it were not for the coercive effect of the same, GDS would not have entered into the Letter Agreement.

506. NCR submitted that none of the essential ingredients of the tort of intimidation were made out. Most notably, NCR made no threat to coerce GDS into entering into the

Letter Agreement. That is the end of the intimidation claim. The originally pleaded threat was that NCR would simply not purchase the Products. This was then expanded, by way of amendment permitted at trial, to include a threat not to make payment in respect of NCR's failure to take the products.

507. To the extent that the "threat" not to purchase products concerned the cancellation of existing purchase orders for Products, the position was that NCR had cancelled various purchase orders on 16 January 2013, more than a month before the Letter Agreement was signed. The cancellation of purchase orders was not capable of being a threat, because it was not an action coupled with a demand that GDS do something. It was something that NCR had already done, unilaterally. NCR was not saying that it would cancel purchase orders unless GDS signed the Letter Agreement. In any event, NCR was entitled to cancel the purchase orders, and so the cancellation was not a breach of contract.

508. To the extent that the "threat" related to products which were not the subject of purchase orders but were encompassed by the forecasts, the same essential points arose. There was no threat: the forecasts had been reduced to zero on 16 January 2013. Further, there was nothing unlawful about not buying that which NCR had not committed to buy.

509. To the extent that the threat related to products that NCR was offering to buy under the draft Letter Agreement, that was not a relevant threat. NCR's proposal was to enter into a new contract of purchase as part of a settlement. It was not unlawful, or illegitimate, for NCR to say that it would not enter into a new contract except on the terms proposed. Nor did NCR ever demand that GDS enter into the Letter Agreement. It was a decision for GDS.

510. NCR submitted that the pleaded threat ultimately boiled down to a case that NCR said that it would not pay for the products it eventually offered to take under the Letter Agreement except on the final draft terms of the Letter Agreement. First, this was not capable of being a relevant threat: it was not a warning of NCR action coupled with a demand. Secondly, it was not a warning that NCR would do an unlawful act. There is nothing unlawful about declining to buy products except at a specified price, absent an obligation to do so, nor in declining to settle legal claims except on specified terms. Thirdly, it was not illegitimate, for the same reasons and because NCR believed that it was acting within its rights and indeed trying to assist GDS in a difficult position.

511. A number of other arguments were also advanced. NCR submitted that the threat (if proved) was not known by NCR to be unlawful or illegitimate. NCR also submitted that justification provided a defence to the intimidation claim, although Mr. Gledhill accepted that that defence was harder to advance if (contrary to NCR's case) there was a threat in January or February 2013. It was, however, a realistic defence if (again contrary to NCR's case) the giving of false forecasts was in some way relevant to the intimidation claim.

H3: Discussion

512. I agree with NCR that the intimidation claim falls at the first hurdle: there was no relevant threat. At no time did NCR make any demand upon GDS whose effect was to say to GDS: do this or else. The position prior to 16 January 2013 was that there was unlawful conduct, by reason of NCR giving deceitful forecasts. However, GDS was in

ignorance of this fact, and the business relationship appeared to be continuing more or less normally. No threats were made during this time-frame, and none which caused GDS to do anything.

513. On 16 January 2013, NCR informed GDS of its position and intentions: to cancel a large number of purchase orders, to 'zero' out its forecasts, and not to buy further products from GDS. There was nothing in the conversation which took place on that day, or in the subsequent e-mail correspondence, which contained any threat from NCR. GDS were not asked to do anything at all on an "or else" basis. There was a request for co-operation on an orderly transition, but this cannot on any sensible view be regarded as a threat.

514. The initiative for the discussions between the parties in New York came from GDS, who were understandably anxious to persuade NCR to take products in GDS's substantial pipeline. This was not therefore a discussion starting as a result of NCR threatening GDS with adverse consequences if GDS did not enter into those discussions or conclude an advantageous agreement. Whilst it is true that NCR had internally contemplated prior to 16 January that there might be a discussion and negotiation in relation to the purchase orders which had been cancelled, NCR does not appear to have initiated any such discussion. Instead, the direction of the parties' discussions was shaped by the initiative which GDS took in providing details of the pipeline and then requesting a face-to-face meeting in New York.

515. In the period up to the New York meeting, NCR was not making any demand upon GDS, still less a demand accompanied by a threat. The discussions at the New York meeting are described in Section D above. No demand or threat was made. The upshot of the meeting was that GDS was to provide certain information to NCR, which was to consider what if anything it was prepared to offer. The question was whether NCR would be willing to take any goods over and above those to be supplied under purchase orders which had not been cancelled. At the time of the New York meeting, NCR had not offered to take any, and GDS's representatives were uncertain after the meeting whether any offer would be forthcoming. There is, however, no suggestion in the inter partes or internal correspondence that NCR was making any threat, or that GDS understood that NCR was making any threat or indeed any demand. Instead, there was a request by NCR for factual information concerning the pipeline which would be relevant to NCR's decision as to what, if any, goods to take.

516. The course of the discussions thereafter has been described in Section D. In summary, NCR put forward its offer to take approximately US$ 7.7 million of goods, and GDS put forward counterproposals aimed at significantly increasing the amount which NCR would take. There was then an impasse reflected in the discussions which took place between Mr. Bisognin and Mr. Kaparis in the recorded 8 February phone call. Essentially, Mr. Kaparis was saying that NCR had reached its limit, although he put forward possible suggestions as to the timing of deliveries. In its closing submissions, GDS submitted that, in the phone call, "Mr. Kaparis had threatened [GDS] into accepting the offer on the table by reference to [GDS's] lack of negotiating strength", and that NCR made it clear to GDS that its offer was all that was realistically available at that stage.

517. It is certainly true that Mr. Kaparis did emphasise GDS's lack of negotiating strength in the discussion, essentially as part of his attempt to persuade GDS that it was better

off accepting the offer than refusing it: as he said, "seven is better than zero". It is also true that NCR made it clear that its offer was all that was realistically available. There is, however, nothing in the discussion which took place in the phone call, whose transcript I have re-read several times, which contains anything that can sensibly be described as a threat. There comes a point in all discussions where one party says to the other: "this is as far as I am prepared to go, and if the offer is unacceptable then there is no deal". But I do not consider that such statements can be regarded as a threat for the purposes of the tort of intimidation. They represent a statement of one party's negotiating position, namely that he is not prepared to make an improved offer. They do not demand that the other party do something: they simply indicate that if the other party wishes to have an agreement, then it must accept the offer on the table and cannot hope for anything better.

518. In any event, even if such statements could be regarded as relevant threats for the purposes of the tort of intimidation, I accept NCR's argument that there was nothing unlawful or illegitimate in NCR's "threat" not to increase its offer and take the volume of goods which GDS wished NCR to purchase. What the parties were seeking to do was to see whether a new agreement could be reached for the purchase of goods which were in GDS's pipeline. No case was advanced, rightly in my view, that NCR was under an existing contractual obligation to buy all the goods which were contemplated by the forecasts or which formed part of GDS's pipeline. NCR's contractual obligations for the purchase of goods extended, at most, to those purchase orders (priced at US$ 5.1 million) which had been cancelled. However, the parties were not negotiating about, or at least only about, the cancelled purchase orders, but instead were engaged in a discussion concerning the wider pipeline and the volume of goods that NCR was prepared to take in circumstances where there was no existing contractual obligation to take all of that pipeline. As NCR correctly submitted, there was nothing unlawful or illegitimate, in that context, in NCR declining to buy any particular volume of products, or declining to pay higher prices than it was prepared to offer.

519. I therefore do not accept that the tort of intimidation was committed by reason of NCR making clear, in the negotiations which culminated in the Letter Agreement, that it was not prepared to go beyond the terms that it had offered for the purchase of goods in the pipeline.

520. NCR submitted that this was how GDS's pleaded case, in so far as it was based on threats, ultimately boiled down: ie that NCR would not pay for the products it eventually offered to buy under the Letter Agreement except on the final draft terms of that agreement. I agree that this is a fair interpretation of paragraph [53] of GDS's amended pleading:

> "The Defendants threatened that if the Claimants did not accept NCR would simply not purchase the Products (including not making payment in respect of the failure to take the same) despite (a) NCR having entered into binding purchase orders in respect of some of the same; and (b) NCR having provided fraudulent forecasts of its requirement in relation to the Products".

That plea was largely repeated in GDS's closing submissions.

521. In so far as the pleading or GDS's case can be read as encompassing wider or different allegations of threats, I do not accept that such threats were made. There was no threat by NCR to withhold payment of the accounts payable in respect of products which had been purchased and delivered in the past. In fact, Mr. Kaparis in the course of the negotiations made it clear that he was working on having those accounts paid. Nor was there any threat to amend the forecasts to zero unless GDS did something. The forecasts had been amended to zero unilaterally on 16 January, without any demand being made. NCR was also right to say that there was nothing unlawful or even illegitimate about NCR not buying that which NCR had not committed to buy.

522. In my view, the closest that GDS came to establishing a potentially relevant threat was the fact that NCR had made it clear that it was not willing to take and pay for the products which were the subject of the cancelled purchase orders. This was the focus of paragraph [308] of the opening submissions of GDS.

523. *Rookes v Barnard* establishes that a threat to breach a contract is a threat of unlawful conduct which can found a claim in the tort of intimidation. In my view, NCR did not have a contractual entitlement to cancel all of the purchase orders which were cancelled on 16 January 2013. That alleged entitlement depended upon NCR's case that terms and conditions allegedly found in various purchase orders overrode the terms of the Purchase Agreement between the parties. I reject that case. However, that does not establish a case in the tort of intimidation for the following reasons.

524. First, the cancellation of the purchase orders was not accompanied by any threat or demand. NCR was simply making it plain that it was not going to take certain products which it had previously ordered. In so doing, NCR were no doubt committing an anticipatory breach of contract or contracts. However, an anticipatory breach of contract is an intimation that a party will not perform a contract in the future. It is not in itself a threat, although there may be cases in which it may be accompanied by a threat express or implied. But that is not what happened here. In the present case, the orders were unilaterally cancelled without any demand, whether to enter into the Letter Agreement or otherwise. It was approximately a month after the unilateral cancellation that the parties finally agreed on the terms of the Letter Agreement.

525. Secondly, even if the cancellation could be construed as embodying a threat, other requirements of the tort of intimidation were not made out in this respect. When NCR cancelled the orders, and reduced the forecasts to zero, there is no evidence to suggest that its representatives understood that they were making a threat. Their strategy was to present GDS with a fait accompli on 16 January, and they demanded nothing from GDS at that stage, save only to express the hope and request that the parties cooperate on the transition. In those circumstances, the second requirement in *Berezovsky,* that the threat is intended to coerce the claimant to take or refrain from taking some course of action, is not made out. I therefore accept NCR's case that it did not understand itself to be making any threat, and did not intend GDS to be coerced by any threat. In its actions following the New York meeting, NCR was trying to achieve an orderly transition and obtain such further product as it needed.

526. Similarly, the third requirement, that the threat in fact coerces the claimant to take such action, is not made out. My focus is again, here, on the cancellation of orders. These orders were worth US$ 5.1 million. GDS's problems, arising from the 16 January 2013 phone call, were very substantially greater than that. The real problem which GDS was

facing was the large pipeline of goods and material which had been built up in order to fulfil not only the cancelled purchase orders, but anticipated further orders contemplated by the false forecasts. The effect of the evidence of both Mr. Bisognin and Mr. Cariolato was that GDS's decision to enter into the Letter Agreement was forced upon them by the overall situation in which GDS found itself in consequence of NCR's announcement on 16 January 2013. I do not consider that either of them perceived NCR as having made any threat, or were reacting to any threat which had been made by NCR, still less a threat concerning the cancellation of orders. They were instead reacting to a threat of a different kind, namely the very real threat to the survival of the company as a result of the situation in which they found themselves in consequence of NCR's announcement. That is not, however, a relevant threat for the purposes of the tort of intimidation.

527. Furthermore, any claim of intimidation based upon any threat to cancel the orders would fail the "but for" test of causation which is applicable in cases other than threats of violence: see *Al Nehayan* at [233]. In my view, GDS would still have concluded the Letter Agreement on the same terms even in the absence of any (alleged) threat to cancel the orders, because the Letter Agreement was beneficial and required in order to alleviate the overall problem caused by the existence of the significant pipeline. This is demonstrated by the fact that the amounts to be received under the Letter Agreement exceeded by over US$ 2.5 million the amounts payable in respect of the cancelled orders.

528. For these reasons, the claim in intimidation fails, and it is not necessary to address in detail the other reasons given by NCR as to why that claim should fail. I will, however, briefly state my conclusions on two matters.

529. NCR submitted that even if it were relevant to consider unlawful conduct other than express or implied threats, and in particular its conduct in giving false forecasts, GDS had not established that it was coerced by that conduct, and the situation in which it then found itself, into agreeing to the terms of the Letter Agreement. NCR relied, for example, upon the fact that GDS was a substantial company, that its main shareholder Mr. Cariolato was likely to be a wealthy individual, that additional credit lines may have been available in the event that NCR did not pay the accounts receivable, that it was receiving legal advice which indicated the favourable prospect of litigation, and similar matters.

530. In my view, however, NCR's deceitful conduct, followed by its announcement on 16 January 2013, did put GDS into a dire position from which its only practical and realistic alternative was to accept the best terms that NCR would offer to take goods within the pipeline off its hands. It is clear from Mr. Cariolato's evidence that his perception was that the future existence of GDS, and with it the jobs and livelihood of many employees, was in serious jeopardy. A notable feature of the case is that this evidence, as to the existential threat to GDS, was shared by Mr. Kaparis himself, as is evident from his "toast" e-mail on 18 January 2013. Similarly, on 4 February 2013, he told his colleagues that they were on a "short fuse to make this offer to GDS before they close their doors due to lack of liquidity on their part". The recorded conversation on 8 February contains statements from Mr. Kaparis as to his knowledge that GDS had no bargaining power – a proposition from which Mr. Bisognin did not dissent in that call. NCR's internal correspondence after that conversation reflects the fact that their senior individuals knew that they simply had to sit tight, and GDS would have to accept their

proposal. This is exactly what happened. The evidence on both sides, as to the lack of a realistic alternative, is therefore essentially the same. I therefore reject NCR's case that, as Mr. Gledhill put it in closing, GDS had other viable options.

531. As far as concerns NCR's defence of justification: I could not see how, if there were threats of unlawful or illegitimate conduct after 16 January 2013, these could be justified by any of the matters on which NCR relied. The heart of NCR's justification case concerned the alleged justification for deceiving or conspiring against GDS in the period up to 16 January, because of the alleged fear of retaliation by GDS. Even in that context, I do not consider (for the reasons given in Section C above) that there was any justification for NCR's approach, so as to provide a defence to the conspiracy claim. The case is, however, even less tenable after 16 January 2013, by which time NCR's plans and intentions had been fully revealed to GDS. Indeed, Mr. Gledhill fairly acknowledged that the case of justification was more realistically focused on the period prior to 16 January 2013, and that the difficulty in fitting justification into the period thereafter was largely created by the fact that there was in fact no threat.

Section I: The Letter Agreement as a consequence of the deceit and conspiracy

532. In its opening submissions, GDS submitted, very briefly, that GDS was (as NCR intended) influenced into entering into the Letter Agreement by NCR's deceit and that this was part and parcel of NCR's unlawful means conspiracy. In its closing submission, under the heading "Continuing influence of the deceit", GDS invited the court to find that GDS was induced to enter into the Letter Agreement by NCR's deceit. It said that although GDS was aware when entering into that agreement that NCR had deliberately deceived them, GDS had been placed in such a poor position by that deceit that it felt that it had no option but to enter into the Letter Agreement. These arguments, in the same manner as the intimidation claim, were aimed at nullifying the effect of the Letter Agreement. GDS therefore claims relief in respect of all losses suffered by virtue of entering into the Letter Agreement.

533. I reject that argument. There is and has been no claim to rescind the Letter Agreement, whether for deceit or duress or for any other reason. The Letter Agreement therefore stands, and continues to exist, as a valid contract and must be applied in accordance with its terms: see Section E above. If the effect of the agreement, including its release provisions, is to prevent GDS from advancing certain claims in fraud or conspiracy, then that is simply a consequence of the agreement that has been concluded. Although arguments have been advanced as to the scope of the agreement and the release, it has rightly not been suggested that its comprehensive language is insufficiently wide to embrace potential claims in deceit or conspiracy.

534. Furthermore, there is in any event no basis for a conclusion that GDS was induced to enter into the Letter Agreement by NCR's deceit or conspiracy. As GDS acknowledges, it believed and was aware when it entered into the Letter Agreement that NCR had deceived it. The fact that it felt that it had no option but to enter into the Letter Agreement does not mean that the agreement was a consequence of the deceit. Rather, it was a consequence of GDS's lack of bargaining power, and the fact that it took the decision to compromise its rights in accordance with the terms of the Letter Agreement. Neither of these matters enables GDS to escape from the terms to which it agreed. Inequality of bargaining power is not a basis for invalidating a binding agreement, and

compromises and releases of claims for fraud or other serious tortious conduct are permissible and commonplace.

Section J: Exemplary damages

J1: Legal principles

535. In *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, Lord Nicholls said (at paragraphs [63] – [65]) that:

> "[63] From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna.
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> …
>
> [65] … the availability of exemplary damages should be co-extensive with its rationale. As already indicated, the underlying rationale lies in the sense of outrage which a defendant's conduct sometimes evokes, a sense not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress."

536. The remedy of exemplary damages is potentially available in a case involving deceit: see *McGregor on Damages* 21st edition, paragraph 13-013. NCR did not submit otherwise.

537. The availability of the remedy was discussed by the Court of Appeal in *Axa Insurance UK PLC v Financial Claims Solutions Ltd.* [2018] EWCA Civ 1330. The claimant insurer successfully recovered exemplary damages in respect of "cash for crash" fraud, which (as the court said) had become far too prevalent and which adversely affected all those in society who are policyholders who face increased insurance premiums. The conduct in that case involved a series of frauds and production of false documentation, and the Court of Appeal referred to the need to deter the respondents and others from engaging in that form of fraud. Exemplary damages in that case came within the "second category" of case which had been identified by Lord Devlin in *Rookes v Barnard No 1* [1964] AC 1129 at 1226-8: ie where the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

538. In his judgment, Lord Devlin had said:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it".

539. The Court of Appeal in *Axa* indicated, in agreement with the trial judge, that Lord Devlin's remarks are not to be read as though they were an Act of Parliament, and also that the word "calculated" does not mean that there has to be a careful mathematical calculation. Indeed, in an earlier case Sedley LJ said (in a judgment with which the other judges concurred) that "calculated" meant "likely": *Borders (UK) Ltd. v Commissioner of Police of the Metropolis and another* [2005] EWCA Civ 197 para [23].

540. In his analysis and conclusions in *Axa*, Flaux LJ (delivering the judgment of the Court of Appeal) said (at paragraph [25]) that it was important to keep in mind that exemplary damages remain anomalous and the exception to the general rule. It was therefore inappropriate to extend the circumstances in which they could be awarded beyond the categories of case identified by Lord Devlin. But if the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant, then exemplary damages may be awarded to deter and punish such cynical and outrageous conduct.

J2: Should exemplary damages be awarded in the present case?

541. GDS submitted in closing that consideration of this issue should be deferred to a second trial if liability were established. NCR opposed this course, pointing out that the issue is expressly within the scope of the issues ordered to be determined at the first trial.

542. One advantage of deferring determination of the issue is that I would then be able to assess the appropriateness of awarding exemplary damages, and in particular the amount thereof, in the context of any award of compensatory damages. In *Rookes v Barnard* at 1228, Lord Devlin said that juries should be directed that if, but only if, the sum which they have in mind to award as compensation is inadequate to punish the wrongdoer for his outrageous conduct, then a larger sum can be awarded to mark their disapproval of such conduct. In the present case, I do not know what sum will be awarded, if any, as compensation for wrongdoing, and I therefore cannot carry out that particular balancing exercise. However, NCR did not submit that this was a reason for deferring consideration of the issue. In these circumstances, and given that exemplary damages is not an issue reserved for later determination, I consider that it is appropriate for me to reach a final conclusion on that question, and the appropriate amount, on the basis of the evidence adduced at this trial.

543. Applying the relevant principles in the case-law summarised above, I have no doubt that this is an appropriate case for exemplary damages.[2] It falls within Lord Devlin's

[2] After receipt of the draft judgment, Mr. Gledhill QC invited me, in an e-mail sent on 27 April 2021, to consider whether there were points made in his written and oral submissions (particularly the latter) which warranted being addressed in Section J. Those points concerned the facts which were relied upon in support of the "justification" case. Reference was made to certain documents which were relied upon as showing that NCR

second category, as explained and expanded upon in the subsequent cases. NCR's conduct in giving false forecasts over a considerable period of time, in the circumstances of the present case, is such as to call for a further response from the courts.

544. Subjectively, the conduct was calculated by NCR to make a profit for themselves which might well exceed the compensation payable to the plaintiff. NCR did not carry out a precise calculation. But their course of conduct was designed to put NCR in the best possible economic position during the period of false forecasting: in particular, by preventing GDS from taking advantage of any bargaining power that they might enjoy during the ramp down period. It was also designed to put NCR in the best possible economic position as and when the time came to reveal its decision to GDS. As set out in Mr. Kaparis's "toast" e-mail, NCR perceived that the likely consequence of its conduct was that GDS would go belly-up. Mr. Kaparis clearly believed that NCR would have no liability for the consequences of GDS having large stocks on its hands or going belly up: as discussed in Section F above, NCR gave no thought to the possibility that false forecasting might gave rise to any adverse consequences in terms of possible liability. Mr. Kaparis also contemplated prior to the 16 January call that there might be a negotiation with GDS about the cancelled purchase orders, and he would have recognised – as the "toast" e-mail indicates – that GDS would have no negotiating strength as a result of the way in which NCR had engineered its approach.

545. Similarly, if one considers the facts objectively rather than by reference to NCR's subjective approach, NCR's conduct was objectively likely to result in a profit which might well exceed any compensation payable. If a company has been reduced to a state where it will likely go belly-up, the prospect that it will be able to engage in potentially expensive litigation to recover losses will recede significantly. In addition, it is likely to result in the situation which in fact happened in the present case, where the difficulties in which GDS had been placed meant that NCR could obtain substantial discounts for products which it wanted and could dictate the terms on which it acquired those products.

546. Accordingly, whether the case is looked at subjectively or objectively, the chances of economic advantage significantly outweighed the chances of economic penalty: see *Axa* at 27.

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feared GDS's reaction to a warning of being desourced. Mr. Gledhill recognised that the facts in relation to justification were addressed in the judgment, but drew attention to the absence of any reference to those facts in relation to exemplary damages. Again (see footnote 1), this seemed to me to be an impermissible attempt to reargue the case. Nevertheless, following receipt of Mr. Gledhill's e-mail, I reviewed the relevant parts of my judgment, and the principal documents referred to in Mr. Gledhill's e-mail including his written and oral submissions. Having done so, I saw no reason to consider altering my fact findings in relation to justification, nor my conclusion in relation to exemplary damages. In my view, the absence of a cross-reference in the exemplary damages section of the judgment to earlier findings, where the issue of justification and the facts are considered in detail, is not a point of significance. I had rejected NCR's case of justification, and it was not necessary to refer back to that rejection in the later section of the judgment. I had addressed the facts relating to the alleged justification for NCR's conduct in detail earlier in my judgment, and had concluded (amongst other things) that I did not accept that there was any justification, whether in fact or by way of a legal defence, for NCR's provision of false forecasts: paragraph [43]. My conclusions on the facts are contained within paragraphs [123] – [151], including my conclusion that the possibility that GDS would cease supply was not regarded as a major risk, at least by the decision-makers Mr. Delamater and Mr. Ciminera.

547. In *Rookes* at 1227 – 1228, Lord Devlin identifies a number of matters which should be borne in mind when awards of exemplary damages are being considered: the claimant must be the victim of the punishable behaviour; there is a need for restraint; and the means of the parties are material in the assessment of damages. None of these matters in the present case leads to the conclusion that there should be no award.

548. As to the amount of the award, bearing in mind the need for restraint, it seems to me to be appropriate to award an amount similar to that awarded in *Borders* but bearing in mind that this was a decision some 16 years ago. I therefore award £ 125,000 as exemplary damages. This seems to me to be a relatively small fraction of the economic benefit which NCR enjoyed as a result of deceitful conduct which took place over a considerable period of time. In *Axa*, where the fraud was on a much smaller scale, the award was £ 20,000. An award of £ 125,000 is a sum which in my view is principled and proportionate.

Section K: Conclusion

549. I therefore conclude as follows.

550. GDS has established the legal requirements of its claims for breach of contract, deceit and unlawful means conspiracy, in so far as such requirements are the subject of the present trial and have not been reserved for further determination: see Section C above.

551. The Letter Agreement, on its true construction, does not preclude all of the claims for damages which GDS has advanced in its Particulars of Claim: see Section E above. The extent to which it does, on its true construction, preclude GDS's claims is to be determined hereafter.

552. NCR's claim for rectification of the Letter Agreement, for mutual or unilateral mistake, is dismissed: see Sections F and G above.

553. GDS's claim for intimidation is dismissed: see Section H above.

554. The effect of the Letter Agreement (on its true construction), in relation to GDS's claims, is not negated by GDS's successful claims for deceit and unlawful means conspiracy. GDS is therefore not entitled to advance a claim in respect of losses suffered by virtue of entering into the Letter Agreement on the basis that the Letter Agreement itself was a result of NCR's deceit or unlawful means conspiracy: see Section I above.

555. NCR is liable to pay exemplary damages of £ 125,000 to GDS, in addition to any compensatory damages that may be awarded hereafter: see Section J above.