Neutral Citation Number: [2023] EWHC 3132 (Comm)

Case No: CL-2019-000755

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 06/12/2023

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) ANTHONY KING **(2) JAMES KING** **(3) SUSAN KING**	**Claimants**
- and -	
(1) DWF LLP **(2) PETER MORCOS** **(3) ALEXANDER HALL TAYLOR KC**	**Defendants**

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Christopher Newman (**Direct Access**) for the **Claimants** (from 15 June to 18 July 2023 inclusive)
Anthony King (in person) for the **Claimants** from 19 to 20 July 2023
Michael Pooles KC, Richard Anderton and **Lucile Taylor** (instructed by **Clyde & Co LLP**) for the **First Defendant**
Ian Croxford KC and **James McCreath** (instructed by **Herbert Smith Freehills LLP**) for the **Second and Third Defendants**

Hearing dates: 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29 and 30 June; 3, 4, 5, 6, 10, 11, 12, 13, 18, 19 and 20 July 2023
Written submissions received 9, 15 and 29 August 2023
Draft judgment circulated to parties: 27 November 2023

Approved Judgment

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimants in this case ("***the Kings***") allege that (a) their former solicitors DWF LLP ("***DWF***") and (b) their former barristers Alexander Hall Taylor KC and Peter Morcos (together, "***the Barristers***") were in breach of duty at various stages during the conduct of proceedings in May 2017 before Marcus Smith J ("***the Misrepresentation Proceedings***"). In particular, it is said, they advised their clients to discontinue their claim on Day 10 of the trial of those proceedings ("***the Misrepresentation Trial***"), to apologise in open court and to agree to pay costs on the indemnity basis, even though (the Kings say) the claim had a very strong prospect of success.

2. The Misrepresentation Proceedings in turn arose out of a transaction in December 2013 ("***the Transaction***"), whereby the Kings sold a stake in their family business to external investors Primekings Holdings Limited ("***Primekings***") pursuant to a Share Purchase Agreement ("***the SPA***"). In the Misrepresentation Proceedings, the Kings had sued Primekings alleging that the SPA resulted from, among other things, fraudulent misrepresentation and economic duress by Primekings.

3. In the present proceedings, the Kings make (in brief outline) the following allegations. They say that Mr Wilson of DWF made a mistake in 2013 when advising on the Transaction, and then misled his clients in order to cover that mistake up. When the Kings sued Primekings in 2015, Mr Wilson chose to cover up his previous default by allowing documents to be filed which he knew were misleading on the issue of the quantum of damages. The other members of the legal team were negligent in not checking the contemporaneous documents, which showed the filed documents to be wrong. The case reached trial in 2017, and on Day 4 Primekings revealed to the full legal team facts showing what Mr Wilson had done. Rather than explaining the problem to their clients, the legal team chose to hide it. That, in combination with external pressure from Primekings, led to the team deciding to ensure that the Kings discontinued the case on whatever terms Primekings specified, even though they all knew that was contrary to their clients' best interests. In order to persuade the Kings to do that, the whole legal team had to conceal the real problem from their clients, give their clients advice they knew to be wrong, and ultimately force their clients to accept the advice by telling their clients they would have to represent themselves if they wished to continue with the case. In the alternative, the Kings allege that the advice to discontinue, pay costs and apologise was negligent.

4. I state at the outset that I have concluded that there is not the slightest merit in these claims. The extremely serious allegations made against each of the Defendants are entirely without foundation.

5. In the course of this judgment, I have on some occasions, in what appear to me particularly clear instances, stated that certain allegations should not in my view have been made at all. For the avoidance of doubt, that should not be taken to imply that I

regard other allegations as ones that could properly have been made. It is unnecessary for me to form or express any view on that matter.

6. The case was tried before me from 15 June to 20 July 2023 inclusive. The Kings were represented by Mr Newman for the greater part of that time, up to and including the filing of Mr Newman's 95-page written closing on behalf of the Kings on 17 July 2023 and his oral closing submissions on 18 July. On the morning of 19 July, the day set aside for the Defendants' oral closing submissions, a letter was received from Mr Newman indicating that he no longer felt able to represent the Kings at trial, following what he described as allegations in the Barristers' written closings of serious wrongdoing by Mr Newman personally. Anthony King told me that he had learned of this development only at 8.30am that morning. The Defendants initially invited me to continue with the trial, but after a short break indicated they would forego their right to make oral closings so that the trial could simply end.

7. After further consideration and submissions, I concluded that that course created a risk of disadvantage to the Kings, given (for example) that Mr Newman might have envisaged leaving certain topics to be dealt with in oral reply submissions in the light of the manner in which counsel for the Defendants responded orally to points in Mr Newman's written closing (and, in one respect, Mr Newman had indicated that he did so envisage). I decided to permit Anthony King to make oral submissions in the afternoon of 19 July, but also to reflect overnight on whether the Kings wished to have more time to submit a further response (orally or in writing, and legally represented or not) to the Defendants' written closings. During the course of those oral submissions, Anthony King told me that he had not in fact had a chance to read the Defendants' written closings (which ran to some 230 pages in total) and had been relying on his counsel. Even by the following day (20 July), which was the last scheduled day of the trial, Mr King had not fully read both of the written closings filed on behalf of the Defendants. Consequently, in addition to hearing oral submissions from Mr King on 19 and 20 July, I concluded that I should give the Kings the opportunity to finish reading, and digest, the Defendants' written closings and, if they thought fit, make a further submission. In the unusual circumstances that had arisen, and given the seriousness and complexity of the matter, I declined to impose a page limit.

8. In due course, the Kings decided that they should make a further submission, and filed Written Reply Submissions (95 pages plus appendices) on 9 August 2023. DWF and the Barristers filed responses to that document (11 pages and 10 pages respectively) on 15 August 2023. Finally, the Kings on 29 August 2023 filed separate replies to those responses, running to 20 pages and 9 pages respectively. The court had not given permission for the documents filed subsequently to the 9 August 2023 Written Reply Submissions, and the totality of these documents amounted to a proliferation of post-hearing submissions that the court would not ordinarily tolerate. I concluded that I should nonetheless read and consider them, which I have done, given the importance of ensuring that after losing their counsel at a late and difficult stage of the trial, the Kings had an effective opportunity to complete their closing of the case. I have given careful consideration to all the submissions made. I make certain further comments in section (M) below about procedural aspects of the case.

(B) THE WITNESSES

9. I heard from Anthony King, called by the Kings. DWF called Lester Wilson, Bill Radcliffe, Jason Blakey, Grace Connor, Victoria Walker and Sarah Wilson. The Barristers, Mr Hall Taylor and Mr Morcos, each gave evidence on his own behalf.

10. Anthony King was cross-examined over a period of four days, which would be an exacting experience for anyone. Even making allowance for that, though, he was not a satisfactory witness. He had a tendency to give long answers, and sometimes speeches, that were sometimes not directed to the question asked. He appeared to have real blind spots about the impact of his own evidence in Misrepresentation Trial, and how other evidence given in that trial may have affected the credibility or reliability of his evidence (such as the extreme lateness of his claimed recollection of the "Fisher Representations" considered later, his denial that he perceived any prospect of HMRC issuing a winding up petition, and his statement that the case against Primekings had not been about him and did not depend on his credibility). Other parts of his evidence were positively hard to credit, such as his evidence that did not at the time see Mr Mattok as an important witness or remember feeling any surprise when Mr Mattok's evidence would not support the Kings' case. He had a tendency, when faced with a fact or document unhelpful to his case, to seek to explain it away by making another allegation of fraud or mendacity.

11. Lester Wilson is a corporate partner at DWF, who advised the Kings on the Transaction, was their relationship partner at the firm, and later was a witness at the Misrepresentation Trial. Overall, he was a good witness. Occasionally he would repeat, in a slightly formulaic manner, the (valid) point that had he realised about the B Shares Mistake, then he would have reacted as he in fact did when he did discover it; and once or twice he slipped into argument. However, I am sure that he was giving evidence honestly and accurately.

12. Bill Radcliffe is DWF's Professional Risk Manager. He gave evidence about certain events that occurred in the aftermath of the Misrepresentation Trial. He was a straightforward witness.

13. Jason Blakey was the lead associate working on the Misrepresentation Proceedings. He gave evidence candidly (for example, accepting at one point that he had probably just not thought about carrying on with the duress case at the Misrepresentation Trial; and accepting that his advice on the merits would be likely to have given the Kings confidence). Very occasionally he answered in a slightly argumentative way (e.g. "*same question, same answer*") or anticipated a question. Overall, however, he was a good witness.

14. Grace Connor was an associate working on the Misrepresentation Proceedings. She too was in my view a truthful witness. She gave evidence candidly, for example in relation to making of the B Shares Mistake and how Anthony King might have felt it ought to have been mentioned during a 2-hour conference. I am satisfied that she answered questions fairly and that I could rely on her evidence.

15. Victoria Walker is Mr Wilson's PA, who has worked with him for about 16 years, and gave evidence about matters including the corrections to Mr Wilson's witness statement. She was a straightforward witness.

16. Sarah Wilson is Mr Wilson's wife. She gave evidence about, in particular, Mr Wilson's discovery of errors in his witness statement which he went on to correct. She was a straightforward witness.

17. Alexander Hall Taylor was cross-examined for between two and three days. He spoke in the manner of a naturally loquacious individual, and tended to give rather long answers, though these were always directed to the question asked and were often a natural response to vague propositions put to him. At only one point did I feel that he showed frustration with the cross-examination and veered into argument. However, bearing in mind the nature of the allegations against him and of the cross-examination, and in the context of his evidence as a whole, that was not a significant matter. Mr Hall Taylor showed understandable emotion at one point about the allegations made against him – which in all the circumstances was unsurprising – and then apologised. Having listened carefully to his evidence over several days, I am entirely satisfied that he was a truthful and candid witness. His evidence was also wholly consistent with the inherent probabilities and the relevant documents.

18. Peter Morcos was a good witness. He answered questions fairly and calmly, despite the serious (and sometimes bizarre) allegations made against him.

(C) BACKGROUND TO MISREPRESENTATION PROCEEDINGS

(1) Kings Solutions Group Limited

19. In 1968, James King founded a business known as J King Aerials. Over several decades he grew and diversified his business, with the core focus becoming the provision of security services. His son Anthony King came into the business at a young age. In 2000, James King stepped back from the day-to-day management of the business and Anthony King took over as Managing Director.

20. Kings Solutions Group Limited ("***KSG***") was incorporated on 12 July 2011. The directors were Anthony King (managing director) and Steve Evans (chief operating officer). The Kings' group of companies was thereafter re-organised such that KSG became the parent company of a number of security companies in the group. KSG was owned by James and Susan King (40%), Anthony King (20%) and as to 40% by a family trust of which James King was Trustee for the benefit of James and his wife Susan's children. The trust was the JPK No. 1 Discretionary Settlement ("***the Trust***").

21. Prior to and during the Transaction in late December 2013, KSG was in financial difficulty because its cashflow came under severe pressure. The full extent of this was, however, disputed during the Misrepresentation Trial and during the present proceedings.

22. GE Capital Bank Limited ("***GE***") was KSG's invoice discounting provider, having taken over from Barclays Bank PLC in August 2013. Invoice discounting involves a business selling its unpaid invoices at a discount to a financier in exchange for immediate cash. Another way of viewing it is that GE made loans to KSG secured on the latter's invoices. The GE facility was important for KSG's cashflow.

23. The material terms of the GE facility, according to a "*GE BUSINESS FINANCE FACILITY PROPOSAL – SUBJECT TO CONTRACT*" letter dated 18 July 2013, were that:

    i) the advance percentage was 85% of the value of the invoice;

    ii) KSG was to settle the invoice (and pay GE) by 60 days from the end of the month of the invoice date; and

    iii) KSG's current account limit was £6m.

24. A short time after the commencement of the GE Facility, on 21 October 2013 GE sent a letter to KSG declaring an event of default by reason of KSG failing to remain within EBITDA (earnings before interest, tax, depreciation and amortisation) projections. GE required KSG to appoint (and pay) KPMG to monitor the drawdowns under the GE facility. GE increased its reserves, thereby reducing the total sums that KSG could draw down. By late November 2013 GE were refusing to sanction payments other than for essential matters and only when approved by KPMG.

25. KSG had very substantial arrears of tax payments due to HMRC (over £2 million as at 16 December 2013). These had triggered a further declaration of an event of default by GE on 12 November 2013.

26. Notes of an internal KSG Management Meeting dated 20 November 2013 indicated that the Kings recognised their cashflow problems. The notes recorded that:

    i) there was a problem with one of KSG's clients' payments. The Kings had provided security services to the Co-operative Group for years and it seems that at this time Co-op had delayed paying their bills, which were of substantial value. In light of this problem, Anthony King had a conference call with his parents and other family shareholders with the result that "*the shareholders were 100% unanimous to proceed with speed to seek external funding*";

    ii) Anthony King met KPMG on 18 November 2013 and requested that KSG adopt "business critical payments only with KPMG monitoring the process in order to gain much needed liquidity from GE";

    iii) Mike Mattok, Financial Director of KSG, reported that GE only allowed a minimal draw down of funds on 19 November 2013 and had not sanctioned a draw down for the 20th. Payments made by KSG for their expenses were therefore being bounced; and

    iv) "[Anthony King] expressed great concern over this state of affairs and said that the lack of any time period commitment from GE to provide finance was placing the Directors in an untenable position."

27. On 20 and 21 November 2013, Anthony King was in email correspondence with Howard Smith of KPMG, expressing his concern at KSG's cashflow problems. Mr Smith was an insolvency partner at KPMG, who had an overview of the cash flow monitoring that KPMG was performing for GE, as well as involvement in marketing KSG to potential investors. The email exchange included the following points.

i) Anthony King noted that KSG was unable to pay ADI Gardner (one of KSG's suppliers) which "now jeopardizes all our future sales and forecasts and our ability to trade as an organisation […] We will begin to fail to meet deadlines on both installs and service and our client base will become aware of this within a matter of 24 hours." Anthony King was essentially asking Mr Smith to go back to GE and negotiate more flexibility in their lending terms.

ii) Mr Smith was pessimistic about what GE would say. Although GE had released about £200k on the 20 November 2013 (an over-advance outside the 85% formula), Mr Smith was concerned about KSG's arrears to HMRC and,

> "like many asset based lenders they [GE] do what it says on the tin, i.e. lend against specific assets using a formulaic approach. This means that when a client steps outside of those parameters it results in "flags" being raised […] The business needs a solution to the HMRC position and this needs to either come from the Co-op or a new working capital provider."

iii) Anthony King replied listing a host of problems KSG faced with its creditors due to the lack of cashflow:

> "repercussions of bouncing everything yesterday had now meant that Barclays are completely spooked […] I have been informed we are 'at our credit limit' with ADI until they receive another payment […] Other creditors who's cheques bounced are now withdrawing credit terms, namely our steel provider, which now means we are unable to fulfil orders that have been forecasted for this month […] I have now just been informed that all of our engineers fuel cards have been cancelled due to the direct debit for the fuel bill being rejected yesterday as well and we have engineers stranded all over the country on garage forecourts. This situation is fast getting out of control now and I need to very carefully review my next steps."
>
> KSG maintained an overdraft facility with Barclays (and previously an invoice discounting facility too, although that was subsequently moved to GE).

28. Thus KSG had real cashflow difficulties prior to the Transaction. They needed an external investment to avoid insolvency – even the Kings themselves recognised this – and that was ultimately provided by Primekings.

(2) Initial negotiations with Primekings

29. Primekings was an SPV set up for the sole purpose of executing the Transaction. Robin Fisher and Peter Swain were beneficially interested in Primekings. Mr Fisher was the former son-in-law of a South African billionaire called Nathan Kirsh. As a result of this relationship, Mr Fisher was able to borrow money from the Kirsh Group to fund suitable investments. Barry Stiefel was the *"right-hand man"* of Nathan Kirsh and was another important figure on Primekings' side during the Transaction.

The Primekings directors were Mr Fisher and Mr Stiefel. Primekings, Mr Fisher and Mr Swain were the defendants in the Misrepresentation Proceedings.

30. Anthony King, as managing director of KSG, led the negotiations on behalf of the existing shareholders of KSG, i.e. himself, his parents and the Trust. The Kings were represented in the Transaction by DWF and, in particular, by Mr Wilson, a corporate finance partner.

31. Mr Swain signed a non-disclosure agreement on 25 November 2013 and requested further information. Mr Swain met Anthony King the following day and a preliminary offer was made on 28 November 2013. Representatives of Primekings visited KSG on 30 November 2013.

32. An initial structure for a deal was agreed between the Kings and Primekings on 7 December 2013 ("***the Initial Deal***") and due diligence steps followed. (The Kings' case during the Misrepresentation Proceedings was that the Initial Deal was agreed on 30 November 2013, but this makes no material difference to present proceedings.)

33. In broad terms, the structure of the Initial Deal, largely reflected in documentation circulated by Primekings' lawyers on 11 December 2013 (draft SPA, draft Shareholders' Agreement and draft revised Articles of Association for KSG), was as follows.

    i) Primekings would acquire 60% of the shareholding of KSG by purchasing the 40% shareholding of James and Susan King for £2 million and subscribing for additional shares for £1 million (thus injecting £1 million cash into KSG);

    ii) the remaining (diluted) 40% of shares would be held by Anthony King and the Trust;

    iii) pursuant to draft Article 31, deferred consideration ("***Deferred Consideration***") was to be paid via the allocation and redemption of B shares in KSG, which would be redeemed by KSG annually for £1 million for three years, provided that KSG met EBITDA targets of £3 million for each of those years (ending March 2015, 2016 and 2017). If the EBITDA targets were missed, then the £1 million redemption payment for each year would be reduced accordingly ("***the B Share Mechanism***"). If the EBTIDA target of £3 million was not met for the year ending March 2015, then Primekings would be entitled to acquire the Trust's shares in KSG for no further consideration (thus giving it control of KSG);

    iv) existing directors' loans (totalling roughly £500,000) would be repaid by the Kings to KSG over the course of three years; and

    v) Primekings would arrange for a £3 million working capital facility to be provided to KSG by an external lender - Ki Finance SARL ("***KIF***").

34. As will be seen below, the B Share Mechanism is an issue of controversy for the purposes of present proceedings. One aspect of the dispute concerned Anthony King's knowledge of how the Deferred Consideration was to be paid.

35. The starting point in that regard is that the draft Articles were forwarded to Anthony King at 16.06 on 11 December 2013 by Ms Claire Rollo of Teacher Stern, Primekings' solicitors. Ms Rollo's covering email included express mention of the draft Articles of KSG covering *inter alia "creation of new redeemable shares to be issued to the Trust"*. Draft Article 31 provided for redeemable shares to be issued by KSG for the purpose of paying the Deferred Consideration.

36. On 12 December 2013, there was an "*all parties meeting*" between Anthony King, Mr Wilson, Mr Fisher, Ms Rollo and Dov Katz (also of Teacher Stern) at Teacher Stern's offices to discuss the heads of terms and the draft Initial Deal. Mr Wilson was late for the meeting, having been unexpectedly held up at another meeting on a different transaction, and called in to notify his delay (and to try to start the meeting by telephone).

37. Mr Wilson's agenda was circulated to the parties before the meeting, including by an email from him to Anthony King saying *"this is the list of points I'll take you through"*. The agenda included, under the heading *"Articles"*:-

> "2.3 Minority protection."
>
> …
>
> "3.1 B Share redemptions
>
> (a) 31/3/15 - £1m per share or (EBITDA/£3m x £1m)
>
> 31/3/16 and 31/3/17
>
> (b) Redeemed 1/3, 1/3, 1/3."

and under the heading "*Structure*":-

> "1.7 Call Option/Put Option (Exit mechanic) and Interaction with redemption."

38. Mr Wilson states at §§ 27-30 of his witness statement that these items were discussed at the meeting:

> "At the meeting each person present had a hard copy of the Agenda. We went through all of the points on my Agenda, including the redemption of the redeemable shares. As this was planned as a redemption of shares, KSG needed to have sufficient distributable reserves each year to carry out the annual redemptions. I was concerned about this and sought specific protections to maintain KSG's reserves to ensure the redemptions would take place. These protections included no dividends (which reduce distributable reserves) until the B Shares had been redeemed. This is reflected in my note of the meeting, on the page that starts '1. Structure' -, on that page there is reference to 'redemption of prefs' ('prefs' being a redeemable B Shares) and there follows ' e/out [earnout] on Trust - subscribe for shares for nil consideration'. In a box

> under those words appears the word 'reserves'. The following page I believe records a list I made, in the meeting, which includes the words '1. Trust sells/ redeems' and '5. E/outprotections' and is a reflection of topics and issues discussed in the meeting.
>
> This discussion is also recorded in Claire Rollo's notes of the meeting and a subsequent email from Claire Rollo on 13 December 2013 at 14:09, where she confirmed the Investors would agree to provide the protections I had sought on the previous day. If the deal had included a deferred payment for shares by Primekings I would have been seeking different protections, to ensure Primekings had funds to finance the payments.
>
> I was satisfied that this was explained in the meeting in such a way that someone in Anthony's position would understand."

39. Manuscript notes disclosed by Ms Rollo correspond closely to the agenda for the meeting, as well as recording near the beginning *"T/I LW"* (consistent with the evidence about Mr Wilson having initially tried to join the meeting by telephone). Unlike other notes reflecting discussions between Ms Rollo and her own clients, they contain no redactions in the portion corresponding to the agenda for the all-parties meeting. I am satisfied that these notes were made at the meeting. They include the following entries:

> "No div
>
> - £3m redeem
>
> - Then 1/3
>
> Pref shares
>
> - 1/3 be redeemed at 1/3 of that figure"

40. Those notes are consistent with Mr Wilson's evidence that the B Share Mechanism was discussed in Anthony King's presence and that Mr Wilson sought additional protection to the effect that KSG, as issuer of the B Shares, was not to declare any dividends until the B Shares had been redeemed.

41. On the evening of 12 December 2013, Mr Wilson sent an email to his team recording *inter alia*:

> "7 Today I've been through the SPA, Articles and Shareholders' Agreement with TS, Anthony and the buyer."

and mentioning as one of the headline terms of the proposed transaction:

> "4 Trust's shares can be redeemed if £3m EBITDA hit in y/e 31 March 2015 at a multiple of EBITDA."

There is no reason to believe that that email contained anything other than an accurate summary of events.

42. Anthony King confirmed in his evidence that a meeting took place between him, James King and Primekings (in the absence of their lawyers) on the morning of 13 December 2013. At 14.09 the same day, Ms Rollo emailed Mr Wilson saying:

> "We understand that there have been some further discussions regarding the purchase price/redemption monies as follows: - […]
>
> 2. Redemption figure for B shares - £2,499,000 – so up to £833,000 per relevant financial year-
>
> 3. Minority protection to be added that the company shall not declare or pay any dividend or repay any capital monies to the Lender, save on a refinancing of the Loan, until the B shares have either been redeemed in full or cancelled in accordance with the Articles".

It is very likely that the "*further discussions*" mentioned were the Kings' meeting with Primekings on the morning of 13 December 2013, following the all-parties meeting on the afternoon/evening of 12 December 2013. The reduction of the redemption figure for the B Shares from £3 million to £2,499,000 reflected the parties having agreed to clear the directors' loans by way of reduction of the Deferred Consideration. That meant that instead of potential payments of £1 million per annum for 3 years, the maximum redemption figure in any of those years was £833,000.

43. Mr Wilson forwarded Ms Rollo's email to Anthony King, saying:

> "Again will call you. A lot of paper here but I'm just keen to get to the bottom of whether this accurately reflects the discussions you've had."

44. Thereafter:-

i) Ms Rollo of Teacher Stern emailed Mr Fisher on 15 December at 15.59 reporting on the "*main commercial points*" of the Kings' demands. In particular, her § 5 recorded:

> "Minority protection - AK proposing that his consent will be required to certain decisions of the Company - this will restrict the Investor even it owns 80% of the Company. Decisions include forming /acquiring subsidiary or merging business (Cougar/Defence), issuing further shares, changing auditors, accounting policies etc. These need further consideration and I recommend shouldn't apply if the investor becomes 80% shareholder on basis that at that point the Company has not performed; UNACCEPTABLE - MAKE DECISIONS IN THE BEST INTERST OF THE COMPANY.AGREE ARTIFICIALLY EFFECT THE ebitda - Barry - maybe for 3

> yrs until the parents pd off - but cant merge the businesses this way??"
>
> and § 9 read:
>
> "Treatment of the Loans - we had amended the Articles to provide that for 3 years from 2015, 1/3 of shares be redeemed at maximum of £833k - DWF has said this should be "grossed up". I am not sure what is meant by grossing up in relation to this figure and we really need to understand how the shareholder/director loans will be dealt with. Confusion as to what was agreed"
>
> with the wording I have underlined in these two passages having apparently been added by Mr Fisher in a responsive email at 17.42.

ii) Mr Fisher then telephoned Anthony King at some stage before 18.05, then sent an email to Mr Stiefel at 18.15 saying:

> "Just spoke to Anthony - said not happy with the changes - especially with time restraints"

iii) Anthony King replied on 16 December 2013:

> "Morning Robin
>
> I don't see anything on here that can't be resolved.
>
> I will go back to Lester on this."

45. The various dealings referred to in §§ 35.-above in my judgment provide compelling evidence that Anthony King was well aware that the Deferred Consideration was to be provided by means of redeemable shares issued by KSG, and had discussed it both with Mr Wilson and with Primekings. Mr Wilson also gave evidence that he discussed the B Share Mechanism, among other matters, on 16 or 17 December 2013.

46. The Kings relied in closing on a passage in an attendance note of a meeting on 30 April 2015 between the Kings, Ms Connor, Mr Blakey and Mr Wilson:

> "The meeting on Thursday 12 December heads of terms were discussed and there was a big push to complete the deal before everybody went on holiday in December they were aware that Barry was leaving on 15th and Robin was leaving on 19th and in light of these deadlines they knew that they had to have the deal concluded by the 18th. LWI was involved in the meeting and said that it was late and Robin was there but nobody else was present. LWI said that Robin was unbelievable aggressive and at the meeting with their lawyers who were Dov Katz and a Claire Rollo, he had been swearing at the solicitors and he'd got the sense that they were trying to change the deal. LWI said he can recall saying i.e. sure about what we are signing up to

> however it was just at this point nothing had changed and they were still looking at the same price. It was discussed that whilst the £1m payment to JK and SK had not been nailed down it had never been discussed that this would be coming from the company. It was also said that there had been no provision for the B shares and those coming out of the business …" (emphasis added)

47. Mr Wilson was asked about this last passage, and said he had been unable to do any background reading before this meeting. He had had collarbone surgery 5 days previously (25 April 2015) and had been advised by the surgeon to take six weeks off work, but only took two weeks off. Mr Wilson had dealt in his witness statement with the topic of meetings in 2015 about the case, though not specifically this particular meeting. He explained that, at that stage, he was not engaged with the detail of the Transaction. Had he realised that the Kings were mistaken in their understanding, he would have said something (as he eventually did when he realised the mistake). In relation to a draft email from Anthony King to Mr Stiefel of 27 March 2015, for example, Mr Wilson said:

> "Even if I had read this email, absent a thorough refreshing of my memory of the Transaction, delving back into the correspondence and historic draft documents, and bearing in mind that numerous changes had occurred on the day of completion, I am not sure I would have realised that Anthony was making a mistake in asserting that one of the ways in which the deal changed was that KSG was made to pay the deferred consideration, rather than Primekings".

Similarly, asked about a passage in some notes of a meeting on 22 April 2015, Mr Wilson said:

> "I believe that I dialled in to this meeting from DWF's Newcastle office and I recall that during the call a partner at the Newcastle office (Ed Meikle) came into the room and I spent time talking to him, with the phone on mute and the volume turned down. Otherwise, I do not recall the conference at all so I do not remember what was said. As I have previously stated, I do not think I would have realised that Anthony was mistaken in his belief that the deferred consideration mechanism had changed, if the matter was discussed in this conference. Had I heard and realised what was said was wrong I would have said something, as I eventually did. I was also in significant discomfort at around this time. I had broken my collar bone in the Dalby Forest on 12 April 2015 and I underwent an operation on 25 April 2015. At the time of this conference, I was taking heavy pain killers which left me drowsy and unable to concentrate. In retrospect, I should not have been working."

48. I accept Mr Wilson's evidence on these matters. I do not consider these meeting notes to establish that the B Share Mechanism was not in fact discussed with Anthony King on 12 and 13 December 2013. I consider that the documents I consider in §§

35.-above show that it was discussed, and are consistent with Mr Wilson's evidence on that point.

49. I therefore reject the allegation in Particulars of Claim § 10 that Mr Wilson was in breach of the duty of reasonable skill and care by not explaining to the Kings the B Share Mechanism, set out in the draft documents, in the period 11-18 December 2013.

(3) Events leading up to Completion Meeting

50. While the discussions outlined above were taking place, KSG's cash flow problems continued and worsened. On 2 December 2013 Barclays said it would reduce the overdraft limit by £25,000 a week from 13 December, and would not commit to providing overdraft facilities beyond 3 January 2014. On 3 December GE told Anthony King and KMPG that it would now place 100% reserves against advance billing. Internal GE communications referred to 20 December as a deadline for a deal to be completed, and an email from Mr Evans of KSG indicated that the company was under pressure to have a deal completed by that date. There was a call on 10 December, involving GE, Primekings and Anthony King, notes of which refer to GE being focused on delivering a conclusion *"before the end of next week"* (i.e. before 20 December). On 11 December HRMC rejected an application KSG had made for time to pay, and said HMRC would be looking into issuing a winding up petition. An internal KSG message from Ms Kehoe referred to Mr Fisher of Primekings having spoken to HMRC to reassure her about the impending deal. On 12 December the GE facility went into an over-advanced position, where it remained until after the Primekings deal.

51. Internal Primekings communications on 16 December 2013 indicated that they were concerned about adverse developments, including a greater than expected cash requirement and items on the KSG balance sheet that might have to be written off. There was discussion about changing the nature of the deal, including to one involving KSG going into administration. Mr Swain expressed resistance to that but felt that "*to keep a solvent deal the structure of the deal must change*." He also stated:

> "Keeping the deal alive without a process, I think is 'prize one' we have all the power, I am not for one minute saying we should use that power to disadvantage The Kings family and gain advantage to the 'Kirsh way' but we need some reality around the deal, it is clear Anthony has no understanding of the true position or that our deal represents the best value by a country mile even if we paid zero to the family. (I think the 1M is almost because we can and we are honourable)"

That message in itself seems hard to reconcile with the allegations of fraudulent misrepresentation and economic duress that the Kings later made against Mr Swain.

52. Also on 16 December 2013, on Anthony King's evidence in the Misrepresentation Proceedings, there was a meeting between him, Mr Fisher, Mr Swain, Mike Mattok and representatives from Baker Tilly LLP, who managed Primekings' due diligence, at KSG offices, where the KSG team "*answered and dealt with all and any issues, questions and queries raised by Baker Tilly, Mr Fisher and Mr Swain*."

53. In his witness statement for the Misrepresentation Proceedings Mr Swain denied this at § 23:

> "I was not present at the meetings on 16 December 2013 described by Mr Anthony King at paragraphs 116-119 of his witness statement (and paragraphs 37-40 of that of Mr James King). On the afternoon of that day I was at my son's school play. I recall that it finished at approximately 2:30pm and that I took my son home after school about 3pm. I believe, but am not entirely sure, that we went out for dinner later."

Mr Fisher agreed (§ 27 of his supplemental witness statement):

> "Anthony King is incorrect to say at paragraph 116 of his witness statement that the meeting which I and representatives of Baker Tilly attended at KSG's offices on Monday 16 December was attended by Mr Swain. He was not there. It would appear from his account of the meeting that Mr Anthony King did not understand the purpose of that meeting."

However, an email from the KSG receptionist on that day seemed to indicate that Mr Swain was indeed present at the meeting:

> "Hi, Peter Swain is in reception but he is still waiting on two others."

54. The Kings point out that this was one of the inconsistencies in the defendants' witnesses' evidence that could have been used by the Kings' legal team in cross-examination to attack their credibility, had the Misrepresentation Trial not been discontinued.

55. Also on 16 December 2013, a cashflow forecast for KSG was produced (the "***16 December Cashflow***"), which was the subject of cross-examination at the Misrepresentation Trial. I return to this later.

56. By 17 December 2013, KSG's financial position and relationship with GE was severely strained. On that day, having already lent monies over and above the contractually agreed formula of 85% to assist KSG's cashflow, GE refused to allow KSG to draw down £152,000 in essential payments to suppliers and refused to advance any further funds. Mr Tom Weedall of GE said during his oral evidence at the Misrepresentation Trial that

> "we weren't convinced that our overdrawn position would potentially come back into formula in short order. Therefore we kind of paused and asked the question to the relevant parties: just give us a very detailed update in terms of the timescales for that injection and that necessary injection of funds into the business.
>
> MR JUSTICE MARCUS SMITH: Who were you asking at this time? Who was your point of contact?

> A: […] My dealings were probably more often than not with Howard [Smith] from KPMG".

57. Primekings' due diligence process, as a prospective investor in KSG, included being updated as to GE's position. Mr Mattok telephoned Mr Swain to relay news of the events of 17 December mentioned above, himself describing KSG's account with GE as "*frozen*" (according to the Primekings' Defence in the Misrepresentation Proceedings and admitted at § 48 of the Kings' Reply). Mr Mattok asked Mr Swain to speak to GE and persuade them to release the funds in circumstances where an external investment into KSG from Primekings was imminent. Mr Swain succeeded in persuading them to allow the drawdown that day. At 20:07, Mr Swain updated Mr Fisher and the team at Teacher Stern on the events of the day:

> "Goodness me - does he [Anthony] not talk to his lawyers? It's us or admin no in between, if we pull out tomorrow trust me GE will appoint and quickly, (whole other plan B story around that with upside)
>
> Today Mike Mattok got me to talk to GE to release 152K cash on the back of 'we are proceeding' it was an overpayment so GE have now frozen the facility, no more cash the message.
>
> GE asked me about the Crown debt, I think I will have to give an undertaking we will clear areas [sic] or produce a written agreement from HMRC (which is unlikely to happen tomorrow) before they agree to support in writing - we cant sign deal until then, might be another long day or you might be in SA when completed." (emphasis added)

58. Again at 22:42:

> "Forgive me, Robin is completing the deal, I am supporting, (meeting GE tomorrow at 1pm) and trying to agree HMRC/creditor pressure. We have moved mountains in less than three weeks to get close to a deal.
>
> Robin and Barry have accommodated every unexpected 'change' and not used the worsening position to disadvantage the King family. (Moved £1.2m) quite the opposite have been very generous.
>
> The reality is GE froze the facility today, no more cash they await our completion to support Kings continuation, we are the only option to keep the business entity alive, if we do not complete tomorrow I believe GE will appoint [an administrator].
>
> I honestly do not think Anthony and his father understand the position or have conveyed this to [their] lawyer - no deals" (emphasis added)

59. Given that this was an internal email, there is little reason to suspect that Mr Swain was being dishonest when he described GE's position (as conveyed to him that day) as having 'frozen' the facility.

60. It seems that Anthony King himself also realised the urgency of KSG's financial situation at this stage. On 16 December 2013, Mr Mattok told Anthony King in an email that "*A prepack is the usual solution for companies in the financial situation of Kings*" then detailed the pros and cons of it.

61. On 17 December 2013, Hannah Graham of DWF emailed Anthony King, Mr Evans and Mr Mattok a draft "*Disclosure Letter*" that seems to have been prepared for the purposes of the Transaction. Each item in the letter indicated the relevant "*Warranty number*", with accompanying text setting out the disclosure against that warranty. It included the following:

> "12.6 The Co-operative Group is in breach of its payment terms by an average delay of 45 days. The Co-operative's average debtor payment is 60-75 days, whereas the contractual terms are 30 days of payment.
>
> 12.6.2 An arrears of revenue is an event of default under the GE facility. […]
>
> 12.7 The Company is in breach of its facilities with each of GE (see Document [ ]) and Barclays. Please see Disclosure [ ] above in respect of the Co-operative Group in respect of the service level agreement.
>
> 17.2.4 GE is allowing the Company to make essential payments only due to a breach of the GE facility.
>
> 17.5 The Company owes the Inland Revenue £2,000,000 (see the Creditors List at Document [ ]). The Company is in discussions with the Inland Revenue to pay this amount over a [six/ten] month period. UK Monitoring Limited is owed and seeking payment of the sum of £148,000 and the Inland Revenue are seeking a restraint on the Company's assets. UK Monitoring is currently obtaining a valuation of the Properties with a view to taking security over the assets of the Company in the next 5 days. The Company will speak to UK Monitoring to arrange payment once they have confirmation from the Inland Revenue as to whether the Inland Revenue is prepared to accept the Company's proposal for delayed payment.
>
> 19.1.8 The creditors of the Company and each of the Subsidiaries are not being paid within the applicable periods agreed with each relevant creditor - please see the Creditors' List at Document [ ].
>
> The Company has a credit facility with Gardiners of £2,000,000, which is repayable at £75,000 per week. Gardiners

> have extended this credit on the existing terms (please see Document [ ]) [Anthony - I don't believe we have had sight of this facility. Please can you send it over to me?]."

62. Other email exchanges on 17 December 2013 indicate Anthony King's state of awareness of KSG's financial situation of KSG at that stage:

i) At 14:50 Anthony King emailed Mr Weedall at GE:

> "Just picked up your message and tried to call you back.
>
> Peter and Alison are coming to meet with you tomorrow at 2.00pm to discuss how we move forward post completion. I understand from your message that you are looking to apply further reserves and not to allow the full amount of draw down today. I am not best placed to discuss this with you as Peter and Mike have been dealing with the cash flow and I have had no sight of it at all." (emphasis added)

ii) Mr Weedall replied at 15:25:

> "I have spoken with Peter and confirmed that we will make todays payment request of £152K to ensure business stability remains and is an ongoing demonstration of GE's support.
>
> We have discussed that the level of advance above our 85% formula is something that must be addressed immediately post completion and will require this to be brought back into formula promptly.
>
> Given the level of over advance we have approved today consideration of any subsequent payment request tomorrow will be required as to how this will be met."

63. At 17:06 on 17 December 2013, Anthony King then emailed his lawyers, Mr Wilson and David Armitage of DWF, in response to the lawyers' suggestion that he was being set an artificial deadline by Mr Fisher, driven by Mr Fisher's holiday:

> "Lester we are in this position because my lawyers have had other commitments and have been unable to deal with this.
>
> We should have been on with this all day today lining up where the documents don't work and the conference call should have been first thing this morning as requested by Clare from their side not at 7.30 tonight to then expect them to work through the night.
>
> If this deal doesn't happen tomorrow GE will cease to advance us anymore monies and my business will be placed into administration. This has nothing to do with Robins holiday it is being forced by GE.

> As a client I feel incredibly let down by all these years of working together, when at the time I really need your support, even I can't get any communication of what's going on let alone their side.
>
> There are 600 jobs on the line here and the livelihoods of a lot of people." (emphasis added)

64. However, in the Misrepresentation Proceedings and during the present proceedings Anthony King explained that in this email he was merely trying to put pressure on his lawyers to get the deal done. He said he did not truly believe that "*GE will cease to advance us anymore monies*". There was support for that view in his email at 16:20 the same day to David Armitage saying:

> "If enough resource was not going to be available at DWF to complete this deal as agreed, then this should have been pointed out much earlier than now."

65. Similarly, Mr Wilson said in cross-examination at the Misrepresentation Trial:

> "Q: Did you take that to be a genuine e-mail when you received it?
>
> A. No, I didn't. I thought it was Anthony trying to get my attention because I did let him down very badly at the meeting on the 12th and I thought that was Anthony trying to get my attention to make sure I was doing the job. I didn't take that as a genuine threat at all.
>
> Q. Not a threat, but a perception of his -- his genuine perception of what the situation was.
>
> A. No, I didn't"

66. Anthony King's email to DWF was disclosed very late in the Misrepresentation Proceedings. On Day 4 of the Misrepresentation Trial Anthony King was asked about this:

> "Q: I want to ask you a few questions about this document, Mr King. This was disclosed fairly late in the day, wasn't it?
>
> A. Yes.
>
> Q. How did it come about that this document was not disclosed until very recently?
>
> A. I don't know.
>
> Q. You don't know?
>
> A. No."

67. It seems however that:

i) Anthony King realised the document (and its significance) on 21 March 2017 when he forwarded it to Ms Connor and Mr Blakey saying "*I hope they don't have this*."

ii) Mr Blakey then replied: "Anthony. I've not seen this email exchange before. It is relevant and has to be disclosed. It is not at all helpful. […] We need to explain this."

iii) Mr Hall Taylor also said: "We need to determine quickly: -whether it has been disclosed -if not, why it was not disclosed (where is it and what searches of AK's, Lester's and David's emails were done and why it did not show up/fall to be disclosed then) -whether it falls to be disclosed (looking at any question of privilege, which I doubt, or which has probably been waived) -whether there is a category of docs that has been missed, or whether there are other docs (identification of which may be triggered by this) which now fall to be disclosed - and if so what/where they are We also need to consider and advise on its likely impact - which I have been giving some thought to."

iv) Anthony King's explanation was: "This was me getting stressed with Lester and David as I felt they weren't giving the attention to the deal it needed to get it over the line. I had no basis for saying this as GE and no one else said this to us at any time, it was a comment under pressure to try and get my lawyers attention and focus."

68. Shortly after his email of 17:06 on 17 December 2013, Anthony King spoke to Mr Armitage, who wrote that both the Kings and DWF would *"work on the basis that you will be given no extensions of time by GE and you have no option now but to do a deal with Fisher/Kirsch* [sic]*, on whatever terms are available"*. In response, Anthony King said:

> "Given the pressure being applied from GE which they are acutely aware of, these people are still offering a very favourable deal with very limited due diligence. They have ignored external advice to do a 'pre pack' and have chosen a solvent route with money out to the family. We have to be seen to be entering into the same spirit of the deal and working just as hard to meet GE's deadline as [they] are."

69. Also in the afternoon of 17 December, Mr Fisher told Mr Stiefel that Mr Cole of GE was "*happy with deal/thinks lawyers also comfortable…Letter of approval to be issued tomorrow*"; to which Mr Stiefel replied "*Good result. One less hassle for next few weeks*." Though the Kings suggest this meant that GE had agreed to provide support for the ensuing weeks, I read it as referring only to approval of the change of control that the Primekings deal would involve. Either way, it was clearly contingent on the Primekings deal occurring.

(4) Completion Meeting

70. Completion of the Transaction was scheduled for 18 December 2013 with a meeting between the Kings and Primekings and their respective solicitors to take place in London (the "***Completion Meeting***").

71. On that day, prior to the Completion Meeting, KSG (via KPMG) made a drawdown request at 11:56 for a further £208,000. This was refused by an email timed at 12:34 from Mr Weedall which included the following:

> "As was advised to the company yesterday given the level of over advance above our 85% formula that approving yesterday's payment created, consideration of any additional payment request would need their consideration as to how this would be met.
>
> We have been pushing for confirmation for the last few days as to when post completion the cash injection would be available to the company.
>
> As we understand the transaction is set to complete today and would expect the cash to be deposited immediately thereafter and available for drawdown.
>
> Until we understand the timing of such cash injection, availability of such cash for the company to utilise and how promptly the GE facility is brought back within formula I am not in a position to approve another payment outside of our lending criteria.
>
> If we can obtain acceptable understanding prior to our payment cut off time today then will seek to approve the drawdown request." (emphasis added)

72. When cross-examined about this e-mail, Mr Weedall agreed with Primekings' leading counsel, Paul Downes KC, that by this time GE "*had reached the end of the road*". Mr Mattok forwarded the email to Mr Swain on 18 December 2013 at 12:48.

73. On that day, Mr Swain also attended a meeting with GE in Manchester with Alison Lord, a turnaround consultant advising Primekings. Mr Weedall and Andy Cole attended that meeting for GE ("***the GE Meeting***"). What GE told Mr Swain during this meeting was a crucial issue during the Misrepresentation Proceedings.

74. At the same time, the Completion Meeting was taking place in London. The attendees for that meeting were Mr Fisher, Primekings' lawyers from Teacher Stern LLP (Ms Rollo and Mr Katz), Anthony and James King and the Kings' lawyers from DWF, Mr Wilson and David Armitage. Mr Stiefel did not attend as he was on holiday in Sri Lanka but was contactable by phone.

75. Halfway through the meeting, at around 15:50, Mr Fisher stepped outside to take a call from Mr Swain who updated him on the GE Meeting he had just attended along with Ms Lord. Mr Fisher then came back into the room and put Mr Swain on

speakerphone so that the entire room could hear him. What Mr Swain told the room was heavily disputed and was a key issue in the Misrepresentation Proceedings.

76. The Kings alleged that Mr Swain – with the knowledge and connivance of Mr Fisher and while travelling in a car with Ms Lord – told deliberate lies about what had happened at the GE Meeting. In particular, they alleged at §28 of the Particulars of Claim in the Misrepresentation Proceedings ("***MP POC***") that Mr Swain reported that GE had told him during the GE Meeting that:

i) all KSG's accounts were frozen;

ii) GE had lost complete faith in the management of KSG and the Kings group of companies (and on that basis GE had excluded Mr Evans from participation in the meeting and would not let him in the building); and

iii) GE was no longer prepared to support KSG and the Kings group of companies and there would be no further funding.

(together, the "***Swain Representations***")

77. The Kings' case, in their claim against Primekings, was that Mr Swain's reference to 'frozen' and 'no further funding' were understood in a permanent sense:

> "Mr Swain stated in absolute terms that all accounts were frozen (implying that to be permanent)…and there would be no further funding (again implying that to be permanent and immovable)." (Further Information dated 22 April 2016)

78. By contrast, the defendants to the Misrepresentation Proceedings contended at §28 of their Defence ("***MP Defence***") that the representations made by Mr Swain were as quoted below:

> "As to paragraph 28 of the Particulars of Claim, it is admitted that Mr Swain spoke on the telephone with Mr Fisher at approximately 15:50 and related what he had been told by GE as to its position at the meeting he and Ms Lord had attended with them. Whilst the exact words used in the Statements (as defined) are not admitted the gist of them is admitted save that:
>
> a. He stated that GE had told him that KSG's account was frozen and would remain frozen unless a deal was done.
>
> b. He did not say the words in parentheses in paragraph 28.2 of the Particulars of Claim or any words to similar effect, and probably used the words "Kings" as opposed to "the management of KSG and the Kings".
>
> c. He stated that GE had told him that there would be no further funding support unless a deal was done.
>
> For the avoidance of doubt Mr Swain's statements were true and in all material respects represented the position that GE had

> taken with them at the meeting. Save as aforesaid paragraph 28 is denied."
>
> (emphasis added)

79. It is plain, therefore, that a key issue to be determined at the Misrepresentation Trial was whether the words "*unless a deal was done*" were used during the Completion Meeting.

80. The only known contemporaneous notes of the meeting, made by Ms Rollo, included this entry:

> "GE frozen – unless py tax + do deal"

81. One further document dating from the afternoon of 18 December 2013, to which the Kings draw attention, is a brief manuscript note made by KPMG, apparently of a conversation with Mr Weedall at 15:15 (shortly before the Swain Representations were allegedly made), stating:

> "HMRC - Clough - written demand
>
> - Want full amount £2. 2m
>
> - Failed to adhere previous plan
>
> - Writing - Formal proceedings against
>
> - Anthony & Anthony's father - not moving on their money £2m fath[er]
>
> No deal done today
>
> - Meet in London today - this evening to agree way forward
>
> - They talking about total cost of deal being £10m"

The reference to Clough appears to have been to a letter on behalf of HMRC indicating that it would write to the KSG companies warning that it may embark upon enforcement action, that the matter would be referred to Enforcement and Insolvency Services, and referring liberally to the possibility of a winding up petition.

82. The Kings suggest that the words *"no deal done today - meet in London today - this evening to agree way forward"* showed that Mr Swain already knew (by 3.15pm) that the deal would not complete that day, before the call to Mr Fisher, which was at 4pm. That, the Kings say, means that "*the whole situation had been set up - he knew what would happen before it happened*", and also that Mr Fisher was lying in his witness statement where he said it was a telephone conversation he had with Mr Cole of GE at 4.29pm that "*was really the straw that broke the camel's back*".

83. Mr Swain and Mr Fisher could no doubt have been cross-examined about those matters had the Misrepresentation Trial continued, but they do not strike me as in any way compelling or conclusive. Even assuming the KPMG note to be accurate and,

further, to record something GE had learned from Mr Swain specifically, it seems perfectly possible that, from Mr Swain's perspective, the matters he had just learned from GE meant that he could not foresee any deal being concluded that day, or simply that no deal had in fact been done that day. Equally, Mr Fisher may have felt that, coming on top of everything else (including what Mr Swain had reported from his meeting with GE), the conversation with Mr Cole a short time later clinched matters from his point of view.

84. An email from Mr Wilson on 18 December at 16:41 (after the alleged representations were made) stated: "*Time just ran out. We have no bargaining position and just need to agree to it*".

85. Following the Completion Meeting, it is common ground that new and somewhat less advantageous terms of investment were agreed to by the Kings (the "***Final Deal***"). Contracts were exchanged on the morning of 19 December and the Transaction was completed on 20 December 2013. Shortly after exchange, Anthony King emailed GE at 09:19 on 19 December thanking them for *"your support during this testing and trying period"*. Also that morning, Mr Wilson sent an email internally within DWF which included this:

> "The King family were absolutely hoodwinked but thanks to some master strokes from King Snr and tenacity from Anthony we averted disaster and got him a far better deal than it might have been. The alternative today of administration doesn't bear thinking about for the King family…"

Asked about this at the trial before me, Mr Wilson said he did not suspect any foul play: he was simply referring to the way the terms of the transaction were changed at the last-minute, and that "ambushed" might have been a better word. I do not consider the email significant. Mr Wilson may or may not have had a feeling, in the immediate aftermath of the Transaction, that the Kings had in fact been 'hoodwinked' in some way. However, it provides no real insight into Mr Wilson's recollection of the facts when he later provided a witness statement or gave evidence at trial.

(5) Differences between the Initial and Final Deal

86. The structure of the Final Deal, as reflected in finalised documentation dated 20 December 2013, was as follows:

i) Primekings acquired 76% of the shareholding of KSG (thus giving it control) by acquiring James and Susan King's 40% shareholding for £2m and subscribing for additional shares for £1m;

ii) James and Susan King's shares were purchased on the following terms:

a) James and Susan King would be paid an immediate cash payment of £750,000, but £500,000 of that would be used immediately to repay the directors' loans, so that only a net £250,000 was payable immediately; and

b) James and Susan King would be paid £1.25 million at a time when KSG was in a financial position to lend money to Primekings to make the payment;

iii) James and Susan King would also receive the Deferred Consideration mentioned above, via the same B Share Mechanism as in the original draft documentation;

iv) if KSG hit EBITDA targets of £3m in the years ending March 2015, 2016 and 2017, Primekings' shareholding would be reduced from 76% to 60%;

v) if the EBTIDA target of £3m was not met for the year ending March 2015, then Primekings would be entitled to acquire the Trust's shares in KSG for no further consideration; and

vi) Primekings would arrange for a £3m working capital facility to be provided by KIF via a loan agreement between KSG and KIF.

The contemporary documents suggest that element (ii)(a) above was probably agreed on or about 13 December 2013: a Second Draft SPA circulated on that date provided a sellers' indemnity in respect of the loans, and in the Second Draft Articles of Association (Article 31.1.3), circulated on the same date, the maximum redemption amount for each B Share was reduced from £1 million to £830,666, which over three years would make a reduction of £500,000.

87. Accordingly the major ways in which the deal changed were that Primekings acquired a controlling interest of 76% in KSG (although this would reduce to 60% if KSG performed well) and James and Susan King received far less on the day of completion itself (though were still due to be paid £2 million for the value of their shareholding).

88. The principle of paying the Deferred Consideration via the B Share Mechanism did not change. The only possible change from the original documents was the identity of the recipient: from the Trust (Initial Deal) to James and Susan King (Final Deal). Ms Rollo's message of 11 December 2013 had envisaged the B shares being issued to the Trust (as had a handwritten diagram made on the Primekings side on or before 9 December). Later, an email from Mr Armitage of DWF to Ms Rollo at 19:24 on 18 December 2013 asked "*Has Robin briefed you on the new deal re the £3m deferred?*", seemingly referring to a change agreed between the lay parties. It may be that the change about who would receive the B shares was in fact agreed between the lay parties shortly after the initial documents were circulated, since an email of 8 December 2013 has the words *"to be pd to mother and father"* added after reference to the Deferred Consideration. However, the point does not matter for present purposes.

(6) Wilson/Kings conversation early on 19 December 2013

89. It is common ground between the parties that a conversation took place at around 3am on 19 December 2013 regarding the B Share Mechanism. However, there is a significant difference about the gist of the conversation.

90. Mr Wilson's evidence was set out in his witness statement for the present proceedings as follows:

> "Changes came again at about 3am in the morning on 19 December. I believe Teacher Stem explained the legal mechanics to David and I verbally. Following us all getting clear on how the deal had changed again I explained it to Anthony and James, who were in a different meeting room. I know that the Kings claim that at this time I represented to the Kings that one of the changes was that the deferred consideration would be paid by KSG, not by Primekings. This is not the case, I recall a conversation I had with Anthony and James at around that time when I went through the revised transaction and explained the mechanics of the deal as a whole. As part of that conversation, I recall telling them about the B Shares being redeemed. I remember Anthony saying "Eh?" to which I responded by saying Anthony, we've talked about this, they've always been there', or something like that. He did not object, ask any further questions about it or raise it again. I just assumed he had made a mistake or forgotten. My memory of this conversation was pricked on the morning of 7 May 2017 when I uncovered the mistake in my statement. I looked back and thought how could Anthony have possibly thought this?" (emphasis added)

91. Anthony King's account of the conversation has varied markedly over time. When first asked about the redeemable shares at the Misrepresentation Trial, on Day 2, he did not suggest that the mechanism had changed following the Swain Representations, or that Mr Wilson had told him that that was the case:

> "Q: And the idea of doing that deferred consideration by redeemable B shares came from DWF, didn't it?
>
> A: I believe so."

92. Asked about it on Day 4 of the Misrepresentation Trial, he said *"the first time I believe my father and I become aware that it's going to be coming out of the business is about 3.00 in the morning"*; but he made no suggestion that Mr Wilson had represented that that was a change caused by the Swain Representations. After he had heard Mr Wilson's oral evidence in the Misrepresentation Trial, Anthony King expressed anger on the basis that (as Mr Hall Taylor recollected it) "*Anthony's position seemed to be that they had never been advised about that provision*". Equally, James King in his oral evidence said he was not told that the Deferred Consideration would be payable by KSG; he said he expressed surprise upon learning that, but did not say when he learned it and did not suggest that Mr Wilson represented that it had been a change resulting from the Swain Representations.

93. On 26 July 2017 (two and a half months after discontinuance) Anthony King made a complaint to DWF. His initial complaint email was followed by an email dated 27 July 2017, in which he said:

> "Lester then replied that he had in fact explained [the B Share Mechanism] to my father and I prior to the 18th and he hadn't realised we didn't understand the mechanism. I'm afraid I have to suggest that Lester lied on the stand to cover his own failings, you will find no record of any meetings with my father and I between the 12th and 18th of December, or telephone conversations, in fact you will find records of chasing and requesting updates and information and frustration at the lack of engagement. I believe Lester had not even realised that it was in the draft documents on the 12th until he was shown the evidence on the stand, as he would have pointed it out right at the beginning of this case that it was not an actual change on the night and couldn't form part of our pleadings. His lack of attention to detail and advice on the original deal meant he simply missed it and failed to advi[s]e us a family…" (emphasis added).

94. Similarly, a draft email from James King to Primekings dated 8 August 2017, when James King was negotiating costs with Primekings, said:

> "…during the trial we learned as a family that on the twelfth of December 2013 you instructed your Lawyers to change the (A) shares to (B) something our Lawyers missed and was never mentioned to Anthony or myself at any of our meetings with you both…"

95. Like Anthony King's email of 27 July 2017, this message was suggesting that Mr Wilson had failed to advise the Kings at all about the B Share Mechanism. That is inconsistent with the Kings' present case that the B Share Mechanism was discussed with both Anthony and James King at 3am on 19 December 2013, but was falsely represented by Mr Wilson as a change caused by the Swain Representations:-

> "At around 3am on 19th December 2013 I can recall Mr Wilson taking my father and I through the new revised transactional documents. For the first time Mr Wilson talked about the earn out/deferred payment, which we always understood was coming from PKH. I believe at this point we pointed out to Mr Wilson the obvious error about the Trust and this was then amended to be paid to my parents. Mr Wilson for the first time explained the earn out (B Shares) and that the Parent Company KSGL would need to pay the money to my parents which was not how we understood it. I can clearly recall my father pushing back on that and being very unhappy, saying they would never get paid, and Lester said something like "there is no point in pushing back, they've changed it, and we don't have any bargaining power now", which was a blatant lie, in breach of his fiduciary duties. Unbeknown to us at the time, KSGL paying the earn out had in fact been in the draft documents since the 11 December but had never been shown or explained to us. I recall Mr Wilson indicating that he had had to draft how the B Shares would work, because Teacher Stern

> didn't know what they were doing." (§ 23 Anthony King's witness statement) (emphasis added)

96. That account of events differs from the versions set out by Anthony King and James King in their 2017 communications quoted above. It is also inconsistent with the contemporary documents discussed earlier, which show that the B Share Mechanism, including the fact that it involved redeemable shares to be issued by KSG, had been discussed with Anthony King on more than one occasion. That in turn means there was no reason for Mr Wilson to suggest to the Kings that the mechanism had been changed in a way that, following the Swain Representation, the Kings had no choice but to accept.

97. I conclude, in the light of the evidence as a whole (including the oral evidence given before me), that Mr Wilson's account is correct. He did advise Anthony King, at least, about the B Share Mechanism prior to 19 December; he did not make the misrepresentation alleged; and he did not later lie when giving his oral evidence in the Misrepresentation Trial. I accordingly reject the allegation to that effect in Particulars of Claim § 14.

(7) Comfort Letter from GE

98. A finalised letter dated 19 December 2013 (the "***Comfort Letter***") from GE to KSL stated that:

    i) *"We confirm that in the event that the Transaction completes today we will waive the Event of Default under the Agreement that arises as a result of the change of ownership, constitution, composition or management of any Obligor. This is on the strict condition that immediately following completion of the Transaction the loan given by KI Finance SARL will be available for utilisation by the Company."* (I shall refer to this as the "**CP Element**")

    ii) *"We confirm that if this condition is met the facility granted by GE pursuant to the Agreement will remain in place for a further 90 days from the date of this letter and at the current level."* (I shall refer to this as the "**Comfort Element**")

99. The Kings say that this Comfort Letter was deliberately withheld from them by Primekings and their lawyers Teacher Stern LLP in a dishonest attempt to cover up the falsity of the Swain Misrepresentations. The Kings relied on three documents (which were in the original trial bundle):

    i) An email showing Mr Katz had received the Comfort Letter at 11:04 on 19 December 2013.

    ii) An email showing that Mr Stiefel and Mr Fisher had also received the Comfort Letter at 12:45 on 19 December 2013.

    iii) Crucially (the Kings say), an email in which Mr Katz at 13:38 on 20 December 2013 wrote to Mr Armitage of DWF (cc Mr Wilson) which (it is argued) constitutes a waiver of the need to receive the Comfort Letter ("***the Waiver***").

100. The Comfort Letter was subsequently released to the Kings on 15 January 2014

101. I do not accept the Kings' characterisation of these events. Mr Katz's email concerned a waiver of the need for a letter of non-crystallisation ("*our clients are happy to waive the completion deliverables referred to below*"). He was referring to clause, of a standard type, in the proposed SPA providing that on completion the Sellers (the Kings) were to provide the Buyers (Primekings) with letters from the registered chargeholders of KSG that any (floating) charge over the assets of the company has not and will not be crystallised. This was in effect to assure the Buyer that they will be free to deal with the company's assets. The relevant clauses in the SPA were:

    i) Clause 4.2.1(a): "the Sellers shall: deliver or cause to be delivered to the Buyer the documents and evidence set out in Part 1 of Schedule 3;"

    ii) Schedule 3, 1.19: "At Completion, the Sellers shall deliver or cause to be delivered to the Buyer the following: […] all charges, mortgages, debentures and guarantees to which the Company or any of the Subsidiaries is a party and, in relation to each such instrument and any covenants connected with it: [letters of non-crystallisation]."

102. In anticipation of the Transaction, on 16 December 2013 Dan Russell of Teacher Stern asked Mr Wilson:

> "From our review of the finance documents received so far, I expect that consents will be required from GE, Santander and Barclays.
>
> How are you getting on with obtaining these and also letters of non-crystallisation from all charge holders?"

103. The next day Chris Ramage from DWF updated Anthony King and Mr Mattok on Teacher Stern's requirements:

> "Anthony/Mike, I have been speaking with the contact at the investor's lawyers as regards the investor's security requirements for its loan to KSG which I understand will be a debenture from KSG and a share charge from KSG over the shares in UK Monitoring. Investor is currently requiring:
>
> 1. Consent to change of control form each of the existing funders (Barclays, GE and Santander)
>
> 2. Confirmation that existing security has not crystallised
>
> 3. Consent to investor security/intercreditor with each relevant funder
>
> 4. Release of UK Monitoring shares from KSG debenture security"

104. On the morning of 19 December Mr Katz, Ms Rollo and Mr Weedall received the signed Comfort Letter from Ben Slack, a Managing Associate at Addleshaw Goddard LLP acting for GE, which Mr Weedall forwarded to Mr Fisher shortly afterwards:

> "Dov,
>
> Signed letter attached.
>
> The letter is released to you once we receive:
>
> - a signed copy of the comfort letter we agreed last night
>
> - a signed and dated copy of the loan agreement between 'KiFin' and Kings Solutions Group Limited
>
> - confirmation that the share sale has completed." (emphasis added)

105. The letters of non-crystallisation were not obtained prior to the Completion Meeting (seemingly due to the fault of Primekings as, according to an email from Chris Ramage from DWF dated 18 December 2013, "*it is really the Investor side that the funders want to hear from*"). As a result, on 20 December 2013 Mr Armitage of DWF emailed Mr Katz saying:

> "If we are to complete now, then please confirm in writing to me on behalf of the Buyer that you are waiving as Completion deliverables […] the 'letters of non-c[]rystallisation' in Sched 3 Part 1 para 1.15". (emphasis added)

and later at 13.32:

> "Dov: When can we expect the Waiver of the particular Completion Deliverables itemised for this purpose on my earlier email?" (emphasis added

106. Mr Katz replied at 13.38 on 20 December 2013:

> "On the basis that the undated pdf version of an apparently signed service agreement for Steve Evans which you sent to me by email at 12:23 today has been shredded (as confirmed by Mr Evans) and is therefore not legally binding, then our clients are happy to waive the completion deliverables referred to below." [referring to Mr Armitage's email of 13:32] (emphasis added)

107. The Kings argued that because the CP Element (which was the letter of non-crystallisation from GE) and the Comfort Element came in the same letter, I should treat the waiving of the former as waiving the latter. However, that conflates the two elements and simply does not follow. I do not accept that Mr Katz's waiver should be treated as a waiver of the Comfort Element of the Comfort Letter, the provision of which was not a completion deliverable for the Kings at all. The Kings also seemed to make the unpleaded suggestion, in submissions, that waiver of the letter of non-crystallisation was in some way an implied representation to the Kings that no comfort letter existed. There is, however, no tenable basis for any such implication.

108. In any event, as noted above the Comfort Letter was only released to Teacher Stern and Primekings when the deal was completed. It is difficult therefore to see how it

could sensibly be said to have been 'withheld' from the Kings, or how doing so could have caused the Kings to enter into a deal they would not otherwise have done. The comfort provided was wholly conditional on the deal being done. Finally, the fact that it was provided to the Kings a few weeks later, on 15 January 2014, apparently voluntarily, is itself rather hard to square with the thesis that it had been fraudulently withheld from the Kings at the time of the Transaction.

(8) Post-Completion events

109. Anthony King's oral evidence during the Misrepresentation Trial was that he first discovered "*that GE did not say* [to Mr Swain that] *the funding had been pulled*" when he attended KSG's offices on 19 December 2013 to find the GE facility working as normal (although in his first witness statement in the Misrepresentation Proceedings, he said he discovered that he had been lied to only when he spoke to Mr Weedall of GE on 20 December 2013).

110. An email from Anthony King to Mr Swain on 20 December at 15:02 may be relevant to the facet of the loss of faith Swain Representation (referred to at paragraph 76.(ii) above) concerned with Mr Evans having been excluded by GE from the GE meeting and building ("the ***Evans Excluded Representation***"):

> "Can we please ensure as fellow directors that we communicate and act as a unified board and management team. I appreciate that you have taken the initiative to speak to HMRC on the companies behalf and arrange a meeting with, but let's do these things together so we all understand the position. As MD I would like to attend with you on Monday to meet GE, having just returned Tom [Weedall]'s phone call he confirmed that no request was made by GE for there not to be a Kings representative at the meeting on Wednesday and he has no issue with any existing person of the management team being involved. <u>The decision for Steve not to be at the meeting came from yourselves</u>." (emphasis added)

111. However, that same email also recorded Anthony King's belief that the representations about GE's position during the Completion Meeting were conditional and not entirely certain:

> "Tom has also clarified that he has put in writing already to yourselves how the facility will work going forward with weekly reserves for advance billing and that they have no intention of not honouring the 85% agreed advance rate on other fundable invoices. <u>So the perceived uncertainly presented on Wednesday of them potentially pulling the account is not there</u>." (emphasis added)

112. At 15:08 on 20 December 2013, Anthony King emailed Mr Armitage, Gaynor Kehoe (KSL's Company Secretary) and Mr Katz:

> "Yes GE have been informed of the completion I have just come off the phone with Tom who had been informed 45

> minutes ago. Tom informed me that GE have already made their position going forward clear to the investor in writing and that the account was only frozen until additional funds invoices were uploaded or monies received to bring down the reserves. Therefore their position to release the account was not dependent on this deal, however if the deal hadn't happened they would have had to consider their options." (emphasis added)

113. This is a contemporaneous record of Anthony King's, implying that he had previously understood that GE's willingness to 'release' the facility was *"dependent on this deal"*. As such, it appears more consistent with the Primekings version of the Swain Representations than the absolute or permanent version that the King were advancing at the Misrepresentation Trial. It is also consistent with the 15:02 email quoted above referring to Primekings having spoken of GE "*potentially pulling*" the account.

114. At 18:21 on 20 December James King sent to Anthony King, presumably for his comments, a draft of an email intended to go to Mr Stiefel to express frustration about the events of 18/19 December:

> "Please allow me to share with you the beginnings of our future partnership together which started on Wednesday the 18th of December […]
>
> Then during the meeting Robin receives an e-mail from Peter who had arranged with our Director the night before to go together and meet with GE our Finance Company in Manchester, Peter reported to Robin that they were considering withdrawing their funding, making the total investment required 9 million pounds, as against the possible original 5 million, [Robin] went into a panic, Anthony then telephoned our Director Mr Steve Evans who had arranged the meeting with GE updating them on the way forward, only to be told that our Director Mr Evans was contacted five minutes before arriving at GE that he wasn't wanted at the meeting, and that only Peter was to represent Kings and our future funders […]
>
> we tried to get something to eat, Anthony and myself had no appetite, but as for Robin he had a ferocious appetite which was wonderful, […]
>
> in closing I can't see any way forward, for our partnership, and maybe there is a Honourable way for us to part, in closing can I sincerely thank you for your part in bringing us together, but we cannot ever work with Peter [Swain] and Robin [Fisher] in the future you and Natie [Kirsh], we would love to."

115. However, on or around 23 December 2013 (by which time KSG had already received a cash injection of £1.5m from Primekings), Anthony King dissuaded his father from sending an email in those terms. Instead, the email that was finally sent to Mr Stiefel on 4 January 2014 concluded:

> "In closing Anthony doesn't know that I have written to you, and despite everything that has taken place, I just wanted to say that I am so very grateful and appreciate all what the Kirsh Family has done for Kings, and that I am personally deeply indebted to you, words will never be able to express my sincere thanks, we look forward to working together with you in the future, on behalf of my wife Susan and myself can we wish you all a happy healthy and joyful new year,"

116. On 29 January 2014, during a visit by the Primekings investors to KSG, Anthony King sought to persuade them to adjust the shareholding ratio to 60/40 (i.e. in accordance with the terms of the Initial Deal), although this did not happen at that point.

117. In an email sent to Mr Stiefel on 30 January 2014, Anthony King said "[f]rom the bottom of my heart I am looking forward to this next phase of the journey".

118. However, on 8 April 2014 Anthony King made his dissatisfaction with the events of 18/19 December 2013 clear in an email to Mr Stiefel and Mr Fisher:

> "the revised deal that was done under duress on the night of December 18th […] Gentleman you remarked that mistakes were made on that night and promised that things would be reverted to the original deal […] Gents can I now please ask you to look at re-instating our original deal and restoring back to my family what should be theirs."

119. This email may have been sparked by Primekings' delay in paying James and Susan King and, on 16 April 2014, Stiefel and Fisher were discussing "*repay*[ing] *a further £250k to the parents*" to "*take a little resentment away*".

120. Anthony King's email of 8 April 2014 went on to say:

> "My father and I do not believe you are the sort of men to hijack our family business and what happened at Christmas was through lack of knowledge and pressure, lets please put that behind us and now that the business is on a solid foundation lets please place the trust and honour in the same place."

121. His request to reinstate the original deal was rejected by Mr Stiefel by an email of 16 April 2014:

> "as we discussed, the agreements as they stand presently are (for better or worse) all we have…we respect signed contracts and I am sure you do likewise"

122. Anthony King's reply included this:

> "there is not a doubt in my mind that with the Kirsh family as our partners, we can take Kings further than my vision or dreams would have ever taken it and so I promise that the

> events of the 18th of December will never be mentioned again" (emphasis added).

123. Anthony King then continued to press Primekings for other advantages pursuant to the Transaction. On 24 April 2014, Mr Fisher confirmed that the payment schedule would be brought forward and that James and Susan King would receive £600,000 shortly thereafter.

124. On 3 July 2014, Primekings agreed to amend the Final Deal, revising the shareholding from 75% Primekings/25% Kings to 60% Primekings/40% Kings (the "***Variation Agreement***", executed on 20 November 2014). The revised shareholding reflected what was in the Initial Deal. The Kings say this effectively represented a reinstatement of the Initial Deal, and showed that they did not affirm the Final Deal. However, the Variation Agreement also noted at clause 5.1:

> "The provisions of the Agreement [i.e. the Kings-Primekings SPA] shall, save as amended by this variation agreement, continue in full force and effect."

125. In an email dated 24 October 2014, Anthony King expressed gratitude to Mr Stiefel and Mr Fisher for the Variation Agreement in the following terms:

> "For returning back to us the shares, is like I said last night, something that reaches far beyond just me and my family, but many others watching on like, lawyers, staff, suppliers and customers who look at this as a very positive move, but even more so it sends a message of who you are as people and how you do business and treat your partners, so a huge thank you for what you have done.
>
> This Christmas will be very different to last Christmas, its amazing how much can change in a year. You know I will continue to build and drive Kings forward to £100M and beyond, its an amazing journey with amazing partners."

126. The Kings say that they finally realised that they had been defrauded by Primekings during a phone call of 2 June 2015 with GE, where GE confirmed to Anthony King that it was not true that GE had said they had lost faith or pulled the funding, or that their support was conditional on a deal being done with Primekings. The note of the call (possibly authored by Mr Blakey) reads:

> "set up! Steve Evans – we were told he wasn't coming! GE lost faith – lie did not say! […] Never funding been pulled. No way. If no deal, continue process to find another funder. Travelling to London to complete the deal".

127. Email exchanges between Anthony and Mr Wilson later that day are in a similar vein:

> "Lester: […] Desperately sorry that you've been exposed to these people and what they've done. Obviously very helpful for

> our position but the seemingly despicable, scheming, calculated acts of these people has me seething. […]
>
> Anthony: […] Can't believe just how much they planned this"

This, Anthony King says, encouraged the Kings to issue their claim form against Primekings, albeit they had already instructed DWF in February 2015 to pursue the litigation.

128. The Barristers suggested that the various correspondence and Variation Agreement referred to above showed that the Kings affirmed the Transaction, in circumstances when they believed a wrong had been committed against them, and that the Kings had lost any right to rescission at the latest on 8 April 2014. They further suggested that the true reason Anthony King commenced litigation only in 2015 was because of his dissatisfaction with Mr Stiefel and Mr Fisher's proposal that KSG merge with other companies known as Defence and Cougar. On 18 December 2014 Mr Stiefel emailed Mr King:

> "I have had lengthy discussions with Robin regarding the meeting at Defence and the apparent negative approach adopted by both you and Mark. We are your partners and have always carefully considered the impact of what we propose on all stakeholders. Would we really propose a transaction that was detrimental to our partners and stakeholders? You clearly think so.
>
> To say I am deeply disappointed would be a gross understatement.
>
> This is the second time that we tried and failed and I guess you think that the combined Grouping is not in your interest. The upshot is that you now have a competitor with backing of your controlling shareholder. So unnecessary. So short sighted."

129. Anthony King replied:

> "Good Afternoon
>
> I would like to wish my partners a happy anniversary on the day of our coming together a year ago today.
>
> Sir I emailed you before going to this meeting asking for your thoughts and guidance as when I met with you last Tuesday in London you were still giving this potential merger further consideration.
>
> 1 never heard back from you.
>
> It seems one year later on some things still haven't changed and the accusations towards Mark and myself for being a little cautious and unsure of what was being put in front of us are just shocking,

> If you would like to have a sensible conversation around this then I am more than happy to do so, sir at some point you will learn to trust me."

I consider affirmation in §§ 537. ff below.

(9) 'Consciousness of guilt' evidence

130. The Kings say that certain communications following the issue of the claim form show that the Primekings defendants realised the Kings had a good claim:

i) On 18 August 2015, Mr Swain said in an email to Alison Lord:

> "If someone has lied to gain advantage AK, does it not seem reasonable to go back to the original plan?".

ii) On 19 May 2016, a report indicates that Mr Fisher was "*talking about appealing any decision* (before the case was even heard) *and that this will drag on for another 2 or 3 years with them* [Primekings] *in control*". The claimants say this shows that Mr Fisher knew he would lose the case but intended to use his deep pockets to drag things out and stay 'in control'.

131. I consider the first of these emails in a little more detail in § 262. below. Neither of these emails provided any real assistance to the Kings' case.

(D) THE MISREPRESENTATION PROCEEDINGS

132. In February 2015 the Kings instructed DWF to pursue their claim against Primekings.

133. The Kings' litigation team ultimately included Mr Blakey and Ms Connor of DWF (both senior associates), Amy Franks and Sophie Lipton (both DWF trainees), Alex Hall Taylor (a barrister Called in 1996) and Peter Morcos (a barrister Called in 2012). Mr Blakey, although not an equity partner in the firm, was referred to in the DWF terms of engagement as the "*Supervising Partner*" for the litigation. Mr Wilson was stated to be the *"Relationship Manager"*.

(1) The Pleadings and the B Shares Mistake

134. After pre-action steps, Mr Hall Taylor was instructed to draft Particulars of Claim in June 2015 ("***MP POC***"). He had initially been instructed on 20 April 2013. His instructions on that occasion were sent electronically and their contents are in evidence. They included a divider, 39 pages long, referred to in the instructions as "*Emails and correspondence passing between the parties from 13 December 2013 to 14 April 2015 (with some narrative from the Claimants in parts)*." The instructions did not include any draft transaction documents and did not show the terms of the Initial Deal.

135. On 12 June 2015, Ms Connor sent further instructions to Mr Hall Taylor along with '3 lever arch files'. Unfortunately it appears that the originals or copies of these files have not been located. The instructions included the following:

> "7. Counsel will find enclosed 3 lever arch files comprising a bundle of relevant documents. Files 2 and 3 are the Corporate bible and they are repeated in the same format. File 1 contains a copy of (at the respective dividers): […]
>
> 7.4 Emails and correspondence passing between the parties from 13 December 2013 to date (with some narrative from the Claimants in parts); […]
>
> 8. Counsel is requested to:
>
> 8.1. Consider the documents referred to above (in terms of the Corporate bible, we refer Counsel to the shareholders' agreement (divider 9 of file 2), share purchase agreement (divider 1 of file 2) and articles of association (dividers 26 and 29 of files 2 and 3 respectively); and
>
> 8.2. Draft the Particulars of Claim. AK and JK would like to issue proceedings as soon as possible and Counsel is requested to let Instructing Solicitors know when they can expect a draft."

136. The Kings maintained that the three lever arch files must have included documents showing the terms of the Initial Deal. However, the evidence does not in fact establish that Mr Hall Taylor did receive them. Files 2 and 3, the corporate 'bible', would not have included them. The disclosed documents in these proceedings included a set of documents put together by Ms Walker at some stage, indexed with the heading "*Corporate Transactional Documents*". This file, however, contained draft documents rather than final transaction documents as one would expect to see in a 'corporate bible' properly so called. Ms Walker said in evidence that that file was not the 'corporate bible', and I accept her evidence.

137. The only entry from the index for the other file sent to Mr Hall Taylor, file 1, whose name suggested that it might have included documents about the Initial Deal was tab 4, *"Emails and correspondence passing between the parties from 13 December 2013 to date (with some narrative from the Claimants in parts)"*. Its name was, of course, very similar to a tab in Mr Hall Taylor's 20 April instructions which did not contain documents about the Initial Deal. Moreover, as a single tab in a single lever arch file which also contained other documents it is very unlikely to have been large enough to contain the 1,370 pages of the "*Corporate Transactional Documents*" mentioned above. In addition, tab 6 of file 1 was "*Draft share purchase agreement dated 17 December 2013*". Had tab 4 contained the draft documentation, this would not have been included separately. Overall, I do not consider it to have been shown that Mr Hall Taylor was sent, or directed to, drafts and correspondence about the Initial Deal that would have shown that the B Share Mechanism was there from the outset. The first time it can be seen that he did receive them was with the trial bundles provided to him in mid April 2017.

138. On 2 July 2015, Mr Hall Taylor sent the first draft of the MP POC to Mr Blakey, Ms Connor and Mr Wilson. The covering email said that "*there are in fact only a few*

relatively minor queries to address". The draft itself included reference to the relevant provision of the Initial Deal as follows:

> "that the new company (Primekings) would provide £1 million funding to KSG by way of subscription for the additional 503 [CHECK] shares, therefore providing an immediate cash injection to shareholder funds;"

139. The MP POC were then re-drafted and a travelling copy was circulated between Mr Hall Taylor and the litigation team at DWF. On 7 July 2015 Mr Hall Taylor asked Ms Connor (cc Mr Wilson):

> "Can you make sure that you trawl through the emails/other docs around the time - and speak to Lester and to the clients to get to the bottom of what the original deal actually was - as I am concerned this is not right." (emphasis added)

140. In these proceedings Mr Hall Taylor said that he had asked for and relied on DWF (and Anthony King's) confirmation of the terms of the Initial Deal because it was a "*moving feast*" of multiple drafts being circulated back and forth between the Kings and Primekings. I consider that he was entitled to take that approach, and I do not accept the Kings' allegation that he was in breach of his duty of reasonable skill or care in relation to this matter.

141. As a follow-up, Ms Connor sent the revised MP POC to Anthony and James King at 18:52 the same day:

> "Please see the attached slightly revised particulars of claim - please can you review these again and ensure that you are happy with the content and that it is accurate.
>
> In particular -please can you consider the provisions of paragraph 23 (i.e. the terms of the "Original Deal") and ensure that this is right." (emphasis added)

142. Anthony King replied at 19:29 listing some provisions of the Initial Deal, concluding that he "*just want[ed] this to be right with no holes in it !!!*", and again at 22:50:

> "OK one more thought
>
> Section 39 the new deal meant the £3M earn out over 3 years was to be paid out of the business and not paid from Prime. We always believed this payment would come from them and get entrepreneur's tax relief and not the tax implications it now has. I reaffirm this belief in my email in April 2014 when I say they should pay my mother and father the full £4.25M owed straight out.
>
> I only say this because in the worse case scenario that we don't get the contract rescinded, then this gets them back to paying mum and dad out directly and also shows they have not reinstated the original deal." (emphasis added)

143. On 8 July 2015, Ms Connor sent a further draft of the MP POC to Anthony and James King (copying in Mr Wilson):

> "Anthony/ James
>
> Please find attached further revised Particulars of Claim which I think should now capture everything.
>
> I'll liaise with Alex to see if he's happy with the amendments."

This draft contained a new § 39.4, stating that one of the terms of the Final Deal, which the Kings had been induced to agree by misrepresentation, was that:

> "39.4. Primekings would "pay" further consideration of £3 million to Mr and Mrs King over three years at a rate of £1 million per annum provided KSG's EBITDA was £3 million or more in each of those years such payment to be made by KSG by way of share redemption"

It therefore implied, for the first time, that the Deferred Consideration would be paid by means of redeemable shares issued by KSG.

144. Anthony King replied at 13:12, saying about that subparagraph:

> "39.4 Can we not add brackets like in 39.3.3 (in other words the funding was to be provided by KSG not Primekings and only payable determined on KSG's financial position) just to emphasize the point."

145. Ms Connor sent a further revised draft MP POC to Mr Hall Taylor at 18:09:

> "Further to our exchange of emails yesterday and further comments from the client received yesterday we've revised the draft further and I attach a comparison (against yesterday's draft) together with a clean word version. […]
>
> Added a new paragraph dealing with the £3million earn out by way of share redemption at para 39.4." (emphasis added)

146. In this draft, new § 39.4 had been revised as per Anthony King's suggestion:

> "Primekings would "pay" further consideration of £3 million to Mr and Mrs King over three years at a rate of £1 million per annum provided KSG's EBITDA was £3 million or more in each of those years. Such payment was to be made by KSG by way of share redemption (in other words the funding was to be provided by KSG not Primekings and was to be delayed and determined by KSG's financial circumstances)."

147. It is common ground in the present claim that the implication in § 39.4 of the MP POC was wrong, because payment of the Deferred Consideration via the B Share

Mechanism had already been part of the Initial Deal. I refer to this as the "***B Shares Mistake***".

148. The claim was issued on 15 July 2015, and served. After the case management stages, witness statements were exchanged in December 2016. Like the MP POC, Anthony King's witness statement contained the B Shares Mistake (although it did not appear to suggest that that was a major difference between the Initial and Final Deal). The witness statements of James King and Mr Wilson perpetuated the B Shares Mistake, although in Mr Wilson's case not consistently or clearly: I discuss his witness statement further below.

149. The question of who was responsible for the B Shares Mistake, its significance and by extension, its effect on the lawyers' state of mind, was heavily disputed during the present proceedings. This will be discussed in greater detail below. In summary the claimants argued that DWF and the Barristers were so concerned about the B Shares Mistake being exposed that they either made a deal with Primekings to advise the Kings to discontinue their claim in exchange for Primekings not launching a suit for improper conduct (primary case); or unilaterally advised the Kings to discontinue to cover up their mistake (secondary case); of suffered from such clouded judgment as wrongly to advise the Kings to discontinue the case (tertiary case).

(2) Mr Wilson's involvement in the B Shares Mistake

150. The Kings alleged that, knowing that he had misled the Kings about the B Share Mechanism on the night of 18/19 December 2013, Mr Wilson then concealed the fact that he was aware that the B Share Mechanism had not been introduced as part of the Final Deal, by approving the Particulars of Claim, the Kings' witness statements and his own witness statement, despite knowing that they were wrong in this respect. They contended that Mr Wilson had a significant involvement with the Primekings litigation, relying *inter alia* on the following pieces of evidence:

i) Mr Wilson's comments on a draft Letter Before Action dated 11 March 2015 (which was eventually sent on 31 March 2015);

ii) the email exchange on 2 June 2015 where Mr Wilson seemingly gave positive advice on the litigation prospects to Anthony King (see § below);

iii) an email from Mr Wilson dated 1 July 2015 where he pushed back against Mr Hall Taylor's advice that Anthony King should not be a party to the litigation:

> "Not sure I agree. Anthony agreed to the dilution of his share as a result of the statements from robin et al. As a result he entered into agreements (shareholders agreement etc) that allowed this to happen."

iv) Mr Wilson having on 2 July 2015 asked to be sent a copy of the Particulars of Claim;

v) an email to Anthony King dated 2 July 2015 in which Mr Blakey said "*Lester and Grace (the people that do the real work) will keep an eye on things whilst I am away*";

vi) an email from Mr Blakey dated 25 August 2016 updating the Kings on the costs incurred by DWF, which so far included £2,012 for work done by Mr Wilson;

vii) Mr Wilson's involvement in drafting a settlement offer between Kings and Primekings on 30 November 2016; and

viii) Mr Wilson's participation in a conference call on 30 November 2016 and then a conference on 23 January 2017 with members of the Kings' legal team (Mr Blakey, Ms Connor and Mr Hall Taylor).

151. By way of context, the Misrepresentation Proceedings commenced 14 months after the Transaction, and, as Mr Wilson said in his witness statement in the present proceedings (speaking of the position as at July 2015), *"there is an assumption in the Kings' case that I was au fait with all the details of the Transaction at all times, which is simply not the case. Nor would it be without me spending time reviewing the correspondence and previous drafts of the Transaction documentation, which I had not done at this stage"*. As DWF point out, the Kings' case on this point rests on the assertion that because something was known to someone once, it must have been known to them at all times thereafter.

152. Further, as Mr Wilson emphasised in his oral evidence, when he noticed that his own witness statement wrongly implied that the B Share Mechanism had been introduced following the Swain Representations, he took steps to address this by way of a list of corrections:

> "Well, obviously there has been a lot of discussion about this and at the time, had I read that [§ 39.4 of the Particulars of Claim in the Misrepresentation Proceedings], had I realised and put it all together, I would have said something because, Mr Newman, when I did find out on 7 May [2017], that's exactly what I did. Nobody told me. Nobody tipped me off. I found out myself and I said something. So every time you come back to this I will come back to saying what I positively did, what was in my mind and what was reflected in what my actions were was absolutely clear. When I found the mistake out I said something. Rather than looking at what I inactively allowed to have happened or alleged to allow to happen, look at what I actually positively did. And what I positively did was scream and shout there's been a mistake when I found it out, and that was the first time I realised that mistake had been made."

153. I accept Mr Wilson's evidence that, to the extent he had certain contact with the case in its early stages, he did not realise that it was being suggested that the B Share Mechanism had been introduced as a change to the Initial Deal. More generally, his involvement in the litigation was peripheral. He was and is not a litigator, and such limited involvement as he had arose from his roles as (a) overall client relationship partner and (b) witness to the key encounters with Primekings, particularly the Completion Meeting. I do not consider any of the matters listed in § above to be inconsistent with that view. Neither the documentary record as a whole nor the witness evidence supports the view that Mr Wilson was playing any central role in the

conduct of the litigation, and I would ascribe Mr Blakey's comment in item (v) about doing the 'real work' to politeness and client reassurance. Mr Wilson recorded only 45 hours of time during the 2-year duration of litigation prior to the start of the Misrepresentation Trial, which is plainly not commensurate with any close involvement in the conduct of the case.

154. Mr Wilson had little involvement in the preparation of the Particulars of Claim and indeed in the Misrepresentation Proceedings generally. His usual approach was not to respond to emails to which he was only a copyee, and, as a busy corporate partner, to leave others to do their jobs. I accept his evidence that he did not read the draft email from Anthony King on 27 March 2015, as set out in his witness statement.

155. As to the Particulars of Claim, the first draft, which Mr Wilson accepts he requested and probably skim-read, did not contain the B Shares Mistake that the finalised Particulars of Claim contained. He was clear in his evidence that he had not read the final version of the Particulars of Claim. He signed the Claim Form because Mr Blakey was on holiday, and that task required him to be satisfied only that the Kings believed that the facts stated in the Particulars of Claim were true. The Particulars of Claim themselves were signed by Anthony King.

156. There is no evidence that Mr Wilson had any role in the preparation of the statements of James or Anthony King. He was sent Anthony King's statement (as a *"final statement"*) only three hours before the planned time for exchange, and even then he was only copied in.

157. As for Mr Wilson's own witness statement:

i) A first draft was prepared by Mr Blakey and sent to Mr Wilson on 11 November 2016.

ii) On 12 December 2016, Mr Wilson returned a revised draft to Mr Blakey. Paragraph 19 of the draft explained the key terms of the Initial Deal. Responding to the query *"further consideration to JK and SK of £3m, £1m pa if EBITDA over £3m?"* Mr Wilson wrote:

> "An issue of shares to James and Mary [sic] King which could be redeemed over a period of time following completion for up to [£1,000,000] depending on the Kings group's financial performance. Teacher Stern's drafting did not work on this as they had deducted the King family's indebtedness from the amount to [be] paid and included an indemnity for the loans in the Share Purchase Agreement. The agreed position was that the loans would be repaid over a period of time after Completion. 3 years I believe and mechanically the Teacher Stern drafting did not work."

That was a clear reference to the B Share Mechanism, and wholly incompatible with the Kings' allegation that Mr Wilson was seeking to conceal that aspect of the Initial Deal. I reject the Kings' suggestion that the paragraph might have been referring to redeemable shares issued by Primekings: there

would have been no reason to do that, and none of the draft documentation concerned Primekings as a company.

iii) As Mr Wilson explains in his witness statement, by oversight he did not correct what was then § 48.6 of his statement, describing one of the terms of the Final Deal, which was arguably inconsistent with what he had added at § 19.5:

> "James and his wife would receive £3m over 3 years at a rate of £1 m per annum by way of share redemption and provided that KSG's EBITDA was £3m or more in each year. The payment, therefore, was to be made by KSG and not Primekings" (my emphasis)

158. As to how the oversight regarding § 48.6 came about, it is clear from the documents that Mr Wilson's original witness statement was prepared with substantial assistance from Mr Blakey. Mr Wilson said, in the present proceedings, that he relied on Mr Blakey's assurance that draft § 48 (later § 49), setting out the terms of the deal, was taken directly from the pleadings and that he did not have to check it:

> "Q. If we go on the right-hand side, please, to {F1.3/12}. And you can see there that you signed on 19 December 2016 with a statement of truth the witness statement and the line which is incorrect is on the same page. And I want to suggest to you, Mr Wilson, that it is just not plausible that you wouldn't have carefully checked all of that witness statement including paragraph 49.6 before putting your signature on it?
>
> A. At the time as I said yesterday, I'd relied on Mr Blakey to get this correct. He'd told me not to worry about paragraph as it was now 49 because it was taken from the particulars and had been checked. I relied on others. That was why I was so cross. I was very cross that I'd relied on others and not put myself into the detail until 7 May. When I signed it I believed it to be true based on my reliance on a very experienced solicitor."

I accept that evidence.

159. Accordingly, there is no merit in the Kings' allegation that Mr Wilson knowingly produced an incorrect witness statement aiming to conceal the true position about the B Share Mechanism. The allegation is clearly inconsistent with § 19.5 of the witness statement, and also with the approach that Mr Wilson subsequently took at the Misrepresentation Trial, unprompted, when he realised that § 49.6 was inconsistent and incorrect.

160. It follows that I reject the Kings' allegation, that in breach of the duty of good faith, Mr Wilson allowed a pleading to be filed on 15 July 2015 and witness statements to be filed on 19 December 2016 which he knew to be false.

(3) Howard Smith and GE Witness Statements/ Summary; Mediation Letter

161. Preparations for the Misrepresentation Trial continued through 2016 and early 2017. During this period, the Kings and DWF were positive about the case because the written evidence from the GE witnesses (Mr Weedall and Mr Cole) and Howard Smith was regarded as being in their favour.

162. At § 7 of his witness statement, Mr Weedall said:

> "Mr Cole and I did not say that KSG's funding facilities were "frozen". I recall that Mr Swain did use that word and I explained that there was nil eligible availability for funds within GE's 85% advance formula to be drawn by the KSG business. By this I meant that KSG's funding facilities were fully advanced and in fact I believe that at the time of the meeting the drawn percentage was around 92%. I also confirmed that it would be very difficult to authorise further overpayment drawdown requests until there was clear confirmation that the proposed transaction, including, crucially, the expected KI capital injection, would be completed within precise timescales;
>
> I do not recall that either Mr Cole or I said that GE had lost complete faith in the management of KSG and the Kings Group. We did however confirm that GE was becoming increasingly concerned with the current trading position and the short term distressed nature of KSG's working capital requirements. We also made specific reference to the fact that drawdown requests continued to be made in excess of agreed cashflow forecasts that the business had provided to GE and that this had a negative impact on the credibility of the current management team;
>
> Steve Evans ("Mr Evans"), KSG's Sales Director, did not attend the meeting but this was not at the request of GE: GE did not request or restrict access to the meeting of any of KSG's shareholders or employees. During the meeting, Ki's advisors told us that Mr Evans had requested to attend the meeting but that they had suggested he didn't as the meeting was to discuss only the progress of the transaction and timelines. They implied that Mr Evans' agenda differed from this and that he wanted to renegotiate the parameters of the GE facility and interrogate specific facility ineligible balances in an effort to improve cashflow availability;
>
> Mr Cole and I did not say that GE was no longer prepared to support KSG or the Kings Group and that there would be no further funding. Over a period of around 5 weeks prior to the meeting, GE had been allowing certain essential payments to be made even though this took the facility over the 85% threshold. GE could not allow further overpayments and required the

> facility to be brought back within the 85% formula. In addition, the KSG business was in a critical condition and needed the transaction with KI to complete very quickly so that the required cash injection would be made. […] Mr Cole and I confirmed GE's intention to continue to make KSG's existing facilities available to it post completion despite the change in ownership, provided the transaction was completed and the investment went into the company so that it was properly capitalised by 20 December 2013. If a deal could not be concluded by this date then GE had no ability to provide an additional overpayment to meet the identified cash shortfall. GE agreed to provide a formal letter of comfort to KI confirming its support as part of the transaction closing process."

163. Anthony King and Mr Hall Taylor felt that this evidence fell in their favour. An email exchange on 23 November 2016 included this:

> Anthony King: "Think it makes certain points very clear in our favour, but opens a couple of cracks that they will try to exploit as being perhaps a "misunderstanding", that said I think the underlying misrepresentation of what GE said is still very much in our favour and for them to explain and defend. We believed that all funding and support was pulled, as did everyone else in the room and clearly GE did not say this. There is no way from anything GE said that Robin can make the statement that he believed he needed another £4.5M to replace GE."
>
> Alex Hall Taylor: "Yes - I agree with this analysis - there is some helpful stuff in there but they will seek to say they misunderstood what was said - but if they do try that presumably we can say that there was nothing doubtful about what they said to AK/JK/LW and what they did say did not reflect what GE had said - nor could it reasonably have been based upon what was said or any reasonable misunderstanding of it... I think that some discomfort will be created by this - and by the fact that he did it voluntarily in his own words."

164. On or around 11 May 2016 Ms Connor contacted Howard Smith to discuss the case. She reported back to Anthony King later that day:

> "It went well - Howard essentially confirmed the content of his conversations with you and his view that GE would not have "pulled the plug" had the deal not gone through at the time.
>
> We're going to write a letter to Teacher Stern outlining what Howard has said and let Howard have the draft before it goes to make sure he's happy with what we are saying and obviously we'll let you see the draft too."

165. The aspect of Howard Smith's evidence that Ms Connor was referring to was encapsulated in § 17 of his subsequent witness summary:

> "As the Christmas break approached, I recall that I discussed with GE the likely strategy if the investment from Defence was not forthcoming, I cannot recall specifically who I spoke to but it would have been either Tom Weedall or Andy Cole as they were my key contacts at GE. We informally agreed that there appeared to be sufficient funds available to enable staff salaries to be paid for December. Once these were paid, KSG was likely to be able to trade through to January. Accordingly, KPMG would have a small number of staff on standby to re-commence a marketing process but not to take an administration appointment over KGS. Another factor taken into account was the nature of KSG's business i.e. providing security, in some cases, to banks. If the security systems at certain client's premises had been withdrawn during the final week of December, this could have caused significant disruption that would impact on GE's major assets, book debts."

166. Because of what was seen as positive evidence from GE and Howard Smith, the Kings sent a strongly worded letter dated 27 May 2016 to Teacher Stern proposing mediation with Primekings (the "***Mediation Letter***"):

> "Your clients' position is that whilst the gist of the words used at paragraph 28 of the APOC is admitted, they are qualified by the addition of "unless a deal was done" (paragraph 28 of the AD).
>
> […] The true position is that your clients represented that it was "game over" with GE, there was no possibility of ongoing financial support full stop.
>
> As you are aware, we have spoken with GE's Tom Weedall and Andy Cole and their evidence is as stated in paragraph 18.7 of the AR. Further, it was not in GE's interests to pull funding either on the day of completion or in the near future. GE had, its email of 12:34 on 18 December 2013 referred to at paragraph 18.5 of the AR, already said that it would provide further drawn down if given an update.
>
> If the evidence of GE is not sufficient, we have now spoken with Howard Smith ("Mr Smith") of KPMG who were engaged by KSG/KSSL, at the request of and with a reporting line into GE, to, amongst other things, monitor the situation with KSG/KSSL and for Mr Smith to be in a position to act, if required, as a possible administrator.
>
> Mr Smith has confirmed that KPMG were not requested by GE to prepare to take an imminent administration appointment at

> any time prior to completion of the sale transaction. His recollection is that once negotiations commenced around the KSG/KSSL investment, GE wished to provide reasonable support to give the transaction every opportunity of completing. Accordingly, the strategy adopted was to monitor progress with a contingency plan that should the transaction not complete then KPMG would re-visit the other interested parties with a view to transacting with an alternate party early in the New Year.
>
> Given the Christmas break, it was considered unlikely that any party would be prepared to carry out due diligence over Christmas, therefore, no staff were mobilised to either assist with a sale process or deal with an administration appointment prior to the first week of January 2014 at the earliest, GE did not want KSG/KSSL to go into administration, it was at risk of losing money if it did. GE was potentially exposed and it wanted to manage its exposure with KSG/KSSL.
>
> It strikes us that the only defence your clients have (to their misrepresentations) is that the statements made were true. Irrespective of what our clients say, based on the independent evidence of both GE and Howard Smith of KPMG, that position is untenable and we fail to see how your clients will not lose on liability. […]
>
> Our clients are quite prepared to continue to trial, they have no hesitation in standing up and telling the truth. However, it is not in the interests of KSG/KSSL for this shareholder dispute to continue; our clients would rather be focussing their efforts on the business than this dispute. Therefore, an alternative way to proceed and one that it is incumbent on the parties to consider is to explore whether the parties are willing to mediate."

That letter, including the use of the word 'untenable', was of course advocating a position to the opposing side, and cannot be viewed as necessarily reflecting DWF's views; nor can it be treated as advice given by DWF to the Kings.

167. Paragraph 17 of Mr Smith's witness summary appears to have been, later, the foundation for § 37 of the Kings' written opening submissions in the Misrepresentation Proceedings:

> "Interest levels amongst potential alternative investors remained very high up to and beyond the date of completion with the Ds, only having been turned away by C3 once the original deal was done with the Ds or having fallen out of the running due to immediate time pressure. The Cs will say one of the many interested parties would have invested or provided finance to KSG/KSSL and that GE would have continued to support them until that was done. The losses consequent on an

> insolvent outcome was such that any alternative was commercially not viable for GE."

168. However, only that unsigned 'witness summary' was eventually served – the Kings' team faced difficulty in crystallising Howard Smith's evidence into a signed witness statement. A draft witness statement was prepared by 17 November 2016 and sent to Howard Smith from Mr Blakey asking for comments and input. Mr Smith replied that day but asked Mr Blakey to "*review and come back to me*" because "*This still needs to go through* [KPMG] *risk*". In the end, however, the Kings served an unsigned 'witness summary' on 19 December 2016.

169. On 24 January 2017 Mr Smith indicated his dissatisfaction with DWF having done so:

> "I have just been informed by Grace that you have submitted a draft witness statement of my position to the other party.
>
> To be 100% clear, this is completely without my authority and goes against all our conversations.
>
> I am very, very concerned that DWF has chosen to take this approach. I am passing the matter to KPMG practise protection."

170. Mr Blakey replied that day:

> "I don't quite understand your email and/or the surprise. You know we have provided the summary/statement as reflected in our exchange of emails on 19 December 2016. My understanding was that you had approved your evidence as drafted (I know that you had been discussing and finalising the statement with Grace through November and December 2016, had provided an amended version and discussed it with Grace on the telephone a few times) but was not able to sign it due to your illness and absence from the office in the week before (12 December 2016). Further, as reflected in your email of 19 December 2016 at 11.03, you awaited internal approval. I understood both of these were formalities; on the latter you had said back in November that it needed to go through risk and we naturally presumed you were on with that.
>
> In any event Howard, as I said in my email of 19 December 2016, my instructions were and are to summons you to appear at the trial as a witness for the King family irrespective of whether you have given any authority or not."

171. The matter was escalated to KPMG's risk department and an email from Phyllisea Peltier (legal counsel at KPMG) on 31 January 2017 said:

> "I have now reviewed the email communication between DWF and Howard Smith together with a copy of the draft Witness Statement/Summary that you have provided. Having discussed

> the matter with Howard, he has explained to me that he made it very clear to you that he was not in a position to confirm whether he is able to provide a Witness Statement to support your client without referring the matter to the firms internal Practice Protection Team. This is something that he has repeated more than once in his email communications with you. […] The internal approval of the witness statement was therefore clearly more than a "formality" as you suggest. I am therefore very surprised that your firm deemed it appropriate to serve a Witness Summary on the Defendants without first having obtained approval from Mr Smith that he was willing and able to be your witness and to provide a statement.
>
> I am also concerned with the nature of the email communication whereby you appear to have set out the position of Howard providing a Witness Statement as a fait accompli rather than a choice. Our KPMG position remains as above, I therefore confirm that Howard will not be providing a voluntary Witness Statement in these proceedings in accordance with the firm's position. If you do decide to proceed via a Witness Summons then we will as always, fully co-operate with the decision of the court." (emphasis added)

172. In light of all these difficulties, Mr Blakey said in oral evidence that, as an experienced litigator himself, his "*gut feeling*" was that Howard Smith would not come up to proof under the heat of cross-examination; he was merely "*keeping* [Anthony] *warm*".

173. An Order of HHJ Walden Smith dated 22 February 2017 provided that:

> "The Claimants have permission under CPR part 32.9 to serve and to rely upon the witness summary of Mr Howard Smith served on 19 December 2016 and to call Mr Smith to give evidence at trial."

174. Once again, however, the Claimants faced difficulties in securing Howard Smith as a witness in the Misrepresentation Trial. His participation (in the capacity of a KPMG employee) in the trial was coordinated on KPMG's side by Darren Bradshaw of Kennedys Law, KPMG's solicitors.

i) Howard Smith initially indicated that he was free on 5 May 2017, and a letter from DWF dated 11 April 2017 serving a witness summons on Mr Smith indicated that he would be called to give evidence that day (although the date was expressed as being subject to change).

ii) However, by 20 April 2017 a draft timetable indicated that Mr Smith would likely give evidence on 10 May 2017. On 1 May 2017, Ms Connor informed Darren Bradshaw that Howard Smith would be required to attend court on 10 May. Mr Bradshaw replied on 3 May that that date posed difficulties for Howard's schedule, asked whether it was possible to maintain the previous date, and provided two alternative dates for his attendance: 12 and 15 May.

iii) On 4 May 2017 Ms Connor e-mailed Mr Blakey: "Howard is being evasive and basically saying he can't do anything next week. Darren Bradshaw is trying to explain to him that he needs to make himself available."

iv) Ms Connor updated Mr Hall Taylor the next day: "*we are having difficulty with Howard*".

v) On 6 May Darren Bradshaw confirmed that Howard Smith was able to give evidence on Monday 15 May.

175. Of the two dates offered on behalf of Mr Smith on 3 May, 12 May was to be a non-sitting day, with the result that only 15 May was a realistic possibility. The exchange of messages summarised above occurred the day before Day 4 of the trial (4 May 2017), i.e. the date on which the alleged conspiracy commenced. Its timing is incompatible with the Kings' case that the legal team *"from around 4 May 2017… began to plan steps to move Howard Smith in the timetable to 15 May 2017*" (Supplemental Statement of Case ("SSOC") § 16.6).

176. The Kings contended that the foregoing shows that Howard Smith was not being deliberately difficult as a witness; rather, it was because of the Kings' last minute changes to the dates that they faced problems. On 14 August 2020 (presumably in preparation for the present trial), Anthony King asked Howard Smith "*why were you moved, was it that you suddenly declined to be available that week, or did DWF ask if you wouldn't mind moving*" to which Mr Smith replied:

> "Our internal records suggest that I was informed at short notice (on the eve of expecting to give evidence on 5 May) that I was not required on the Friday. It appears I provided details of my availability during the trial period, and that my own commitments meant that Wednesday 10 and Monday 15 May were my next available dates, with the latter being more convenient for me as I was travelling on the Wednesday. It was on the evening of Saturday 6 May that DWF informed Kennedys (who as you may recall were providing KPMG with some external legal support) I would be required to attend to give evidence on Monday 15 May."

177. Counsel for the Kings suggested that, in the following passage from the Misrepresentation Trial, Mr Hall Taylor misrepresented to Marcus Smith J that Howard Smith was being difficult as a witness:

> "MR JUSTICE MARCUS SMITH: So Day 8 remains largely unchanged.
>
> MR HALL TAYLOR: In fact remains unchanged, subject to us sliding over slightly with anyone from the Monday. What I would then propose, my Lord, because all of the witnesses currently on Wednesday the 10th can actually do the 11th, subject to one person, which is Mr Smith, Mr Smith, you will remember, is a KPMG witness, and he has actually said at the

> moment, although we are impressing upon him that this is not a terribly acceptable answer, that he cannot now do next week."

178. I do not agree that that was misleading. Mr Smith's solicitors had indicated that 10 May would pose difficulties for him, and there appeared to be no other sitting day that week when Mr Smith would be available.

179. In any event, Mr Smith was never called to the stand because the Misrepresentation Trial was discontinued before he could give his oral evidence. The Kings pointed out that Howard Smith was in fact stood down on 12 May 2017 by Ms Connor in an email to Darren Bradshaw ("*To confirm – Howard is not required*") even before a formal decision to discontinue the trial was taken. However, that was also the day of a crucial conference between the Kings and their legal team, at which the contemporary notes record a decision having been taken not to call Mr Smith. I accept Ms Connor's explanation that that was not a unilateral decision taken by DWF and the Barristers but one in which the clients concurred.

(4) Advice given by DWF and the Barristers; offers to settle

180. The Kings allege that DWF and the Barristers gave extremely optimistic advice about succeeding on liability, bordering on certainty of winning, albeit they concede that the lawyers had always advised that there was some risk as to obtaining rescission.

181. The Kings say that this must have been so because there is no other reason why they would have been willing to risk everything to fund the litigation:

> "Having originally been told by DWF that it would cost £100,000 to get to trial, costs quickly spiralled, but on the strength of the 100% advice from Mr Blakey and Mr Wilson my parents re-mortgaged their house to generate £80,000, Caroline Nash, my sister, re-mortgaged her house to borrow £180,000 to pay DWF's fees, I borrowed £120,000 from Steve Evans my COO who had heard the 100% advice himself, who in turn borrowed it from his friend Phil. I also borrowed £135,000 from Ms Julie Kenny another friend for brief fees, who also received very positive advice from DWF on a conference call in February 2017. 1 summarised this to DWF on 31 January 2017 when I said: "We are putting everything we have into this...". We would not have done any of this, nor would our friends and family unless we had been told we would definitely win." (§ 39 Anthony King Witness Statement)

182. The Kings also rely on some text messages from Mr Evans, and an email from him dated 4 May 2018, referring to the alleged '100%' advice, but their weight is limited since they are hearsay, date from well after the relevant events, and come from a close contact of Anthony King's.

183. I do not accept that the Kings were advised that they had a 100% chance of success. It is certainly true that Mr Blakey told Anthony King that he believed the Kings would succeed on liability (as opposed to necessarily succeeding on rescission): see, e.g., §§ 199. and below. However, (a) that was on the assumption that the Kings'

witnesses would come up to proof; and (b) Mr Blakey's advice had to be read alongside advice from counsel, Mr Hall Taylor, which was more cautious (see, e.g., §§ 184., 196., 198., 200., 202., 206. and 210. below).

184. Notes from a conference on 22 April 2015 between Anthony King and Mr Hall Taylor (amongst others) suggested that Mr Hall Taylor had said:

> "I am not in a position to advise you whether you'd win […]
>
> Initial concerns: Knew about this almost immediately – how it was dealt with […] ratified the agreement […] positivity towards deal […]
>
> Key facts are strong in your favour
>
> Can't tell you until I see a hell of a lot more"

185. Mr Hall Taylor made this general point about DWF's notes of conferences and other discussions with counsel:

> "A. Can I just -- when we come to these notes, just because it is going to be a point that I am going to have to make time and time again, these transcripts -- firstly, let's start with a fundamental point. These are not very good notes, as a general rule. I don't want to be too harsh to DWF, but as attendance notes go, almost every single one of them is not very good, and that is putting it mildly in some cases. They are not complete. They do not accurately reflect who is speaking in certain particular moments."

I accept the general gist of those comments, though having heard both Anthony King and Mr Hall Taylor give evidence, I would expect their pace of speaking to be difficult to keep up with for a notetaker. Nonetheless, it is a pity that some of the more important discussions with counsel in the Misrepresentation Proceedings were reflected in manuscript notes that did little more than jot down certain points, sometimes cryptically, rather than being written up afterwards in notes of conference or attendance notes (though I would accept that extreme time pressure during trial may have precluded this).

186. On 27 March 2015 Anthony King drafted an email to Mr Stiefel (sent to Mr Blakey and Mr Wilson for comments) reflecting a firm belief in the strength of his claim:

> "On December 18th 2013 a terrible injustice, born out of deceit and lies was committed towards my parents and family. […] the agreement that you and our family shook hands on at your offices on December 13th, before you left for your vacation.
>
> This was all undone and betrayed when Peter Swain and his colleague Alison phoned into Robin at the lawyers saying our funding had been frozen by GE and they had refused Steve Evans entry as they had lost faith in Kings Management team. It was put to us that the deal would require a further £4.5M to

> capitalize the business and replace GE, you know that we have proved all that to have been a lie. I met with Robin just last Friday and he confirmed yet again that he even spoke to GE and in Robin's own words he admitted he had personally spoken to them and 'they were about to withdraw funding'.
>
> There is a huge difference in what we believe someone is about to do and what someone has actually done. Had we have known at the time that the statement made by your side was a lie, we would have not agreed to the alterations to the agreement done between you and my father."

187. On 2 June 2015 Mr Wilson in an email exchange was seemingly optimistic about the claim although, as has been analysed above, he consistently maintained in these proceedings that he was not in charge of the litigation with Primekings:

> Mr Wilson: "Just spoken to Jason who relayed your conversation. Desperately sorry that you've been exposed to these people and what they've done. Obviously very helpful for our position but the seemingly despicable, scheming, calculated acts of these people has me seething. I can only imagine how you must feel."
>
> Anthony King: "Thanks Lester Can't believe just how much they planned this and had us over ! Let's just get them in front of a judge and held to account for their actions. Very saddened that these people got any where near us, feel gutted they got to even put there names on our books !! Let's 'ave em !!"
>
> Mr Wilson: "Indeed!"

188. On 15 July 2015, a text message exchange between Mr Wilson and Anthony King read:

> Lester: "As I said…top floor for dinner! I've signed the claim form."
>
> Anthony: "Yep bubbles on the top floor when we get the business back !!!"

189. Anthony King said about a meeting after the CMC in March 2016:

> "I clearly recall Mr Blakey had been making a lot of comments to me about the budget of PKH (which was £2. 7m) stating it was laughable and an impossible figure and was not true and was being used to intimidate us and frighten us. I recall Mr Blakey and Ms Connor laughing about how it would equate to a lawyer working on the case every day full time and that wasn't possible. Our Counsel Mr Hall Taylor seemed very pleased with how the CMC went as PKH were told to resubmit new budgets and we went for drinks at a bar round the corner (I

> believe it's called the Refinery) and Mr Hall Taylor said to Mr Blakey and I, that he believed PKH would be on the phone by the end of the month to do a deal. I recall Mr Blakey and I weren't quite as optimistic given how aggressive PKH are and we had a joke about who would buy drinks if he was correct." (emphasis added)

190. Mr Hall Taylor challenged that evidence and said he only advised Mr King during the meeting after the CMC to explore settling with Primekings because there was no guarantee of obtaining rescission (which was their primary goal). That evidence is consistent with the recorded advice from Mr Hall Taylor reflected in the documents, and I accept it.

191. Mr Blakey accepted that he had been more optimistic than Mr Hall Taylor, as regards succeeding on liability though not about rescission. A DWF note on 9 May 2016 recorded:

> "JBL said that they [Primekings] are really struggling on liability particularly with the evidence from Howard now which collaborate [sic. corroborate] what GE say. However, as JBL has said before, the risk for AK and the family is on the remedy which the court orders…..He and the family would still be protected on costs, JBL confirmed that would be right as we would win, but that would at least give us something to think about if a damages offer is made."

192. In his witness statement in the present proceedings, Anthony King alleged that during a dinner on 8 September 2016, Mr Wilson said:

> "we should not offer them a penny, we will get the business back for a f***ing pound."

193. That would clearly have been incorrect: even if the Kings had managed to obtain an order for rescission, they would have had to pay Primekings a fair value of their shares, and Mr King understood that. Indeed, discussions between the Kings and their legal advisors revealed that they were having difficulties finding a source to 'fund' rescission. During the present proceedings Mr Wilson explained this exchange:

> "Q. And you made a comment like "we should not offer them a penny. We will get the business back for a f***ing pound". Do you agree?
>
> A. No, I certainly don't. What I do remember very clearly is Anthony King saying "How will we get the shares back?" and as part of a settlement I said we would be able to transfer the shares back for a pound. He said, "Really?", I said yes, for the shares you only need nominal consideration to transfer the Primekings shares back to the family. It was in that context that I said it."

I think it more likely that that was the gist of the exchange, rather than Anthony King's version, which does not fit with the recognised need to find money, in the event of rescission, to buy Primekings out.

194. On 13 October 2016, Primekings made a £2.5m offer to settle the claim. This was discussed by Anthony and James King over text messages:

> "Anthony: Well just had a meeting and just to let you know Robin has offered £2.5m to drop the case. Had to tell you x
>
> James: Your mum and I would like to take it!
>
> Anthony: Sleep on it ! X
>
> James: Think about a Disney cruise! Take the money
>
> Anthony: Think about the rest of our life's !!! X
>
> James: Ok it's back to Butlins!
>
> Anthony: Barry doesn't believe we can raise the money to pay them off and that the business will have to be sold. God is going to shock them. Robin is just terrified !!"

195. The Kings rejected Primekings' offer.

196. A conference call took place between Mr Hall Taylor and Anthony King the very next day (14 October 2016), where the former advised the Kings to make an offer to settle:

> "Gambling – assume you win at trial + you have to pay them
>
> Go to trial you lose + haven't got what you wanted.
>
> No win in going to trial
>
> No additional win in going to trial.
>
> Just make them an offer"

197. Anthony King became unhappy with the pessimism displayed by Mr Hall Taylor. On 14 October 2016 he wrote to Mr Blakey:

> "I know but it has led them to believe that even our own Barrister does not believe that what we are asking for is reasonable.
>
> I do have concerns about Alex sometimes."

198. Mr Hall Taylor persisted in his advice to Anthony to settle. In an email to Mr Blakey dated 1 November 2016 (cc Ms Connor) he said:

> "Understood re mediation - but it is necessary to have some form of formal discussion about resolving this even if that is

> just between AK and Barry – and for that he needs the valuation (where are we with that) and some idea of funding availability. I am not convinced "just" offering them their money back is going to work - unless they also accept the company is worth less and not likely to recover (unlikely to be accepted, I suspect, and not reflective of reality as we know). May be possible to go in at that level but AK needs to be ready to pay a decent price to get what he wants which is to get them out - and he needs to factor in his own views about the prospects of turning things around...
>
> Anyway - lecture over(ish) - I have said the same thing from the outset...let's see where he gets with it - but he needs to factor in that trial is not that long away, their views are likely to harden particularly once it becomes apparent that the critical GE evidence is not being volunteered, the company is likely to be looking more valuable by then, and costs will be over £3m...
>
> He needs to sort this this month or next either through negotiation or mediation – it can't really drift much longer."

199. On 29 November 2016 Mr Blakey updated Mr Hall Taylor on his conversations with Anthony King the day before:

> "We've told him that our (DWF) position is that we will win on liability. He asked me what I saw as our biggest risk and I said whether we could get rescission or not. He thinks from the conversations he has had with Barry etc (hereafter the BGs) that is where they are at; they don't expect to win but will appeal if we get rescission. He understands that if we don't get rescission we are into damages and the question then is what loss have we suffered. I have told him that if I were the BGs I would make an offer to reflect that which would really put some pressure on us in terms of costs.
>
> AK and JK are prepared to make an offer. […]
>
> I've told them it has to be sensible to make an offer now, the company is in a position where it "appears" to be struggling and may not be worth very much (we await KPMG valuation) and any deal will take away the risks of litigation, expense and their time. […]
>
> AK and JK are not quite on the same wavelength in what they want now. AK does want the company back but needs time to find the funding. He told me yesterday that he can do it but, as you will have seen yesterday re D&B, does he really believe that? JK seems to want his day in Court. He's not had his £3m and so is out of pocket. He wants the deal tearing up but then what...?"

200. On 5 December 2016 at 14:27 Mr Hall Taylor emailed his concerns about going to trial to Anthony King direct:

> "Next – there are some very serious concerns about this case irrespective of whether we prove that they lied on the day (and some of these points are clearly driving the other side's thinking at present). I have pointed all this out before but will just recap because it seems to fade from the forefront:
>
> we may very well fail on rescission - and this could happen for a number of reasons - first because the Judge has to be satisfied that he can put the parties back in the prior position - he may not believe that can be done - because things are very different now from when the investors came in. Second the Judge may consider that the Kings have affirmed the position or waived the right to rescission both because of delay generally and because they knew or suspected the position with regard to the misleading report of the GE position soon afterwards but did not in fact take action – preferring to see how things panned out and also to renegotiate (this is what the other side are hinting at)
>
> - we have to present a very clear evidential case on what could or would have happened if the Kirsh investment had not come in – they will argue forcefully that the business would simply have collapsed/been lost – we need to show what other options would have been available to save it - that they would have saved it - and that the company would be in the same position (or near enough) as it is today irrespective of whether they had come in
>
> - even if the Judge does order rescission, given the recovery of the company, he is very unlikely simply to order that they should get back what they paid plus interest. It is far more likely that he will order them to be bought out at current market value - to which no minority shareholder discount would be applied. Offers realistically need to be based around the market value - which may have to take account the value on a trade buyer sale.
>
> - if we lose on the evidence as to the lying - then obviously the Kings will end up paying all the costs (which I believe would then exceed £3.5 million)
>
> - if we win on the lying/duress but lose on rescission - then the costs are likely to be split - and that may be on the basis (say) of the Kings getting 60% of their costs but against that the Kirsh lot getting (say) 50% of their costs - which may well be more

> - damages by that route might be significant but not massive (not like the full value of the shares) - so all that would probably do is provide some form of discount if they were then prepared to sell back the shares – but the starting point would still be current market value" (emphasis in original)

201. Frustration with Mr Hall Taylor's approach led Anthony King to email Mr Blakey and Mr Wilson at 14:39 that day:

> "I have to admit I am not happy with the below statements by Alex, none of this was set out before us like this at the beginning. If you believe it was can you please remind me and resend it to me, so I can remind myself how we were advised of the risks below and still proceeded believing we were going to win. Costs have doubled from the £400K we were told this would cost and now we are being advised we probably don't really have a great case.
>
> Even I am starting to believe the reason Kirsh are sat there so smug, is because they have got better legal advice than us."

202. However, Mr Blakey replied with essentially the same advice as Mr Hall Taylor on 7 December 2016 at 11:29 (this e-mail had received the input of Mr Hall Taylor). The email included the following points:

    i) Both Mr Hall Taylor and Mr Blakey took the view that Anthony King should adopt a "*more direct involvement*" in reaching a settlement with Primekings. Mr King should "*explore settlement*" because even "*On our best case*", that is "*we win on liability and get rescission, we still have to pay back the money invested potentially plus interest*."

    ii) In any event, "*my own view, as I have said from day one, is that I do think we will win on liability but rescission is up in the air*".

    iii) This was primarily because it was difficult to put the parties back in their original position: *"[the Judge] will struggle with how it is fair that your family picks up the full uplift in value of the company where that was only made possible due to the other side's input/finance – and where if the company was left to its own devices it might have failed and all value (to everyone) would have been lost. That is why [Mr Hall Taylor] advised […] that a Judge would be unlikely simply to give the other side back their money – that is not a fair outcome, however dishonest they have been."*

    iv) Other problems with obtaining rescission were: *"the time lag and just getting on with things in the meantime which, as Alex mentioned, could act as a complete barrier to rescission. I have to say that point does concern me particularly when you knew early on that they had lied but tried to work with them for some time before [suing them]"*.

203. Anthony King maintained in the present proceedings that Mr Blakey's email of 7 December 2016 backtracked from his original advice of a 'sure-win'. Even at the

time, Mr King was so unhappy with what he perceived to be his lawyers' change in tone that he did not want to speak to them anymore. Mr Blakey told Mr Hall Taylor:

> "I did say that a con would be an opportunity to discuss all this stuff etc but AK said he had had enough of talking! I'm not quite sure what is going on"

204. He then tried to repair the relationship between Mr King and Mr Hall Taylor:

> "Alex has asked me to apologise if the approach taken was unwelcome and to emphasise to you that he was not being negative about the case but rather pointing out some essential considerations that should not be far from any of our minds in preparing this case"

205. As part of the run-up to the Misrepresentation Proceedings, a threatening letter was sent by Macfarlanes on behalf of Mr Stiefel accusing the Kings of defamation. However, in these proceedings Mr Blakey said (and I accept) that DWF were not unduly concerned by the letter or felt pressured by Primekings; to him this was a normal litigation tactic. No action was ever brought for defamation.

206. Mr Hall Taylor maintained his cautious stance on the Kings' chances of success. A typed attendance note of the discussions between Anthony King and Mr Hall Taylor at the Pre-Trial Review (22 February 2017) recorded:

> "AHT said that he thought that we had the better side of the evidence on a number of points but that it was not necessarily black and white and that <u>he was not convinced that we would necessarily win and/or if we were to win, that we would get the outcome that we wanted</u>." (emphasis added)

An argument then ensued between the two. According to §§ 38-39 of Mr Blakey's Witness Statement:

> "Alex and Anthony had an argument on the day of the PTR on 27 February 2017. The detail is recorded in Grace Connor's notes and my handwritten notes. Alex said that he thought the Kings had the better side of the evidence but that it was not necessarily black and white. Anthony kept saying that it was.
>
> The conversation went round in circles in the terms above. Anthony refused to accept that it was not black and white. On the walk back to Court, Anthony said to Alex "I need to know that you are 100% willing to fight". Alex said that he was and Anthony said "that's all I need - the rest is down to me." This argument cleared the air between them."

207. The Kings also allege that during (or around the time of) the Pre-Trial Review:

> "In early 2017 Mr Hall Taylor mentioned to Anthony King that Mr Downes was "not so bad" and in fact had asked him to be his junior on an upcoming case. Mr Hall Taylor told Mr Blakey

> that he was surprised at being approached by Mr Downes in that way. Mr Hall Taylor was surprised because he recognised that the approach by Mr Downes was intended to create a conflict between the personal interests of Mr Hall Taylor and his duty to fearlessly promote the interests of the Kings and so was improper so close to the start of a bitterly contested trial." (§ 35 Particulars of Claim)

208. Mr Hall Taylor's evidence was this:

> "It is said (PoC 35) that Mr Downes QC had asked me to be his junior in an upcoming case, so as to suggest that we developed a close relationship. That is also false. In early 2017, Mr Downes QC told me that he had been asked to provide an opinion in another matter in which I was already involved. I thought it appropriate to inform Anthony King and DWF about that, and I offered to terminate my involvement in the other matter if they were uncomfortable with it. In fact, the other matter did not progress - at least with my involvement - and I had no further contact with Mr Downes QC about it." (§ 94 Witness Statement)

I accept that evidence.

209. Mr Hall Taylor remained adamant that settlement was the best way forward rather than going to trial. On 17 March 2017 Anthony King reported to Mr Hall Taylor on a meeting with Mr Stiefel:

> "Met with Barry today (at his request) thought it might have been some sign of movement, but he basically sat and told me how we had zero chance of winning, his words were 'not a snow balls chance in hell!' How our family came from nothing and will go back to nothing and be ruined and destroyed.
>
> Said we had been badly advised and they were 100% certain they will win.
>
> I didn't realise he was so worried !!"

210. Mr Hall Taylor responded once again favouring settlement:

> "Did you explore whether they have any appetite to be bought out and, if so, at what price?"
>
> "Certainly we need to give the clear impression now that all focus is on preparing for and winning at trial - that you've placed your bet and put up the funds to get there if needs be - but, alongside, that if they wish to be bought out at a sensible price then they can be"

(5) DWF's legal fees; agreement to grant a charge

211. The Kings consistently faced difficulties in paying DWF's fees. In December 2016 they had to raise funds from their friends including Caroline Nash. On 31 January 2017, Joel Heap (senior litigation partner at DWF) emailed Mr Blakey and Mr Wilson telling them to "*get a grip of*" the Kings' failure to pay DWF's legal fees:

> "you need to get a grip of this now as we discussed J
>
> We're basically exposed as a firm to over £200k (£60k to third parties who we can't just write off) and have funded this since Sept already with no up side for us.
>
> Unless the client has an answer to the below position (have they replied?) - ie it is exposed to us for £200k and can pay, we surely cannot incur the fees you have set out
>
> 1 mediator (well we won't be allowed to because they will want that paying up front)
>
> 2 Counsel
>
> 3 Expert
>
> When we know the client can't pay but the primary liability to pay rests with DWF - it's basically incurring third party liabilities when we know the client can't afford it - why would we expose DWF to that (on top of the £200k we're in the hole for if they can't pay)?"

212. Mr Blakey updated Anthony King on DWF's costs the same day:

> "I set out below an update on the costs position. These figures are up to and including 24 January 2017.
>
> Current position
>
> DWF has work in progress of £114,284. Grace has £28,780, Lester £3,500, Oliver (our current trainee) £11,925 and I have £67,282 (which leaves just under £3,000 consisting of other fee earners' time). The time covers the period 27 September 2016 to 24 January 2017.
>
> In addition, Alex has unbilled work of £30,662.50, there is our travel from the conference last week and a Court fee of £100."

213. Anthony King wrote back, saying that the Kings were putting all of their money, plus money borrowed from others, into the litigation:

> "So looking at your figures, we owe circa £200K now

> With a further £116K of disbursements after that to go to court, can I ask where are you on the £230K SIP fund my father asked to be put into the Menston property ?
>
> We are putting everything we have into this, but we are actually relying on you to release this money sat in Dads pension. The speed of that being released is in your hands not ours." (emphasis added)

and at 15:29:

> "Jason if we lose, if Alex doesn't have the passion and conviction to convince a judge of the merits of the case (which he seems to struggle to convince me of sometimes !) and to get the courts to find in our favour, then we the King family lose everything, not just the business, but our homes, our shares, B shares, pensions the lot. It's not your costs I'm worried about, it's their costs that concern me. It's the £1.7M we would need to find if we lose." (emphasis added)

214. The solution being mooted at this time was for the Kings to grant a charge over one of their properties to secure DWF's fees. There was a concern that granting a charge at this stage might be an unlawful preference. However, in an email dated 24 February 2017 to Mr Heap, Mr Blakey suggested that was not a problem:

> "I've spoken to Matt Brown on the potential preference issue. It is unlikely that a preference claim could be successful because:
>
> 1. A preference requires a "desire to prefer" on the part of the charger. DWF are saying to Anthony King that for us to continue representing him/the family in the litigation, we require a charge over the property i.e. he is not giving it to us by choice and there is no "desire to prefer" us over anyone else. And
>
> 2. There is a second defence that at the moment of giving the charge i.e. now, he is not insolvent and will not become insolvent as a consequence of granting the charge. He reasonably believes that he will succeed in the litigation (we and Alex have advised that he has good prospects on liability but the remedy is more difficult (rescission and ability to repay/put the Defendants back in the position they were pre deal)) and, therefore, that he will not be liable for their costs. So the contingent liability (the likelihood of being responsible for £2m of the other side's costs) is sufficiently remote that it need not be taken into account in assessing his solvency at the point of granting the charge to us. For completeness, it is possible that if we don't get rescission and damages are awarded then there may be some split order as to costs or each party pay their own."

215. On the same day, Mr Blakey informed Anthony King that DWF could not formally instruct Mr Hall Taylor and Mr Morcos "*until they are in funds, which, as you know, means you have to pay in advance for their work*." Anthony King replied:

> "So that's £246,600 before the trial just for counsel, with £62,400 being due next Monday.
>
> I have huge concerns we are not going to be 'liquid' in time to meet these payments.
>
> As mentioned before I have my property at Menston up for sale and had a lot of interest and viewings but no offers yet. It's up at £725,000 and I owe £225,000 against it, even if I sell at a discounted rate of £525,000 it won't be done in time.
>
> Mum and Dad are re-mortgaging their home and have £100K on the way but are not in control of the timescale. Dads pension worth £230K is proving very difficult to get invested, in light of all this I don't see how we can instruct a junior at this time, we are going to be all on keeping Alex covered." (emphasis added)

216. On 1 March 2017, Mr Blakey asked Anthony King whether DWF could have a charge against a beauty salon he owned ("***the Menston Property***") to which Mr King replied:

> "Steve is hoping to have the £100K before the end of the week and will be paid onto you straight away.
>
> Mum and Dad have just signed to release £80K from their home, waiting for this to go through the system so could be still a couple of weeks, again this is eared marked for DWF.
>
> Yes you can have a charge against my Menston property, that's not a problem."

217. It was agreed that Ms Julie Kenny, a friend of the Kings who provided them with funding for the Misrepresentation Proceedings, would also take a charge over the Menston Property and rank equally with DWF. However, the charge in favour of DWF was eventually signed by Anthony King only after the Misrepresentation Trial, and even then Mr King complained that he was pressured into signing it (albeit the email quoted above suggests that he freely agreed to it to fund the litigation).

218. Even after the charge over the Menston Property was agreed to, the senior team remained hesitant to continue to act for the Kings. On 2 March 2017 Mr Heap emailed Mr Blakey and Mr Wilson:

> "Lester, as you'll know, lock up is well on the agenda and I can't effectively sign off a "debt plan" of >£200k over an unknown period. The up shot is that Graham will not support DWF funding this. So we therefore need to be cash funded or we can't proceed I'm afraid. If the £250k from the friend can be used for us or he can use the shop or his shares as security for a loan?

> I know this isn't what you want to hear but I have to say I fully understand G's decision"

219. Mr Wilson intervened on behalf of the Kings that day, replying to Mr Heap and Graham Dagnall (Practice Group Partner for the Litigation Practice Group):

> "My view
>
> 1. Dispassionately and commercially:
>
> a. if we drop them we will be giving up (as a worst case) a secured position on up to £380k (£180k + £200k) of fees in favour of an unsecured position on £180k. Recovery of the £180k will require suing King and months of delay to recover possibly very little (we will also have little prospect of recovering the £50k of Counsel/KPMG fees). We will be increasing our risk of recovery and potentially worsening our cash-flow position. Not sure this is the best thing for us.
>
> b. We are not incurring any further direct costs in going to trial (there'll be some disbs). We already have the overhead which will not be 100% utilised if we miss this trial. There is no opportunity cost in going to trial nor any real "loss" (save for disbs) to us.
>
> c. We lose the client - whilst not FTSE 100 King's is not a tiddler (£50m t/o, 600 employees). There will be a corporate deal to do in the aftermath of the trial and lots of ongoing work. We've seen/been involved with correspondence from 3 interested parties who want to look at the refinancing and purchase of the South Africans' interests (Business Growth Fund, Stanley Security and Contract Fire and Security).
>
> 2. On the softer side:
>
> a. Morally and reputationally we should not be dropping a client at this late stage.
>
> b. This client is not [client x] or [client y]. I have acted for them for over 20 years and they are honourable, decent people. We trust them."

220. Mr Dagnall replied on 3 March 2017 agreeing to continue to act for the Kings if they agreed to a charge over their shares in KSG. However, Mr Wilson did not think that was a good idea:

> "To pick up on the share charge: A controlling VC type investor will never permit shares in one of its investee companies to be freely transferred or encumbered (unless they've been really badly advised). That is the case with Anthony's shares. Creating a charge would require the investor's consent.

> We'd completely undermine his negotiating position if we asked the defendants for consent to a charge (which would not be forthcoming). Even if consent was granted we'd be taking an interest in a company and shares over which we are litigating. Again, I'm not a litigator but to me this gives us as a firm some difficulty in the litigation as well as a potential conflict of interest with our client." (4 March 2017)

221. Finally, the Kings managed to borrow £100,000 in cash from Mr Evans to pay DWF on 7 March 2017. However, the next day Mr Blakey wrote to Anthony King asking after other possible sources of funding. Mr King replied:

> "Jason you got £100K yesterday.
>
> […] I repeat, your original estimate to trial was £440K, it's now close to £1M.
>
> Had we had known that from the beginning then we wouldn't have started this, we are doing everything we can to cover this."

222. A text message exchange on 7-8 March 2017 with Mr Wilson further indicated Anthony King's dissatisfaction with DWF:

> Anthony King: "Steve just transferred the £100k"
>
> Mr Wilson: "Great – many thanks – massively appreciated!"
>
> Anthony King: "Just seen Jason's email, you guys may be getting some pressure but I'm starting to get seriously hacked off !!"
>
> Mr Wilson: "Understand. It's not coming from us. Happy to have a chat."
>
> Anthony King: "We were wrongfully advised on costs for this!! We stand to lose everything and DWF are just trying to cover billings!"

(6) The Misrepresentation Trial

223. The Misrepresentation Trial commenced on 28 April 2017.

224. It is common ground in the present proceedings that the opening submissions were again wrongly advanced on the basis of the B Shares Mistake.

225. Before court on Day 1, Mr Hall Taylor and Mr Downes were corresponding with each other over issues with the bundle and inadequate disclosure by the Primekings defendants. At 07:13, Mr Hall Taylor asked:

> "In terms of anything beyond pure housekeeping, unless there is further corresp/concession I am not aware of, it looks as if

> we will be pressing our app for email searches/disclosure by Swain, Fisher and Stiefel after 20 Dec asking for the docs by next Fri. Is that objected to?"

226. Mr Downes replied at 08:04:

> "My position is that we need further time to address the scale of this exercise. We are deeply sceptical that it serves any useful purpose, but are trying to work out what is involved.
>
> The chaotic bundling has been a massive logistical exercise this end, so if you want us to get into that - we shall be asking that your application be adjourned on grounds that we are not in a position to address it because we have been fire-fighting on the documents front."

227. At 08:30 Mr Hall Taylor pointed out that the bundling and the disclosure were two separate issues and that the latter was more pressing:

> "The disclosure and the bundling are separate issues.
>
> I have previously apologised and will apologise again to you, your solicitors and the Judge for the bundles. As you know we have been doing all we can to improve them as requested. […]
>
> That is all entirely aside from your clients' disclosure obligations and the fact that a statement made in each of their disclosure statements, to justify limiting their electronic disclosure, was untrue. We acknowledge the silent admission of that in the work that has been done to date to search and provide further disclosure, but plainly that is not enough. There is no justification for stopping the exercise at 20 Dec, nor have your solicitors provided one. I imagine the Judge will be surprised by the suggestion that that is where it should stop - and will expect your clients now to be doing everything possible to comply with their obvious obligations. The disclosure is plainly more useful than much of what your clients have been seeking - and should in any event already have been given if they had in fact complied with their obligations. We are prepared to allow you some time to deal with it provided we have the disclosure in good time to prepare any cross-examination based on it. That should give your solicitors a week. […]
>
> If we don't have a commitment to the searches and disclosure sought beyond 20 Dec then we will advance our application this morning."

228. This led in due course to the so-called Weekend and Fisher Disclosures (see below).

229. At the start of trial, Mr Justice Marcus Smith (of his own motion) suggested an order that none of the witnesses (including the parties themselves) be allowed to attend the cross-examination of others before giving evidence themselves (the "***Embargo Order***"):

> "MR JUSTICE MARCUS SMITH: To what extent would it be sensible to have the witnesses out of court, or in court? I am conscious that you are going to be making some fairly serious allegations against Mr Downes' witnesses. […]
>
> MR JUSTICE MARCUS SMITH: That was my issue, because there could be, for instance, a surprising recollection on the part of a witness which one might want to not have witnessed by someone who is giving witness evidence later on."

230. The Embargo Order was made by consent of all parties on Day 2 of the trial.

231. Anthony King commenced 5½ days of his evidence on 2 May 2017.

(7) Day 2 (Tuesday 2 May 2017)

232. Three notable events occurred on Day 2 of the Misrepresentation Trial.

233. First, there were several aspects of Anthony King's evidence that did not come across well:

i) He agreed with Mr Downes that it was "*strange*" that the Primekings defendants needed to lie if they, as Anthony King accepted was possible, genuinely "*believed you had no other options*". They simply "*could have just gone in and said: look, the deal's changed*."

ii) Anthony King initially said he did not believe the business was insolvent (prior to the Transaction) but when pressed had to concede that it was from both a balance sheet perspective (liabilities exceeding assets) and from a cashflow perspective (the business could not pay its debts as they fell due).

iii) He agreed that arrears of over £2m were owed to HMRC, and tried to blame that on GE for not giving him cash to clear the arrears.

iv) He could not explain the extent of the benefits that members of his family were taking from the business or why his father had a Porsche from the company as taxable remuneration, even when he had already retired.

v) He eventually accepted that KSG needed more funding by 20 December in order to pay the wages, at least if that were to be done by BACS.

234. Secondly, the B Shares Mistake was mentioned:

> "*Q: And the idea of doing that deferred consideration by redeemable B shares came from DWF, didn't it?*
>
> *A: I believe so.*

Q: Have you made any complaint against them?

A: No.

Q: You haven't?

A: No.

Q: You've not intimated a claim against them in any regard?

A: No."

235. There is no real context to this exchange: Mr Downes seems just to have pointed it out in the course of asking about the Deferred Consideration, with no further follow up at that stage.

236. Thirdly, Anthony King denied any knowledge of why Mike Mattok was not called as a witness:

> "Q. All right. Now, the period between October to December, you blamed GE for the increased pressure on the business because of them reneging on this way of drawing down, and Mr Mattok, Mike Mattok, comes into the company as your interim FD. […]
>
> Q. Why is he not giving evidence?
>
> A. I don't know, sir."

237. During the present proceedings the Barristers suggested that that was untrue: Anthony King knew that Mr Mattok was not being called because his evidence was unfavourable to the King case. On 15 December 2016 Mr Mattok sent a copy of his statement with his changes added to Ms Connor (Mr Blakey copied). It suggested *inter alia* that (1) the only interested third party investor was Primekings and (2) the Kings would have accepted the Transaction whether or not the misrepresentations were made, because they had no other choice to avoid insolvency:

> "30. By mid-December the only remaining party interested in investing in KSG on a solvent basis - i.e. to invest in the existing Group companies so that they could continue trading and thereby seek to continue to honour and pay in full all the liabilities to all creditors was the Kirsch [sic] family "the Investors".
>
> 35. In the absence of such a deal and with no prospect of any other solvent solution it was apparent that if the Directors were to fulfil their fiduciary duties and not further increase the losses to creditors then in accordance with insolvency law the Directors would have had to immediately file a Notice of Intention to appoint an Administrator to secure a one week to two week moratorium over the Christmas period to seek to achieve a business and asset sale of KSG to safeguard and

> maximise the return for creditors and to try to maintain service levels for customers and continue to safeguard the jobs of employees.
>
> 36. This would have crystallised multi million pounds of losses to creditors and finance providers, the King family shareholding would have been lost, the Directors over drawn loan accounts would have had to be personally repaid to the appointed Administrator, Directors personal guarantees would have been called and there would be the potential for significant loss of employment."

238. That was obviously particularly damaging to the Kings' case. Shortly after receiving the statement, Mr Blakey emailed Anthony King (Mr Wilson and Ms Connor copied), at 17:11 that day:

> "We (Alex, Grace and I) have discussed Mike's evidence and the call Grace had with him at 4pm.
>
> Mike is not prepared to change his statement so that he leaves out the bad bits; it is all or nothing. On that basis, we should not in fact cannot call him as a witness.
>
> If you have had chance to read his statement (and I had not really read it when I passed it on) it is damning to our case; there are various examples of this in it (GE; language used - so severe, insolvency, financially distressed situations, investing in KSG on a solvent basis, pre-pack admin; para 33; and paras 36 and 371). Even if we could get him to put in a "good" statement, his evidence at trial (under cross-examination) would be what he says in his statement so he is just too dangerous for us.
>
> As I say, if his evidence is correct and that is established at trial, we are in trouble full stop. His evidence is basically that the company was doomed, already insolvent, the only deal we could get was with the Defendants failing which we would immediately go into insolvency and so on. This is totally at odds with what you, Howard, GE etc say but I must reiterate that if what Mike says was the true position, and the Defendants can establish that, we really are in difficulties.
>
> We're not quite sure why Mike has changed his tune. He has told us he has not been contacted by the other side. Anyway, just to minimise any risk of him contacting the other side, we are not going to tell him until after Monday that we are not calling him."

239. When this was put to Anthony King in the present proceedings, he said Mr Mattok would not have been a material witness, and dismissed his evidence as 'background noise'. I find that evidence highly implausible. Mr Mattok clearly had a central

involvement in KSG's operations, and the fact that, as it turned out, his evidence would be adverse must have been seen as important, and will have been memorable.

(8) Day 3 (Wednesday 3 May 2017): first day of Anthony King's evidence

240. A significant aspect of Anthony King's evidence on this day was the difficulty he had in explaining logically how the alleged conspiracy between Mr Fisher and Mr Swain could have worked.

241. On being showed an email from Mr Swain to Alison Lord on 6 December 2013 that said "*Robin and I have had a blazing row!*", he agreed that as at 5 December 2013 there was no question of Mr Fisher being involved in any conspiracy. In an attempt to explain away the apparent disagreement between Mr Swain and Mr Fisher, he suggested that Ms Lord was conspiring with Mr Swain to cheat Mr Fisher:

> "Q. So she's trying to cheat Robin, is she?
>
> A. Looking at this it looks like something's going -- something's been thought through, yes.
>
> Q. But not you?
>
> A. Not at this time, no. Well, not at this time, no, there isn't.
>
> Q. So, if anything, in your head this supports another conspiracy? Doesn't it? It's another conspiracy. There are a lot of them, aren't there, Mr King?
>
> A. Well, there's a lot of deviousness going on, yes.
>
> Q. Yes. All right, so we agree this isn't the conspiracy that we're talking about in this claim.
>
> A. It's the build-up to it, yes."

242. He was asked to explain the goal of Ms Lord and Mr Swain's conspiracy, given that it was only Mr Fisher who had the money to buy KSG:

> "Q. Yes, I quite see that. But what you're suggesting here is that there is a conspiracy between the two of them that if they can't get the deal they think ought to be done with Mr Fisher ----
>
> A. Yes.
>
> Q. ---- they can procure a situation where he will walk away and they will exploit the opportunity for themselves.
>
> A. That's what they've said, yes.
>
> Q. Right, okay, that's how you read it. Where are they going to get the money from for this other deal?

> A. It doesn't say in here.
>
> Q. Any idea? Any theory on that?
>
> A. You would have to ask ---- a word with Alison as to how she was going to advise that was going to happen.
>
> Q. But you don't know of anything?
>
> A. I'm not aware of anything, no."

243. Anthony King had difficulties suggesting why the Primekings defendants might have felt the need to lie:

> "Q. You don't. So you accept that one of the mysteries in this case is the motive for the lies. They didn't appear to have any reason or need to lie?
>
> A. Because I don't think they believed that they could get my dad to change his mind. They could have tabled it, as I've said, but they don't believe they can get dad to change his mind […]
>
> Q. So never mind what the truth is, it's what they believe that matters. They believe you have no choice. So if they believe that, they think the only alternative to their money is insolvency; you agree with that logic?
>
> A. I believe they believed that at that time, yes.
>
> Q. Yes. I think you say you believe ----
>
> A. They believe it.
>
> Q. ---- they thought that throughout?
>
> A. Yes, they believed that, yes.
>
> Q. So when we come to the 18th and they are going to lie to you to get you to sell the business, you think they think they need to lie to get your dad to change his mind.
>
> A. Yes.
>
> Q. Now, presumably what they are thinking is that your father would rather go into insolvency rather than do the deal, because if they think you've got no choice and they walk away, the company's going to fall. They must think that."

244. However, if Primekings believed that James King would rather see the business go into insolvency than change his mind about a 60/40 split, then it is hard to see why they would have expected him to be persuaded by the alleged Swain Representations: the underlying thrust of which was that KSG would go into insolvency absent a deal:

> "Q. Well, let me try and help you, because I'm going to submit at the end that this is a real problem for your main conspiracy theory. Let's assume that there's a meeting between the conspirators just before they hatch the plan and they go into action, and somebody says, "Look, we're going to have to somehow get them to do this revised deal we want," and somebody says, "Well, I know how we'll do it, we'll lie to them, we'll tell them that GE are pulling the plug so they need our money".
>
> A. Okay.
>
> Q. And somebody else says, "Well, why do we need to bother to do that, because they need our money anyway, just go in and say that's the deal", and somebody else says, "The problem is James King. We've got to try and bring him round." This matches up with your theory of things so far. What I'm suggesting to you now is the reason that doesn't work is that if they believe that insolvency is, in truth, the only alternative, why do they need to lie to your father when the only thing the lie does is bring home to him that insolvency is the only alternative?"

245. Anthony King responded with a new theory, that Mr Swain and Ms Lord had gone to the GE Meeting with a plan to deliberately 'spook' GE into giving unhelpful answers which could be used in some way when truthfully reported then to renegotiate the deal, but to their surprise GE instead indicated their willingness to support the business, with the result that Mr Swain, Ms Lord and Mr Fisher had to agree to lie about what GE had said. One problem with that theory is that GE's position had been repeatedly expressed on that day and the preceding days, and Mr Swain had been told about it. Another was that Mr Weedall and Mr Cole's evidence did not support the view that GE was willing to support the business, absent a substantial cash injection within a timescale that only Primekings was in a position to provide.

(9) Day 4 (Thursday 4 May 2017): second day of Anthony King's evidence

246. During the morning session of Day 4, Anthony King accepted that KSG was in real financial difficulty prior to the Transaction: so much so that one employee put £20,000 on his own credit card to defray company costs, Mr Evans was talking about remortgaging his home and one supplier was at risk of going out of business if KSG did not pay them. Anthony King had difficulty explaining why in those circumstances he had taken almost £40,000 out of the business by way of loan in April 2013 in order to pay school fees and incurred a £27,000 credit card bill for his holiday.

247. Anthony King was asked about alternatives to the Primekings investment:

> "MR JUSTICE MARCUS SMITH: So what was your plan if the investment didn't take place?

> A. If the investment didn't take place ----we were always assuming it would get an investment, sir.
>
> MR DOWNES: Let me show you a document ----
>
> MR JUSTICE MARCUS SMITH: So there was no plan B?
>
> A. There was not a plan B to --- after we realised we needed to get the investment in, there wasn't a plan B that we would be able to somehow produce all this money from nowhere, no."

248. Directly after lunch, questions were asked about the B Shares Mistake. It is common ground that Mr Downes established then that the Deferred Consideration being paid by the B Share Mechanism (redeemable shares to be issued by KSG), rather than by Primekings direct, was always part of the Initial Deal and not a change following the Swain Representations. The following extracts give a sense of the very modest significance Primekings and the judge attributed to this point:

> "MR DOWNES: Mr King, there's a point that's been floating around, I want to try and clear it up with you now, and it was the point about part of your complaint is that the £3 million deferred consideration, the million, then the million, then the million, the B shares ----
>
> A. Yes.
>
> Q. — part of your complaint is that after the fraud you were placed in a position where you had to take that from KSG rather than from Primekings, the purchasers.
>
> A. Yes.
>
> Q. I just want to show you that that actually had happened before the fraud, the alleged fraud. […]
>
> Q. But the important thing is at this stage, on any view, that deferred consideration is coming out of KSG?
>
> A. That's not the way it's portrayed to us, no.
>
> Q. It's a redeemable share, this is the articles of association, the only way a redeemable share can be paid for is by the company paying that money out to the shareholder?
>
> A. As I say, the only thing I can tell you is that's not the way the negotiations took place.
>
> Q. What, specifically, do you have in mind where somebody said: That will be new money coming from Primekings and not money coming out of KSG?

A. When we had the negotiations it was just simply that there would be a million pounds paid to mum and dad if I hit my target. It was never discussed further than that, and whether it was a wrong assumption or a right assumption, it was just that money would come to mum and dad. We did not at any point envisage this would come out of the business. […]

Q. I will be corrected if I am wrong, but let's work on the basis that these articles of association are in draft on 14 December and work on the basis that this provides for the million, whatever the figure is, to be paid to you ---- paid to your parents if you hit the targets and it's to come from KSG. Can we work on that basis?

A. Okay.

Q. If that is the right reading of these documents, it's wrong, isn't it, to complain that that is in any way connected to the fraud?

A. It was not put to us in that way.

Q. No. No.

A. I don't know whether this is ----- all I can tell you is the fact that I do not ever recall having a conversation that this was coming out the business. The negotiations that we agreed never mentioned anything about money coming out of the company to mum and dad. It was just a million, million ----- the first time I believe my father and I become aware that it's going to be coming out of the business is about 3.00 in the morning. I can't comment on the drafting of these documents because I wasn't involved in how they were drafted. […]

MR DOWNES: I'll tell your Lordship, just so that my learned friend understands, our reading of these documents is that at a very early stage, the idea that this deferred consideration should be by way of redeemable B shares came from DWF and that mechanism was settled, in fact before the 14th.

MR JUSTICE MARCUS SMITH: Yes, I see that. It may be – […]

MR JUSTICE MARCUS SMITH: Yes, I understand that, and if that's right that you have this mechanism embedded in the transactional documents at the time, then I understand the implications you're drawing from that, but it may be that this was seen as a technical detail that the witness wasn't troubled with, or it may be that there was an explanation and he's forgotten it.

> MR DOWNES: That may be, it passed him by, but it would still mean, whether this witness knew about it or not, it would still mean that logically it cannot be attributed to the fraudulent conspiracy.
>
> MR JUSTICE MARCUS SMITH: I understand that, and that's really why I am picking you up on, because that's in a sense a[] logical consequences that follows irrespective of what Mr King says.
>
> MR DOWNES: It's his case.
>
> MR JUSTICE MARCUS SMITH: Yes, I understand.
>
> MR DOWNES: I don't know whether he will have some other ... anyway. […]"

249. The Kings, however, now contend that this was the turning point of the Misrepresentation Trial, because it was when the Barristers realised that the Particulars of Claim, the witness statements and the opening submissions were wrong due to their mistake. It is said that they then alerted Mr Blakey, who was not in court that day, to this problem. The Kings relied on an e-mail exchange on Day 4 (4 May 2017) after court between Mr Hall Taylor and Mr Blakey:

    i) Mr Hall Taylor at 17:02: "When the transcript comes through from this afternoon - read it as soon as you get chance...and let's speak later."

    ii) Mr Hall Taylor at 18:10: "*Tried calling - lunch is at page 107 so read on from there if you can. Call me back when you have chance - in chambers for now*." The evidence about the B Shares Mistake in court was after lunch on Day 4. Mr Hall Taylor told me that he had in mind not the B Shares point but other parts of Anthony King's evidence, which were damaging, including those I mention in §§ 254.-255. below. In all the circumstances, I consider that far more probable.

    iii) Mr Hall Taylor at 18:35: "*Although some of it is bad – it actually doesn't read as badly as it felt at the time…"*

    iv) At 19:40, Ms Connor sent the Day 4 transcript to Mr Blakey's personal Sky email address. The Kings suggested that Mr Blakey had a tendency to use his Sky account for "*off the record*" conversations (because those emails were not retained by DWF for document retention purposes) and that Mr Blakey instructed Ms Connor to use his Sky account because he was embarrassed about the B Shares Mistake. However, Mr Blakey's official DWF email was copied into the email from Ms Connor, so that suggestion is entirely implausible. Mr Blakey said that the reason he used his Sky email account was so that he could read the transcript on his personal iPad, which did not have his corporate email account loaded. However, on being referred to emails sent from Mr Blakey's DWF account containing the "*Sent from my iPad*" sign-off at the foot of the email, Mr Blakey eventually conceded that it was possible he could access his DWF account on his personal iPad.

250. The Kings allege that the Barristers and Mr Blakey then held discussions about the mistake, "*the possible consequences for them personally*" and "*what could be done*". The upshot, according to the Kings' pleaded case, was as follows:

> "The Kings' primary case is that that led to Mr Hall Taylor at some point in the period between lunchtime on 4 May 2017 and 10:00am on 10 May 2017 reaching an informal understanding with Primekings that the Kings' legal team would not be accused of improper conduct by Primekings if Mr Hall Taylor caused the case to be withdrawn following the close of the Kings ' evidence. Mr Morcos and Mr Blakey were aware that that understanding had been reached. That understanding was, in breach of fiduciary duty, never disclosed to the Kings. Mr Hall Taylor has (in breach of fiduciary duty) not been willing to tell the Kings pre-action when he first made Primekings aware of the possibility of a discontinuance because he knows that answering that question will tend to support this claim.
>
> The Kings' secondary case is that if no such understanding was reached, then Mr Hall Taylor, Mr Morcos and Mr Blakey were made to feel so professionally exposed by what had been communicated to them by Primekings that they collectively came to the view that a discontinuance on whatever terms Primekings insisted on was the only way to avoid significant personal consequences for them.
>
> The Kings tertiary case is that Mr Hall Taylor, Mr Morcos and Mr Blakey felt so professionally exposed by their own negligence (all of them being aware of the threatening conduct which Primekings had engaged in) that their judgment was clouded, giving rise to grossly negligent conduct with reckless disregard for professional duties as set out below."
>
> (Particulars of Claim §§ 51-53)

251. I deal with these allegations in more detail in sections (G) to (J) below. However, I note at this stage the absence of any evidence specifically relating to the B Shares Mistake to suggest that either Primekings, the court or any member of the Kings' legal team saw it as being significant. I have already quoted from the transcript of Anthony King's cross-examination about this on Day 4. Further, a handwritten note of a telephone conversation between Mr Blakey and Mr Hall Taylor on the evening of Day 4 did not even mention the mistake but instead focused on the fact that Anthony King's oral evidence was coming across poorly.

252. The Kings complain that the legal team did not fully explain the implications of the B Shares Mistake to them. Anthony King said at §§ 54-56 of his witness statement:

> "The barristers have now admitted that what Mr Downes pointed out might have been 'actionable' by us after the trial. I am sure they realised that at the time but chose not to mention

> it to us and instead in breach of fiduciary duty chose to hide it from us.
>
> Court finished at 4.40pm and I now know that around twenty minutes later Mr Hall Taylor prompted Mr Blakey to read the transcript of the afternoon session of Day 4 and asked to speak with him. I was then copied into an email by mistake where Mr Hall Taylor emphasised to Mr Blakey that he needed to read the afternoon's transcript and I now know Mr Hall Taylor later mentioned just how 'bad' it 'felt at the time' and yet still it was still not even mentioned to me or my father at all.
>
> The consequences of this problem for my own witness statement and the pleadings in breach of fiduciary duties were hidden from my father and I and never discussed with us. I was not told my own witness statement was wrong on this point and so needed to be amended. There was no mention of it to us at all, even in a two-hour conference with me on 9 May 2017, or in the 36-page advice we were given a week later, or in the conferences with my father and I on 12 May 2017 and 15 May 2017."

253. However, I reject the suggestion that this was a deliberate choice. Rather, the main concern on Day 4 was the implications of Anthony King's evidence in general, particularly as regards the Swain Representations. It might be said that, despite its minimal significance in the context of the Misrepresentation Trial, the legal team ought to have explained explicitly to the Kings the effect of the B Shares Mistake. That would have had to have been after Anthony King and James King had given their evidence. However, it is understandable that, as Mr Hall Taylor said, it was overtaken by more important and more pressing matters. I note in this context that the Kings have never made a claim on the footing that the B Shares Mistake in itself caused them any financial loss, and it is hard to see how it could have done. I return later to its consequences.

254. A significant exchange after lunch on Day 4 concerned Anthony King's evidence about the participation of Mr Fisher:

> "Q. So are you positing that Mr Swain and Ms Lord had the plan to spook GE but Mr Fisher was unaware of that? Is that -
>
> A. I don't know. I've said they had a plan that as a collective, I believe they asked Robin whether it is appropriate for Steve to attend, so they are working as a collective around what the strategy is going to be with the GE meeting. I don't know what is discussed and what is that agreed strategy.
>
> Q. But is Mr Fisher involved in that strategy for the GE meeting?
>
> A. I don't know. He's involved — I believe ----

> Q. What do you believe? I agree -
>
> A. I don't know, again, whether Mr Swain went rogue or whether Robin agreed to the strategy.
>
> Q. You don't believe Mr Fisher was involved in the conspiracy, do you?
>
> A. I don't know when he becomes aware of it.
>
> Q. You don't really believe Mr Fisher was involved at all —
>
> A. He knew what was said was wrong ---
>
> Q. No.
>
> A. — but I don't know when he became aware of it. […]
>
> Q. Do you believe that Mr Fisher was involved in this fraudulent conspiracy at any stage before the phone call on 18 December?
>
> A. I don't know.
>
> Q. Do you believe that Mr Fisher was involved in this conspiracy at any point up to midnight on 18 December?
>
> A. Yes."

255. The Kings contended that that evidence went to show only that Mr King did not know exactly when the conspiracy was formed, and that the case against Mr Fisher was not solely that he partook in the conspiracy to mislead from the outset but that he also continued it when he received the Comfort Letter. They also point out that Anthony King elsewhere in his evidence suggested that Mr Fisher had acted fraudulently. However, Mr Hall Taylor's evidence, which I accept, was that the evidence Anthony King gave on Day 4, which included the evidence quoted above, was nonetheless damaging to the case against Mr Fisher:

> "But -- well, he says that there. You have to have experienced what that was like to watch, and it wasn't very credible, again, and it is not the totality of his evidence on it either. I mean, all I can say to you is by Saturday morning, Peter and I felt that we were having to give up a lot of our -- you know, potentially, at least, a lot of our case on conspiracy against Mr Fisher. That is what I was thinking about."

256. Also on the afternoon of Day 4, Anthony King accepted that Mr Swain's email of 17 December 2013 quoted earlier, telling his colleagues that *"[t]he reality is GE froze the facility today, no more cash they await our completion to support Kings continuation, we are the only option to keep the business entity alive, if we do not complete tomorrow I believe GE will appoint"*, was an honest email. He also accepted, in the context of the Mr Swain Representations, that if by 'frozen' Mr

Swain was referring to GE having just refused a drawdown, that would have been a fair statement.

(10) Day 5 (Friday 5 May 2017): third day of Anthony King's evidence

257. Anthony King's cross-examination continued on this day of the Misrepresentation Trial. The Kings in one of their 29 August 2023 written reply documents quote a discussion between the judge and Mr Downes shortly before the lunch break which touched on the B Shares Mistake as follows:

> "MR JUSTICE MARCUS SMITH: And the other thing which may be more difficult and is less urgent: the comparison of old and new terms, it might be worth trying to agree simply what the old terms and the new terms say. I appreciate that there is a matter of controversy about what Mr King may have understood about those terms, and I wouldn't want either party to go into that in an attempt to agree a document, I think that is a matter for the evidence, but simply in terms of what the old terms said and what the new terms actually agreed, that might be something which, rather than having to trawl through what may not be controversial in a judgment, it might be worth seeing if that can be agreed , I don't know.
>
> MR DOWNES: My Lord, I'm sure it can. My Lord, that table I handed up was deliberately taken simply from my learned friend's pleading.
>
> MR JUSTICE MARCUS SMITH: I see that.
>
> MR DOWNES: But it would be helpful, the main point being: do the claimants accept that before the 18th, the concept of redeemable shares was already in the drafts.
>
> MR JUSTICE MARCUS SMITH: Was somewhere in the transactional documents ----
>
> MR DOWNES: Indeed.
>
> MR JUSTICE MARCUS SMITH: --- irrespective of what anyone may have thought was in there, simply what was in there and what wasn't, that would, from my point of view, be quite helpful.
>
> MR DOWNES: I'm sure that's achievable."

258. This exchange occurred after Mr Downes had indicated that it might be a convenient moment to break, and was the second of two matters that the judge had introduced in the terms *"[t]wo things occur to me in terms of materials that might help going forward"*. The Kings submit that this exchange presented *"[t]he opportunity for Mr Downes to apply pressure about that conflict of interest"*, i.e. the alleged conflict relating to the B Shares Mistake, and that it was *"exactly why D3 told his husband the following day, 'going to have to concede that we cannot proceed with part of our case*

at some point next week...not good!'" I deal with the latter suggestion below, but reject the Kings' submission that the exchange quoted above had any significance of the kind they suggest. To the contrary, it was a 'housekeeping' discussion in the same vein as Mr Downes' entirely matter-of-fact treatment of the matter in his cross-examination. It was a would-be issue that in fact appeared to have been resolved and merely needed to be tidied away to enable the judge to focus on the real issues.

(11) The weekend of 6-7 May 2017

259. By the weekend of 6-7 May 2017, Anthony King had given a significant amount of evidence which the legal team felt damaged their claim. The problem with maintaining the case against Mr Fisher is mentioned above. More generally, even at this early stage Anthony King's general credibility was in serious question. On the afternoon of Day 4, Mr Blakey reported to a partner at DWF that "*Anthony king started ok but has become evasive, shifty and does not answer the question. Very frustrating*...". Similarly, in the present proceedings Mr Hall Taylor said:

> "Anthony was much more nuanced and much more, I suppose in the thick of it, is probably the best way of putting it, but the problem with that was that he then -- he gets into the thick of it almost and tries to solve the problem. He tries to find a solution and that -- you can see that throughout his evidence in the trial.
>
> And I get it, and I understand why he does it, and I understand why he felt wronged, but it caused immeasurable problems in his evidence because he was arguing, analysing, re-thinking, rejigging, changing his case, changing his evidence. It was absolutely disastrous from a credibility perspective."

260. On 5 May 2017, the Kings' legal team received late disclosures of emails from the Primekings defendants ("***Weekend Disclosures***"). In particular, the Weekend Disclosures revealed two emails sent by Mr Swain which the Kings in these proceedings say were especially favourable to their claim:

i) Mr Swain to Mr Fisher on 26 January 2014:

> "R, please read and destroy […]
>
> 1. The day before the deal (17th) Mike Mattok (Kings own Interim Finance man) called me to advise that GE had frozen the account. […]
>
> 4. I secured the payment, GE would overpay to support the deal (the money was for an essential payment) but this would be the last one - the account 'remained' frozen, it took some negotiation. […]
>
> 9. It was decided that if we were talking about different outcomes it would not be appropriate for Steve Evans to attend, I stopped Steve's attendance. […]

> 11. I had then requested if any discounts were available. GE were then very specific to state "that Kings Directors, not GE would be expected to appoint before Christmas if a deal was not finalised quickly, the account remained frozen, no discounts"
>
> 13.I advised twice once to Robin and once to all parties on loud speaker 'GE, the account remains frozen, they are annoyed they made an overpayment based on completion, and that if a deal was not completed they expected Kings Directors to appoint' everyone heard that, it could have been verified immediately by any call to GE, I had no reason not to say it as it was, anyone could have verified with them directly. Immediately.
>
> 14. I also told Mike Mattok who said that this met with his understanding.
>
> 15. Please verify with Mike Mattok, account was stopped/frozen, no more money 07779 260524 or GE.
>
> 16. I invited Steve Evans and I stopped his attendance. This made no difference to the position or truth, only that Steve never heard it first hand, on reflection it would have been better if he was present, it would not have changed the reality and not led to conspiracy theories.
>
> 17. Kings or there representatives were welcome to call GE in person at any time between our meeting at 1:30pm and the 15 hours after it took to conclude the deal, but they knew the position, Mike there man did as well." (emphasis added)

ii) Mr Swain to Alison Lord on 18 August 2015:

> "Info - this is the day before I was kicked out of Kings so Barry/Robin must have bought the Kings line. Likewise, it was Kings who wanted me removed as a Director not Robin, Robin asked me to do it.
>
> If someone has lied to gain advantage AK, does it not seem reasonable to go back to the original plan?"

261. With regard to the first email, I consider that, if anything, it tended to support Primekings' case because it suggested that Mr Swain genuinely believed (at least at the time) that GE had told Primekings that the account had been frozen. There is no particular reason to think Mr Swain would have had a reason to lie in this contemporaneous email to Mr Fisher. Anthony King responded, in cross-examination in the present case, that Mr Swain was a *"compulsive liar"* who *"just can't tell the truth to save his life"*. However, given the absence of any reason for Mr Swain to lie on this occasion, and the fact that the account had in a real sense been 'frozen', Anthony King's response in my view tells one more about his approach to the facts than Mr Swain's. The email was also consistent with Primekings' case that GE had

made its position conditional on a deal being done (§ 11: *"if a deal was not finalised quickly…"*) and, arguably, that that had been discussed with the Kings (§ 13: *"if a deal was not completed they expected Kings Directors to appoint"*). The Kings' suggestion that the words *"read and destroy"* showed a tendency to destroy documents was somewhat undermined by the fact that neither Mr Fisher nor Mr Swain had deleted the email. Mr Swain and Mr Fisher had given a consistent and plausible explanation of these words in their first witness statements, to the effect that the words were aimed at ensuring that the email was kept confidential and not sent on to Anthony King.

262. The second email did not obviously assist the Kings. It was in no sense an admission that Mr Swain had lied to the Kings, given that the words *"someone has lied"* were preceded by *"if"*. It might even have been a suggestion that Anthony King had lied, because it would appear that Mr Swain was aggrieved that he had been removed as a director and that *"Barry/Robin must have bought the Kings* [sic] *line"*.

263. Nonetheless it does seem that the legal team found the late disclosures at least somewhat useful, although there were portions which they felt damaged their case against Mr Fisher. Mr Blakey's trial notebook indicated that 'reviewing disclosures' was on his to-do list. Among the Barristers, it seems that it was Mr Morcos who reviewed the disclosure. At 10:54 on 6 May 2017 he emailed Mr Hall Taylor:

> "I've read the Swain emails this morning and a couple of them might actually be very helpful tactically if we need to drop conspiracy against RF. We may also want a witness statement from TS as to when during AK's xx they knew about these documents. I'll isolate the emails I'm talking about and send them over once I'm back at my desk."

In my view the very fact that Mr Morcos was considering the most advantageous tactics if it were necessary to drop the conspiracy claim against Mr Fisher in itself indicates that, far from having already decided (as the Kings allege) that the Kings' claim would be discontinued, he was continuing to do his best to advance it. The same point applies to Mr Morcos' email of 12:31 the same day:

> "This is my pared down version of the PS additional disclosure - takes out about 100 pages (although you may eventually want to read the whole lot). Key points: […]
>
> I think this final one is very confusing - can be read as RF being involved in a conspiracy but not necessarily (not sure what Robin asked PS to do – lie about GE? Or become a KSG director?). But there is a lot here to suggest that PS and AL "went rogue" and that they were either keeping RF in the dark or manipulating him."

264. It is common ground that neither the Weekend Disclosures nor their possible deployment in the Misrepresentation Trial were discussed with the Kings (for example, during the Tuesday Conference on 9 May 2017). Nor were they analysed in the Advice to Discontinue (see below). The Kings alleged at §§ 55-56 of their Particulars of Claim that this was because the legal team had by that point already

decided to pressure the Kings to discontinue the claim in order to cover up the B Shares Mistake:

> "Mr Morcos and Mr Hall Taylor began drafting the written advice to discontinue … on or before 8 May 2017, because they knew that they intended, in breach of fiduciary duty, to pressurise their clients into discontinuing and would need a written advice to do that.
>
> In breach of fiduciary duty, no attempts were made to use the Weekend Disclosure to assist the Kings, because the legal team had already decided that the Kings would be forced to discontinue the case."

For the reasons given later, I am sure there was no such decision.

265. A similar argument was made with regard to the "***Fisher Disclosures***", which seems to have been received by DWF on 9 May 2017. The Kings alleged at § 57 of their Particulars of Claim:

> "Further disclosure was due to be received from Mr Fisher ('the Fisher Disclosure') but it was never received. In breach of fiduciary duty the legal team made no efforts to obtain the Fisher Disclosure and the Kings were not advised to wait for such potentially helpful disclosure. That was because their legal team had already decided that the Kings would discontinue the case."

266. The Kings say that the Fisher Disclosures would have revealed emails which were likewise helpful for their claim. Teacher Stern's search of Mr Fisher's inbox revealed that there were 11,347 emails in his sent box but no emails in his inbox, draft or deleted items. They say that this could have been deployed as an attack on Mr Fisher's credibility.

267. Mr Hall Taylor's oral evidence that the reasons why these disclosures were not discussed with the Kings were that: (1) they did not further the case in any substantial way, and (2) by that stage, there were far more important problems with the case to be dealt with. I accept that evidence. There may have been innocent explanations for the state of Mr Fisher's email account, such as filing of emails elsewhere once dealt with, deletion in the ordinary course and the fact that his deleted items folder was automatically cleared after 30 days.

268. On Saturday 6 May 2017 at 09:59, Mr Hall Taylor emailed a third party unconnected with the case (whose name is redacted on the email but whom Mr Hall Taylor says was his husband):

> "I was completely zonked – although I woke up early and then tried to force myself to doze, which I managed on and off for a couple of hours - but my mind was racing a bit too much - our client really has messed up in the witness box so we are going

> to have to concede that we cannot proceed with part of our case at some point next week...not good!" (emphasis added)

269. The Kings argued that the "*part of our case*" that had to be dropped referred to the B Shares Mistake and the fact that that aspect of the damages claim would have to be removed from the Kings' statements of case. They emphasised the "*not good!*" reaction and argued that this email showed that Mr Hall Taylor was seriously concerned about the implications of the B Shares Mistake. I do not accept that contention. Mr Hall Taylor's explanation in cross-examination for this email was that the "*part of our case*" referred to the conspiracy/fraud case against Mr Fisher. That had to be dropped in light of the unconvincing nature of Anthony King's Day 4 evidence that Mr Fisher (and Mr Stiefel) were part of the conspiracy to defraud the Kings (see above). § 17 of the Advice to Discontinue (which will be discussed in greater detail below) encapsulated this opinion:

> "Somewhat surprisingly both Anthony and James King also gave evidence that was at times very favourable to Mr Fisher and Mr Stiefel, such that it would in any event have been unlikely that a Court could make a finding of dishonesty or conspiracy against either man."

Mr Hall Taylor's evidence on this point is plainly consistent with the fact that the possible need to drop the fraud claim against Mr Fisher was under active consideration that weekend: see the email from Mr Morcos quoted in § 263. above. It also makes sense, since dropping the claim, or part of the claim, against Mr Fisher would have been a serious matter whereas the B Shares Mistake was of far lesser significance (a topic to which I return later).

270. I mention for completeness that during oral openings, in response to a question from me, about which 'part of our case' the email might have referred to, Mr Croxford replied that Mr Hall Taylor would explain for himself but it might have related to the evidence about whether the words 'unless a deal was done' were used at the Completion Meeting. As the evidence, including Mr Hall Taylor's explanation, showed, that was not in fact the correct explanation. In a characteristically extravagant submission, the Kings argued in their written closing that *"[t]o allow a sophisticated and well represented defendant to disown a previous inconsistent statement, about an email flagged in the opening skeleton and made by his leading counsel, without consequence when he has international law firm Herbert Smith Freehills providing support, would be to afford to Mr Hall Taylor a procedural advantage not afforded to less well represented defendants in courts up and down the land"*. The simple fact is that it was Mr Hall Taylor, not Mr Croxford, giving evidence, and for the reasons given above I accept his evidence.

271. In their written reply closing submission, the Kings made the new suggestion that this and other emails Mr Hall Taylor sent to third parties about the case were evidence of consciousness of guilt and an agitated and anxious state of mind. Save that Mr Hall Taylor had good reason to have been anxious, and may have been anxious, about how badly the case was going in light of the adverse evidence emerging as the trial proceeded, I see no basis for the Kings' belated suggestion and reject it.

(12) Corrections to Lester Wilson's witness statement

272. As noted earlier, Mr Wilson's initial witness statement arguably in part reflected the B Shares Mistake, to the extent that § 49 (unlike § 19.5) implied that payment of the Deferred Consideration via redeemable shares issued by KSG was a change from the Initial Deal:

> 49.6. James and his wife would receive £3m over 3 years at a rate of £1m per annum by way of share redemption and provided that KSG's EBITDA was £3m or more in each year. The payment, therefore, was to be made by KSG and not PKH." (emphasis added)

273. On Monday 8 May 2017 (Day 6 of the trial) at 15:18, Mr Wilson sent the first draft of a typed-up version of a list of corrections he wished to make to his witness statement ("***List of Corrections***") to Mr Blakey and Ms Connor. A final draft was then forwarded to Mr Hall Taylor and Mr Morcos at 18:59. One of the corrections was that:

> "There was nothing new in the redeemable shares or KSG paying for the redemption."

274. The Kings alleged, at §§ 47-48 of their Particulars of Claim, that in breach of the Embargo Order Mr Wilson was tipped off about the events of Day 4 and the B Shares Mistake by "*a member of the legal team*":

> "At some time after the cross-examination referred to in paragraph 43 above took place, a member of the legal team contacted Mr Wilson to bring to his attention the fact that Primekings had identified in Court facts which showed that the Particulars of Claim, the witness statements and opening submissions (all of which had been based on his instructions) were wrong.
>
> That caused Mr Wilson to prepare with the assistance or input of at least Mr Blakey, Mr Hall Taylor and Mr Morcos a word processed list of corrections to his witness statement ('the List of Corrections'). The effect of those corrections was to make Mr Wilson's evidence irreconcilable with the witness statements of James and Anthony King, the Particulars of Claim, and the opening submissions."

275. In support of their allegation, the Kings cited a page from Mr Blakey's notebook from 8 May that recorded "*LW amends to his statement*", although whether this was a to-do list or a note of a conference that evening was disputed during these proceedings. The page stated the time "*5.20pm*" at the top and "*end 8.30*" at the bottom. A series of emails between the Kings' legal team during this period of time implied that they were not in the same room. Both Mr Blakey and Ms Connor said the document was a 'to do' list rather than a note or notes of a meeting or meetings. It contained entries regarding administrative tasks that would be inapt as part of a discussion with Mr Hall Taylor (e.g. "*GQ [i.e., Gary Quirke] expenses - £211.75"* and *"Anymore C1-C8*

labels"). It was in similar form to a list Mr Blakey created two days later while in Leeds and hence clearly not in conference with other team members. It included the entry "*LW amends to his statement 8x*", which, Mr Blakey said, was merely a reminder to ensure that eight copies of Mr Wilson's corrections were printed for court. On the basis of this evidence, I reach the clear conclusion that the document was no more than an action list created by Mr Blakey for his own use, with the start and end times likely recording the hours he was engaged, and did not reflect a conference with other members of the team.

276. The Kings also cited Mr Blakey's time recording for 8 May 2017:

> "10.5 hours. In court, travel to/from Court and chambers, discussions with witnesses, discussing LW's amends, action points etc."

I do not accept the suggestion that the words "*discussions with witnesses*" must be a reference to discussions with Lester Wilson. It is possible that *"discussing LW's amends"* referred to discussing the amendments with Ms Connor, but there is no reason to believe that (as Mr Blakey said in evidence) any such discussion would have been other than purely administrative.

277. In these proceedings DWF have:

> "denied that he prepared the List of Corrections with the assistance or input of any member of the legal team." (§ 58.5 Defence of D1)

278. Mr Wilson's explanation at §§ 89-94 of his witness statement for the change of evidence was this:

> "The Particulars allege that one of the legal team contacted me during Anthony King's cross-examination to tell me that Primekings had found facts which showed that the Particulars of Claim, the witness statements and opening submissions in the Primekings Litigation were wrong, all of which were based on my instructions. As I have already said in this witness statement, I did not give instructions regarding the Particulars of Claim or witness statements in the Primekings Litigation. I did not give instructions about opening submissions either.
>
> I was not contacted by a member of the legal team about the above matters.
>
> The first time I realised that a mistake had been made in my witness statement regarding the redeemable shares was on the morning of Sunday 7 May 2017. On the Friday (5 May), I had printed out a lot of the relevant documents from my inbox (using Mimecast), so that I could take them home to prepare for giving evidence in court the following week. I wanted to get the deal clear in my head as well as the chronology of events as I could remember very little detail. I started looking at them on

> Sunday morning. I remember noticing an error which didn't correspond with something I'd read in the correspondence. I can't remember exactly what this was. I therefore undertook a checking exercise of each paragraph in my statement against the correspondence and documentation I had printed. I found several errors including the error regarding the deferred consideration.
>
> I felt physically sick when I realised there were mistakes in my statement. I will never forget how I felt that morning; I was appalled and furious and I was kicking myself. I felt very angry with Jason for not checking the details. My wife came in and I told her about the mistake and that my witness statement was wrong.
>
> I realised I had to do something about it but I didn't know what to do exactly. I'm not used to dealing with witness statements or litigation and I was in some distress. I believe I may have tried calling Jason that morning.
>
> On the Monday morning (8 May 2017), I couldn't speak to Jason as he was in trial. I think I got Grace's number from one of her colleagues in the office and managed to get a message to her saying I needed to speak to her and Jason urgently. When I spoke to Jason and Grace I told them my statement was wrong and asked 'what do I do?' I was told they couldn't talk to me about it. I insisted 'what do I do?' I think Jason said that I should send them a list of my corrections. So they were expecting the list of corrections when I sent it to them."

279. His wife Sarah Wilson corroborated this explanation at §§ 7-10 of her witness statement:

> "It was a Sunday morning and I remember that Lester was due to go down to London later that week to give evidence, but I don't remember the date. I can remember Lester sitting on the bed with his head in his hands saying something about his witness statement being wrong and that "Blakey" (referring to Mr Blakey) had got it wrong, and he needed to speak with him. I also remember him pacing up and down the landing and trying to contact Jason Blakey. I can't remember if he was successful or not as I was running round getting us all organised to leave the house.
>
> I can't remember timings or much else other than the feelings I had, as these feelings don't leave you. I remember two distinct thoughts / feelings.
>
> I remember feeling angry at Lester as we needed to get the children up and out to activities that they had on. I remember they needed to be in two different directions, so it needed both

> of us. It has often been the case that work has interrupted our personal lives, interrupting holidays etc, and on this occasion, I could see it doing that again, as Lester was clearly distracted and not engaged in family life.
>
> I also remember being annoyed and frustrated that Lester had managed to get to a position whereby he had signed his witness statement and was now noticing that it was incorrect. I remember getting quite vocal as to how he could have got himself in that position; how could he have not had the required attention to detail? As I said above, I qualified as a lawyer myself and, whilst that was not in litigation, I know that a witness statement is something that you should not be signing off unless you have read it in great detail and are absolutely sure of the contents."

Mrs Wilson confirmed this in her oral evidence.

280. Similarly, Ms Connor denied tipping Mr Wilson off in light of the events of Day 4. She said at § 38 of her witness statement:

> "There was an order made by the judge that there was not to be discussion amongst witnesses regarding the evidence which had been given by witnesses who had gone before them, and we were not to share copies of the transcripts or other similar information. We were very conscious of this order and did not want to inadvertently breach its terms; I did not contact Lester about Anthony's evidence and I don't recall having any input into the list of corrections. I was not aware of Jason having any input either, or the barristers."

281. Surprisingly, the Kings did not put the "tipping off" case to Mr Hall Taylor, Peter Morcos, Mr Blakey or Ms Connor, save perhaps in the rather cryptic suggestion made to Mr Blakey that:

> "the sky.com account was used as a mechanism by which Mr Wilson could keep up to date with the case" {Day13/41:16}

though no questions were asked as to how Mr Wilson could have been able to access that account.

282. It was suggested to Mr Wilson that "*contact was made with you by phone or text to inform you of what had happened at court*", but that case was not put to the other witnesses. It was also suggested to Mr Wilson that Mr Blakey might have left a transcript of Day 4 in view on his desk, but no such suggestion was made to Mr Blakey himself.

283. Mr Wilson denied being made aware of the evidence of Day 4 in any fashion, and I accept his evidence, as well as the supporting evidence of Sarah Wilson and Ms Connor that I quote above.

284. The final draft of the list of corrections differed in one respect from an earlier draft. The earlier draft, at § 49.1, referred to the term in the Final Deal whereby James and Susan King would receive £1.25 million (of the £2 million consideration for their 40% shareholding). In the earlier draft, Mr Wilson stated: "*as far as I'm aware, no money has been paid under this provision*." The final draft removed that statement. During the early evening of 8 May, Ms Connor emailed James King's and Mr Armitage's witness statements to Mr Wilson. Mr Wilson said in his witness statement:

> "I do not recall specifically how that change came about. However, having recently been referred to the emails sent to me by Grace Connor at 18:23 and 18:26, attaching the witness statements of James King and David Armitage (for the first time since I originally received them) I now have a vague recollection that I had a discussion with Grace Connor about whether this payment had been made. Either I asked whether it had been paid and she told me that it had been and that it was covered in one of the witness statements, or she told me this unprompted; I cannot remember now. I understand that this issue was never contentious in the Primekings Litigation."

285. It was suggested to Ms Connor that that account was likely to be correct, and that she probably pointed out that that sentence in Mr Wilson's first draft of the list of corrections was incorrect; but she said she had no specific recollection about it. The focus of the cross-examination that followed appeared to be on whether any such conversation would constitute "assistance" or "input" into the list of corrections. However, none of this had anything to do with Mr Wilson's evidence about the B Shares, and no suggestion was made to Ms Connor or Mr Wilson of any impropriety. The removed sentence concerned an erroneous impression of a matter which was common ground in the Misrepresentation Proceedings, namely that James and Susan King had received the £1.25 million, and it was proper for the matter to be corrected in the way it was.

286. Anthony King was in court on the morning when Mr Wilson's list of corrections were read out. However, the Kings maintain that it should have been provided to them earlier. Further, at § 47-48 of their Particulars of Claim they allege:

> "Mr Hall Taylor and Mr Morcos in breach of fiduciary duty refused to provide a copy of the List of Corrections to the Kings pre-action because they understand its significance in that regard."

287. The Kings also say that the implications of the corrections were never explained to them, even though the legal team had ample opportunity to do so (for example during the two-hour 'Tuesday Conference' on 9 May 2017).

288. Since Mr Wilson formulated the corrections over the weekend of 6/7 May, while Anthony King was still in the course of his evidence, they could not have been discussed with him until later on Monday 8 May. It might have been desirable for them then to have been discussed before Mr Wilson gave evidence on Wednesday 10 May. However, I reject the suggestion that this was a deliberate omission on the part

of the legal team. Rather, I consider that at that point in time they had bigger issues occupying their mind, not least the abrupt change in Anthony King's evidence on the morning of Monday 8 May, Day 6.

(13) Day 6 (Monday 8 May 2017): Anthony King's new evidence

(a) DWF pressing for legal charge to be signed

289. On the morning of Day 6 before court began, DWF was pressing to secure the legal charge over the Kings' Menston property. At 08:55 Mr Blakey emailed the banking team at DWF:

> "Morning. I know you want me to ask Anthony again for a contact at Barclays but please can you see/try anything further to progress this. Can we get Anthony to sign a charge anyway pending Barclays' approval? Can we finalize anything? What do we need to do? We really need to sort this for the firm urgently. We are back in court from 10ish today. Anthony finishes his evidence later today so he will be able to deal with stuff if you send it through to him. Thanks"

290. This was not done, and Mr Blakey's to-do list on 10 May 2017 in his trial notebook contained "*Charge – Banking*" as an item. The charge was only finally signed after the Misrepresentation Trial.

291. The Kings say that the reason why DWF was pressing urgently to secure the charge at this point was because they had already planned to pressure the Kings into discontinuing the claim and therefore foresaw that they would be made insolvent. However, Mr Blakey's evidence was that DWF had always planned to obtain security for their legal fees; that was their standard practice; it was delayed and not completed by the banking team; and so it is to be expected that he would be following up on it. Moreover, by that point it must have been clear to the Kings' legal team that there was (at the very least) a real prospect of losing (for reasons entirely unconnected with the B Shares Mistake), which would have resulted in the Kings becoming subject to a substantial adverse costs order. It was legitimate for DWF to be continuing to seek a charge for their outstanding fees half-way through the trial, especially given that the Kings had already been struggling to pay DWF in late January 2017.

(b) Introduction of Fisher Representations

292. As mentioned, the Kings' pleaded case during the Misrepresentation Proceedings, and their witness statements in support of it, alleged that there was only one set of misrepresentations made during the Completion Meeting – the Swain Representations – and that the words "*unless a deal was done*" were never used during that meeting.

293. Hence Anthony King's witness statement said:

> "132. At about 3.50pm or so Mr Fisher left the room to take a phone call. A couple of minutes later Mr Fisher returned and placed his mobile phone on the table putting it on speaker

> phone. It was Mr Swain on the end of the line. Mr Fisher asked Mr Swain to repeat what he had just told him.
>
> 133. Mr Swain said that he'd just come out of the meeting with GE (Andy and Tom) and that they had said that KSG's accounts were all frozen, that GE had lost complete faith in the management of the Kings Group and GE was no longer willing to support the Kings Group or provide any further funding. I immediately asked whether Steve had been at the meeting and Mr Swain said that GE had refused to let him into it. […]
>
> 140. My solicitors have asked me if Mr Swain or Mr Fisher qualified the statements referred to at paragraph 132 above with the words "unless a deal was done" as alleged in the Defendants' Amended Defence at paragraph 28. I confirm that neither Mr Swain nor Mr Fisher used these words either on the call, in the meetings that followed or at any other time." (emphasis added)

294. The witness statements of James King, Mr Armitage and Mr Wilson were consistent on that point.

295. On Day 6, however, Mr Anthony King changed his evidence on this issue in a fundamental and unexpected way. Mr Downes had suggested that Anthony King re-read over the weekend the draft email written by James King dated 20 December 2013 referred to above. When he returned to give evidence on the morning of Day 6, Anthony King said this:

> "My Lord, when I briefly looked at this on Friday I felt a little bit embarrassed on the train home, to be honest. I just thought, "Dad, this is all over the place, what's happening here". But I was so relieved to get home, I'll be honest with you, I didn't really pay much attention to it, and then I came back to it on Saturday.
>
> This has been a difficult weekend for me. This is - I had to go back to a place where I've never wanted to go back […]
>
> Then, your Honour, I'll be honest with you, I broke down and cried this weekend because I remembered. There's been a lot of debate about whether the words "unless a deal is done" were used, and they were used, but not by Peter; they were used by Robin. They were used by Robin.
>
> What happened was Robin left the room and he goes out after this big bombshell has been dropped on us, he goes out of the room. Then he comes back in, I don't—I can't recall whether it was half an hour or 45 minutes later, and he says he's spoken to GE and he's—what Peter has said is true but he's managed to convince them to stay with us and if we do a deal, if we do a deal, it will all be okay but he can't possibly do it now on these

> same terms. He has to relook at—there's huge risk now around GE and he can't possibly do it on the same terms. And we just sit there and dad says –we're just floored...
>
> …He never tabled anything. He just said we have to—GE will continue to support, I managed to talk them into it, but we can't possibly do it on existing terms now."

296. This evidence was then subject to cross-examination, in a passage which I need to set out at some length given its importance and the fact that it took some time to reach the end point:

> "Q. Now, I assume that you want to change [your witness statement] now, do you?
>
> A. Yes.
>
> Q. So just, you are saying, are you, that we have to really delete the last sentence, or say "at the time of the call", although Mr Fisher later did make it clear that GE's position was conditional on the deal not being done?
>
> A. No, Mr Fisher came back in and said he'd spoken to GE and that unless — he'd managed to convince them to stick with Kings, stick with the deal, but a deal now had to be done — that - he confirmed that what Peter Swain had said was true, that GE's position was absolute, but he had now spoken to them and that if we do a deal, they will continue to support. But he said under no way can I continue to do this deal now under these terms, with this uncertainty. […]
>
> Q. So have I got it right: Mr Fisher says that the position - he's spoken to GE and the position stated by Mr Swain was correct, but he's sort of talked them round?
>
> A. That's the way it was put to us, yes.
>
> Q. Right. Let's pause there a moment. It follows from that, doesn't it, that Mr Fisher at that stage when he confirms Mr Swain's earlier statement, must be lying?
>
> A. He must have - he must be, yes.
>
> Q. So he has had the call with GE, he has found out the truth, and he knows that it was never the position that GE were going to pull the plug?
>
> A. Yes.
>
> Q. So what he does is he comes in and says - and lies and says: what Mr Swain said earlier was true -- that's a lie -- but I have talked them round to a slightly more reasonable position.

A. Yes.

Q. And that's a lie as well, isn't it?

A. He -- he ... yes, he hasn't talked them round.

Q. So he is lying on both fronts, but the odd thing is that where he gets to at the end of his statements, albeit he has told two lies, he gets to the position which is precisely what the evidence suggests the position was, ie that GE were not going to advance further funds unless a deal was done.

A. No. No. He does not say that it was only a position of overadvancing. He supports exactly what was told to us by Peter, that whole bombshell that everything's over, everything's finished, but he's now talked them round.

Q. Yes.

A. He doesn't confirm "Oh, that was a misunderstanding".

Q. No, no, I'm giving you that one for the moment, at least, for the purposes of this debate, Mr King. But what I'm saying is the end point, what Mr Fisher says is the position we are now at is that GE will pull the plug unless the deal is done. He says that?

A. They've pulled the plug but he's now talked them round.

[…]

MR JUSTICE MARCUS SMITH: Understand, Mr King, I think what counsel is asking about is the end position, in other words, he is accepting, for the moment -- he will put to you his clients' case - he is accepting for the moment that there was a statement that GE had completely pulled the plug, but what he is trying to understand is what position you ended up after this second conversation with Mr Fisher. I wonder if you can just try and answer that for us. We don't need the history as to how you got there.

A. Sorry.

MR JUSTICE MARCUS SMITH: But just see if we can work out what you thought at the end of this second conversation that you have recollected?

A. Is that we -- we just have to do a deal. The only thing to save the business is a deal.

[…]

> MR JUSTICE MARCUS SMITH: So just looking at what you said earlier, [draft] page 12 of the transcript: He says he's spoken to GE, he's managed to convince them to stay with us, but only if a deal is done.
>
> A. Provided -- yes, yes. Which is why when I spoke to the lawyer later I said it wasn't ever conditional on a deal being done. I spoke to David Armitage, he showed me an e-mail, and I reflect back to David Armitage and I've said to David: it was never conditional even on this deal being done. Even that wasn't the truth.
>
> MR DOWNES: So apart from the fact that obviously we don't accept there was ever a lie, we don't accept that Mr Swain told a lie, we don't accept that Mr Fisher told a lie, but apart from that, where we come to at that point in time, so about 5.00 pm on the 18th -
>
> A. I imagine so, yes.
>
> Q. - is that everybody is really on the same page; that if no deal is done, you can't survive, and if a deal is done, you can survive.
>
> A. Yes."

297. The new alleged representations by Mr Fisher (the "***Fisher Representations***") had never been mentioned before by Anthony King or any of the other witnesses. They amounted to a new case of which the existing statements of case contained no hint, and which contradicted the case that Primekings never used the qualification "*unless a deal is done*" (or similar). It was also a new allegation of fraud against Mr Fisher, made in the middle of trial. It severely undermined the Kings' case that they had relied on representations that GE had permanently withdrawn funding, without qualification. Further, in due course James King maintained that the Fisher Representations were not made. These entirely unanticipated developments in Anthony King's evidence were disastrous from the point of view of the Kings' claim.

298. As to the possibility of any application to amend, Mr Downes gave this indication during Day 6:

> "MR DOWNES: My Lord, can I just raise one housekeeping matter I just mentioned to my learned friend. It occurs to us that there may be — and I put it no higher than that — a need for the claimants to revisit the pleading and what I've suggested to my learned friend is a sensible way forward is that we wait and see what the claimants' evidence is as a whole, see what the other witnesses say. Obviously they can't be told about what Mr King has said in the witness box and I hope - I am sure my learned friend does, but I hope all those sitting behind will understand how important that is.

> We then finish the most part of his witnesses on Thursday -- only Mr Smith, but he really doesn't affect things one way or the other. He then has the long weekend to decide if he wishes to make any amendment to his pleading and, if so, what it is. My only request is that we do get to see that case before my witnesses go in the box. I don't intend to be difficult about it. If we can deal with the case as matters stand, obviously it is in the interests of everybody to do so. So long as it doesn't bring in some huge other factual issue that we need to investigate.
>
> If that doesn't happen, I do reserve the right at the end of the day case to say: this new case isn't pleaded and you can't succeed on it, so I am just giving everybody fair warning." (emphasis added)

(c) Evidence about Mr Fisher

299. Another damaging aspect of Anthony King's evidence on Day 6 was his apparent reluctance fully to implicate Mr Fisher in the alleged fraud, even though Mr Fisher was a named defendant and now stood accused of making the Fisher Representations:

> "Q: It's all very lovey-dovey, isn't it, between you and Mr Fisher?
>
> A. I hugged Mr Fisher on Tuesday when we started this court case, sir. I still love the guy. I still love the guy.
>
> Q. What, the fraudster? The liar?
>
> A. Yes, I still love the guy. I still hugged him on Tuesday when I saw him outside the courtroom."
>
> ...
>
> "Q. No, you can persuade yourself of exactly how you should feel or did feel or thought and then it just becomes a reality in your own head, is that how it works?
>
> A. No, not really, no.
>
> Q. I'm asking you, is this a genuine statement?
>
> A. This is genuine. This is absolutely genuine.
>
> Q. "You are my trusted partners and friends and I thank God for bringing you into my life."
>
> A. I do, absolutely.
>
> Q. The liars?

A. I've forgiven that. That is not even in my heart and in my mindset, I've moved on from that.

Q. Not now, you haven't, because now you are suing them.

A. Yes, unfortunately we are.

Q. Steps that have had real consequences and adverse impact on men who they say have done you no harm whatsoever?

A. Well, the forgiveness, unfortunately was only one way. I didn't want to be here. I don't want to be here.

Q. You sued us?

A. Yes, we had to."

"Q. And then - I don't think we need to look at that. Then {D/50/12890}, December 2014, there's a series of texts with Robin Fisher. All very friendly, isn't it?

A. I think you've seen all the way through these e-mails, me and Robin are trying to build a future. Me and Robin believe that we can work together.

Q. Look at 12891 at the bottom. Even at this stage you are grateful and thankful that Robin Fisher has come into your life?

A. I like Robin.

Q. But he's a liar, and at this stage -

A. I'm not forgiving about him being a liar. Me and Robin never talked to each other like that. Me and Robin want to build a future. We are friends. We want to make things work.

Q. You have sued him and alleged that he was engaged in a criminal, fraudulent conspiracy -

A. We - unfortunately events got to where they've got to, but me and Robin have tried and have wanted to resolve this. Right up to a few weeks ago we've tried to resolve this, me and Robin. This, really, is between my father and Barry, who are where they are with each other.

Q. You blame your father, do you, for it? You've signed the statement of truth -

A. Yes. No, I support what he's done, I support the facts."

(d) Re-examination plan for Anthony King

300. The Kings' legal team had made provisional plans for the re-examination of Anthony King in a document titled "*AK Re-Examination*". The Kings highlighted (i) that it mentioned documents the legal team were planning to but did not in fact deploy to prove that there were external investors who were interested in KSG besides Primekings (going to the 'reliance' aspect of the misrepresentation claim); and (ii) that the document stopped at Day 4. The Kings said that was because after Day 4 the legal team had already decided to force the Kings to discontinue their claim. I do not consider it remotely possible to draw that inference. Further, Mr Blakey explained that the legal team were extremely concerned about how Anthony King would perform in the box and felt that it would do more damage than good if he were to be re-examined. That evidence seems to me entirely plausible. It is hard to see how re-examination could possibly have undone the damage caused by Anthony King's oral evidence.

(e) State of the Kings' claim at the end of Day 6

301. At the end of Day 6, Mr Hall Taylor sent an email to Mr Blakey (copying in Mr Morcos) at 22:36 taking stock of the claim in light of (in particular) Anthony King's evidence on that day:

> "I think it is necessary at this point to provide some brief but important advice on the present situation arising from Anthony's evidence. I have discussed matters with Peter, and this email has been seen and approved by him. While I am leading and taking responsibility for our case, this advice should be considered to come from us both and to be an expression of both our independent and collective views.
>
> Last week Anthony's evidence was, as you know, very disappointing. Ignoring for the moment, the unfortunate and evasive manner in which some of his evidence was given, there were certain aspects in which he seriously undermined and narrowed our case. Examples include but are not limited to effective exonerations of Barry and Robin and concessions affecting adjustments on rescission. There were also serious credibility and causation issues arising from his evidence. I have had to adjust my intended approach to cross-examination of a number of witnesses as a result.
>
> At the end of last week, Peter and I were left very flat, feeling that Anthony's evidence had undershot our pleaded claim. That claim was, I had felt in pleading it, already a restrained version of what Anthony and his father wanted to run. If he wanted to run the 100% case, I probably pleaded the 75% case, and his evidence last week undershot that considerably. It was probably well below 50% of the case he and his father originally wanted to run and it was hard to reconcile his previous instructions with the evidence he gave last week. Having reviewed the transcripts over the weekend, even without the negative "tone"

> of seeing/hearing the evidence "live", the substance has supported that view.
>
> Today, however, an even more serious issue has arisen. In effect Anthony has returned from the weekend with a completely new version of events for 18 Dec 2013 which he has never previously mentioned (and indeed expressly contradicted). He has also sought to revoke his exonerations of Barry and Robin (whilst this may be understandable, it further undermines the credibility of his evidence last week). The new version of events does state for the first time that the "unless a deal was done" phrase was used by Robin - despite numerous examples of prior evidence/pleadings to the contrary (as PDQC was able to make much of). It will be obvious to you, I know, and we have briefly discussed that this creates even more serious credibility issues as well as the need to consider amendment and/or whether (and on what basis) certain aspects of the claim can now be maintained. PDQC has already flagged at least one submission he can now make that completely undermines our existing pleaded case (and it is one that had occurred to me long before he first mentioned it this morning).
>
> We will have to see how the remainder of the evidence plays out this week. There are obviously a number of possibilities, some of which may raise further credibility, pleading and even professional issues. I need say no more about that for now. We cannot, it seems to me, take a proper and full view on how this leaves the case until after the evidence has been given. We will then have to advise. Given that this will be advice that has to be given to Anthony and both of his parents, this is another reason why it must wait until after their evidence has been given, even if we have some prior discussions with Anthony alone.
>
> What is imperative, and I know you will emphasise this to Anthony, is that the Judge's order concerning the witnesses/evidence is respected and adhered to. There must be no indication to any witness of any prior evidence given (or any advice relating to it), and no discussion of the case with any witness in the box. Any failure to comply would constitute contempt and carry very serious consequences, as well as potentially further undermine credibility and/or our case."

302. Earlier the same evening, at 21:19, Mr Hall Taylor had sent a lengthy email to Peter Morcos entitled "*Medcalf excerpts*", referring to *Medcalf v Mardell* [2002] UKHL 27. They included, for example, part of the passage from Lord Bingham's speech quoted in § 420. below. The same passages were reflected subsequently in the Advice to Discontinue. The Kings suggested that at this early stage the Barristers already had a plan to discontinue the case and this e-mail was written in preparation for it. I reject that allegation. The recent developments in the evidence made it essential for counsel to have regard to their *Medcalf* obligations.

303. The next day Mr Blakey had lunch with Anthony King to update him on the state of the claim. His notes of the conversation recorded:

> "AK: - I told the truth – I understand – Knew the risks
>
> JAB: - Not believed – Did not support the evidence
>
> – hugging RF – BS – RF conspiracy – Why didn't you say statement?
>
> – We have serious problems – We are in real trouble
>
> AK: - If we lose then we've told the truth"

(14) Day 7 (Tuesday 9 May 2017): the GE evidence; the Tuesday Conference

304. On Day 7, the witnesses from GE (Mr Weedall and Mr Cole) gave evidence. Mr Weedall gave evidence that the KSG facility was over-advanced prior to 18 December 2013 and that GE was working towards 20 December as a rather fixed deadline for external funding to come through:

> "Q. And the amount that's available, if you follow it down 2 to 11 December, we're now down to 4,000 available?
>
> A. Yes.
>
> Q. So that's virtually nothing. Then on the 12th, you go into the overadvance position of 103. The 13,250 — I mean, this must be the point at which you are starting to feel extremely uncomfortable?
>
> A. Clearly we are advancing beyond our agreed 85 per cent formula so, again, I think it demonstrates that we were trying to assist, where possible, and making drawdown requests above our 85 per cent. From memory, the reasons why we — I took the decision, and obviously ratified it through my director at the time, was that we had line of sight potentially to a solution being found and new, fresh monies being injected into the company by 20 December, and therefore we felt that we should make the payments over and above the 85 per cent advance rate, put ourselves into an overdrawn position, because, as I say, we felt we had good line of sight and then an agreed timescale to deal with necessary funds being injected into the business.
>
> Q. That was my next question, was that you were only prepared to go into that overadvance facility because you believed there was an imminent deal going to be done –
>
> A. Yes.

> Q. -- to bring money in and sort the problem out?
>
> A. Correct.
>
> Q. And you wouldn't have allowed it to go into overadvance if that had not been the position?
>
> A. I think, more than likely no. […]
>
> Q. And that other solution was administration?
>
> A. One of, yes, agreed.
>
> […]
>
> MR JUSTICE MARCUS SMITH: Mr Weedall, again, a few minutes ago you said: "We felt we had a good line of sight". Which is why I asked you about the lines of communication, and then you said: "... an agreed timescale to deal with necessary funds."
>
> Was that, again, an informal communication about when the transaction, the funding transaction, might be expected to be achieved, or are you thinking of a more formal communication?
>
> A. No, so our communications to the company were saying — and, again, there's an e-mail from myself advising the 20 December - the reason why 20 December was the appropriate time was because the cash flow forecast significantly had a substantially larger overdrawn position than what we could manage leading up to that time period. I think we wanted the assurance from all parties, whether that was KPMG, the company, or the investors, that the timescales would be achieved of the 20th. So in terms of formal correspondence, I suppose that was being done via e-mail or telephone.
>
> MR JUSTICE MARCUS SMITH: Yes, so all three parties, the purchasers, the company itself and KPMG were aware of the 20th as being a really rather important date -
>
> A. Yes, no, absolutely, yes."

305. Mr Weedall accepted that if the Transaction fell through such that no external funding was available on 20 December 2013, there was a very real possibility KSG would go into insolvency.

> "A. I think administration wasn't 100 per cent the final outcome, but clearly it was a significant possibility given the cash flow forecast that we have just seen. From GE's perspective, what we were trying to do was provide the company and its advisers and all stakeholders and parties the opportunity and the time to perfect and inject the necessary

> funds that kept the business solvent and obviously the employees' jobs, et cetera. But certainly there was - we would have had to have another all-party conversation to understand if there was any alternative before the company taking advice around, you know, their responsibility as directors and whether that business was being traded insolvently. So it wasn't, certainly, GE trying to say: if this doesn't happen, it is insolvency and administration, but clearly we were making the overpayments and the advances we were making because on the good faith and assumption this transaction was happening and the necessary funds were put into the business.
>
> MR JUSTICE MARCUS SMITH: I quite understand, Mr Weedall, but let's suppose -- obviously the transaction going through was the preferred solution for everyone, I'm sure -
>
> A. Yes.
>
> MR JUSTICE MARCUS SMITH: - but let's suppose that didn't occur. In terms of options that GE had, what were they? I mean, obviously you would want to see if there was an alternative solution to replace the preferred solution -
>
> A. Yes.
>
> MR JUSTICE MARCUS SMITH: - but suppose that didn't exist, or didn't exist within a feasible time frame; what were the options?
>
> A. Correct, that's right, we would have had another meeting to explore alternatives. If there was no alternative in the very tight timescale we had, then administration was a real possibility, absolutely.
>
> MR JUSTICE MARCUS SMITH: Yes. A real possibility, and I don't want to mince words, really -
>
> A. Yes.
>
> MR JUSTICE MARCUS SMITH: - if there was no other alternative to replace the transaction which I'm hypothesising didn't take place, then -
>
> A. Yes, from GE's perspective we would be expecting the company to take the necessary advice around are they trading that business insolvently and look at their director responsibilities and for them to make the appointment of administrators, if we'd exhausted all other options prior to that."

306. Although both GE witnesses were unwilling to say in terms that GE was 'terminating' the KSG facility, they admitted they said they were unwilling to continue any over-advancement of funds if no deal was done and that describing the GE facility as being

'frozen' was just a "*difference of words*" from GE's true position (and what GE had told Mr Swain during the meeting). Mr Weedall gave this evidence:

> "Q. So, so far as they are concerned at that meeting [the GE Meeting], they learnt that the account had been temporarily suspended?
>
> A. We had advised that we had been, and obviously, it's again in the documents showing we'd demonstrated our ongoing support and continued to make a number of overpayments beyond their 85 per cent approved level, and that we were making those overpayments on the basis that the funds would come in by 20 December. I think what we ensured was that the message was clear that the account wasn't frozen. To freeze the account, from a lender bank language and terminology, would mean that we have, you know, we've completely — our facility is terminated and therefore we've kind of stopped and given the business the time to get the necessary funds in place. We hadn't done that.
>
> Q. Why are you going and dealing with freezing. That's not what I asked you.
>
> A. Only because, as I say, that was in my witness statement.
>
> Q. No, but I've asked you a very simple question that you have done a long speech about. Let me ask it to you again: "So far as they are concerned at the meeting they learned that the account had been temporarily suspended."
>
> A. "Suspended", "frozen", I don't know - that's the language that we used.
>
> Q. No, no, I didn't say –
>
> A. "Suspended", then. I used the word frozen because you said suspended, but suspended, no. It wasn't suspended. What we didn't have was any availability to make drawdowns, but the account was still live, it wasn't suspended, but we didn't have any availability to make any payments.
>
> Q. No money was going out?
>
> A. Because of no availability.
>
> Q. And do you say "frozen" is your word?
>
> A. No, not my word.
>
> Q. Right. Whatever is discussed at this - have you had witness preparation training?

> A. No.
>
> Q. You haven't?
>
> A. No.
>
> Q. It's just that you've got this technique that you won't just say yes or no in answer to my questions, so you insist on putting it in your own words. Let me - let's try again. You agree with me that it's probable that they were told that the drawdown request had been refused?
>
> A. Yes.
>
> Q. Yes. And do you agree - you don't agree that Mr Swain might have taken the impression that that amounted to a temporary suspension? That he might have taken it that way?
>
> A. Yes, I agree it could be in - it could be taken that way.
>
> Q. And so if he goes away and says to somebody: the account's been frozen, and he means by that temporary suspension, you wouldn't say that he's taken away an unfair impression from the meeting, would you?
>
> A. No, just a difference of words.
>
> Q. No, and we don't say that you used the word "frozen", just so you're clear. I don't doubt that."
>
> (emphasis added)

Though the Kings submit that Mr Weedall's evidence as to 'impression' was irrelevant opinion evidence, in my view his answers concern his recollection of the substance of the discussion at the meeting, i.e. a matter of fact.

307. Mr Cole gave these answers:

> "Q. It paints the same picture that you have said Mr Weedall says in his statement that if a deal couldn't be done, GE were not going to fund the cash shortfall by overpayment.
>
> A. That's a fair statement. […]
>
> Q. So I suggest to you again that, given the circumstances and given what we now know to be the case, if Mr Swain and Ms Lord went away from that meeting with the impression that, as matters stood, there was no more money from GE unless a deal was done, that had to be a fair impression, didn't it?
>
> A. I don't think we specifically said that, you know, that that was no more money if - unless the deal's done. But, you know,

> we would have had to reassess our situation, and -
>
> Q. I'm not asking you about what you said. I'm asking you about whether you will accept that they may genuinely have taken that impression away; do you accept that or not?
>
> A. It's ...
>
> Q. Why are you so reluctant? This is pretty obvious, isn't it? […]
>
> A. I think it's just the way that you're saying there's no more money unless the deal is done.
>
> Q. Their impression. That's their impression.
>
> A. Impression. Well, if that's their impression then I'm fine with that, you know, that, you know, from what we communicated to them then that's - I can't remember, you know, what was and what wasn't, to be honest. […]
>
> Q- Yes, and so if they're told that the account has been, for that day, effectively suspended, it wouldn't be unfair for them to go away with the impression that there had been this temporary suspension on the account, would it?
>
> A. Yes, that's — I think they would - just the words "suspension" and "frozen" and things like that, there's just - there wasn't a payment made.
>
> Q. Nobody says that you said the account was frozen. Nobody says that. I don't suggest that to you.
>
> A. Right.
>
> Q. All that I suggest is that for Mr Swain and Ms Lord the impression that they had, genuinely, was the account had been temporarily suspended and they described that as frozen. That's all I'm suggesting.
>
> A. Okay. […]
>
> Q. Right. I mean, for example you wouldn't say, "The liars, they're lying"; you wouldn't say that, would you, if they had used that word to describe the situation?
>
> A. No. […]"
>
> (emphasis added)

308. During his cross-examination in the present proceedings, Anthony King questioned the reliability of Mr Weedall's evidence in the passages quoted above because, he

says, Mr Downes misrepresented the meaning of the 16 December Cashflow. I consider the 16 December Cashflow later, and I do not accept that any such misrepresentation was made.

309. The GE witnesses also accepted that there had to some extent been a loss of confidence in the KSG's management. This seemed to be because the KSG management continued to make drawdown requests in excess of the agreed cash flow forecasts, which impacted on their credibility. Mr Weedall gave these answers:

> "Q. And, depending on the way it was said and what the intonation and all these things, Mr Swain must have been entitled, surely, to have gone away from that meeting with the impression there had been, to a greater or lesser extent, a loss of confidence?
>
> A. Potentially.
>
> Q. If he says that, you wouldn't say he's lying, would you?
>
> A. No.
>
> Q. No. And obviously loss of confidence, you can have a little bit of a loss of confidence and you can have a huge loss of confidence, but if he was unspecific about the degree of loss of confidence, if he says his impression was there had been - that you had lost confidence in them, you wouldn't say that he's lying when he says that, would you?
>
> A. No. As I say, my recollection is that we discussed the credibility of the cash flow forecast and that can be implied as a loss of confidence. I think we didn't - what we'd been trying to demonstrate is that we were still supportive of the transaction trying to be concluded in a solvent manner, but yes, we certainly had experienced, certainly in the six weeks that I'd been involved in the case, some - I suppose some ups and downs but certainly some, I suppose, lack of clarity and accuracy in some of the information that was being provided, which was impacting upon the credibility, as I've said in my statement. […]
>
> MR JUSTICE MARCUS SMITH: And essentially you said in this sentence you were saying two things. You are saying first of all that the drawdown requests continued to be made in excess of agreed cash flow forecasts that were being provided, and then you say that as a consequence has a negative impact on the credibility of the current management team?
>
> A. Yes.
>
> MR JUSTICE MARCUS SMITH: So you said both those things. They are linked, obviously?

> A. Yes.
>
> MR DOWNES: And if at the start of a relationship you have complete confidence in your client, and later on you have lost confidence, some confidence, at least, it means that you no longer have complete confidence in them, logically?
>
> A. Yes.
>
> Q. So if somebody said that you lost complete confidence in them, that would be right as well?
>
> A. As I say, the words and the recollection that I had is that it was impacting on credibility. I don't think we went as far as to say we'd lost complete faith in the management team, but was our faith complete as a whole, then no, it wasn't.
>
> Q. I don't think you are seeing the point. There is a difference between a complete loss of confidence and a loss of complete confidence. If there is a complete loss of confidence it means you have no confidence left. If you say "I've lost complete confidence in you", it might mean that you just have lost some confidence; do you follow?
>
> A. Yes.
>
> Q. Now, we don't know the words that were used, this is all impressions being reported down the line -
>
> A. Yes.
>
> Q. - but if it was the case that it was more nuanced, then* all confidence is gone, that wouldn't be an unfair description of the impression gained at the meeting? You would agree with that?
>
> A. I would agree with it. As I say, the meeting was around the go-forward kind of strategy and ensuring that GE didn't act under its agreement because of the events of default, but yes, there was discussion around our confidence and comfort in the management team and we pointed to the fact that the cash flow forecast continued to be made in excess of the advance rates that had been agreed, and that was absolutely affecting the confidence of the kind of performance of that team, so no, I wouldn't expect, no, the people to go away from that meeting thinking we had complete confidence in the team."

(* I suspect the transcript here should read *"more nuanced than all confidence is gone"*.)

310. Mr Cole answered as follows:

> "Q. If they're providing you with these cash flow forecasts, and the drawdown requests and they can't even stick to their own forecasts, that's going to cause a loss of confidence in them.
>
> A. Yes.
>
> Q. And if we couple that with HMRC arrears, if we couple that with EBITDA forecasts not hit, if we couple that with Winterhill Largo having to go in, if we couple that with KPMG having to help them with their cash flow, it's not surprising, is it, that Mr Weedall's recollection is that these -- the picture was such that there was a negative impact on the credibility of the current management team?
>
> A. Yes.
>
> Q. You no longer had complete faith in what they were telling you?
>
> A. We had lost confidence in the performance that they were - the business was - with regards to the short term cash flows and delivering those to target, and obviously they caused, you know, swings in the cash flow and swings in the overadvance position that alarmed us.
>
> Q. And, again, if the impression they got from this meeting is that there had been this loss of confidence, that would be a fair impression, wouldn't it? […]
>
> A. A loss of confidence, yes."

311. After the court day a conference was held between Mr Hall Taylor, Peter Morcos, Mr Blakey, Ms Connor, Amy Franks (trainee at DWF) and Anthony King (the "***Tuesday Conference***"). Notes of the conference (taken by Ms Connor) suggests that there was concern by the lawyers about the effect of Anthony King's evidence.

i) He was described as being an "*obstructive*" witness.

ii) His recollection of the Fisher Representations was said to be:

> "1. Inconsistent with everything we've ever said about case. 2. Inconsistent with earlier evidence. 3. Other witnesses who don't recall in the same way of your recollection."
>
> "Judge could conclude lightbulb moment but very unlikely"

iii) As a result:

> "We have to change our case. We don't know if we can. […] May mean we can't win the case."

iv) It was necessary to:

> "assess impact […] advise on impact of way forward. May not be possible to do it by Monday. Told PDQC we definitely need until Monday – we may need to reassess. I'll [Hall Taylor] tell PDQC by lunchtime on Friday. Weekend – lot of work"

v) Mr Hall Taylor did not have much confidence in the Fisher Representations:

> "AHT Do I believe there is credible evidence that RF joined a conspiracy with PS to mislead you further? No.
>
> AK I think there is…
>
> AHT No that's speculation, putting words into his mouth.
>
> AK Argue
>
> AHT Going to hold you down. I've pushed you on what you've recalled, you haven't said he said PS true, I understand why you conclude what PS has said is true but doesn't lead to conclusion that RF further misled you. He was just telling you something else.
>
> The problem is - I cannot, I am professionally prevented from advancing a case against RF in relation to fraud or conspiracy. It has a big impact on the case for obvious reasons.
>
> It is important that you know I don't not believe you. Your recollection is new.
>
> It's not a blame thing - it's an impact thing. The impact it has on our case and what I can't/can't do.
>
> Going forward.
>
> 1. Assume what you say we'll believe you, it's taking what you said and dealing with it. I wish you'd recollected it earlier - because you didn't it has an impact and we have to deal with it.
>
> 2. See through our evidence because we can't determine.
>
> Vitally important that you don't talk to your dad. I know you haven't and I know you won't.
>
> Not going to talk to anyone. Until your mum and dad are through the witness box.
>
> If PDQC doesn't finish with James by Thursday we'll need a break.
>
> AHT - it's impact - we'll work it out - what you want to do.
>
> From this evening - put it down, let it go.

> You are an observer - just watching, don't worry about it, don't over analyse it. Go through the motions.
>
> Once we know where we are we will decide."

312. Mr Newman, on behalf of the Kings, submitted in these proceedings that the legal team should not have been questioning the validity of the client's evidence at this point given that it was made under oath (and did so only because they were seeking to undermine the case in order to cover up the B Shares Mistake). In my view, however, it is evident from these notes that counsel was, entirely properly, advising on how the court was likely to view the evidence.

313. The Kings also relied on this passage in the notes as showing the Mr Hall Taylor considered there still to be a viable misrepresentation claim and that Mr Swain had been an *"evil misleading git"*:

> "AHT
>
> Remains may be only element [case - PS misrepresented position on phone.
>
> Wipes out conspiracies.
>
> Just left with misrep claim.
>
> Still a debate on evidence as this was said.
>
> * credibility *
>
> Withdraw large part of case
>
> * cost consequences *
>
> Later convo [conversation] with R.F.
>
> * Reliance on those misreps [are] undermined
>
> …
>
> AK
>
> * We might have got this wrong*.
>
> It is what it is.
>
> I have to stand by what I've said - it's the truth.
>
> AHT
>
> Because of one thing - it's the impression. Later on it the day.
>
> I still believe they knew.

> It is still true that P.S is misleading evil git - but no one else did know. Because of what [he] did – [loggerheads].
>
> PS has caused - you to react in different [way] – [they] may fully understand.
>
> Doesn't equal fraud from [us].
>
> Reluctant [to run]. - find it difficult not to [understand].
>
> You may find - they fully understand but don't take responsibility.
>
> AHT
>
> You've [hit] the [nail] on the [head]
>
> Fraudsters – have to say" (emphasis in original)

314. I find it difficult to draw any real conclusions from notes as sketchy as that. Mr Hall Taylor questioned whether the comments relied on were correctly attributed to him at all. He said he did not believe he had been suggesting that Mr Swain had still made the misrepresentations alleged; he might have been suggesting that Mr Swain (whom he had not met) might nonetheless be a slippery person. In any event, even if these notes might suggest that Mr Hall Taylor at this stage thought there could still be some vestige of a misrepresentation case left, on mature reflection and by the time the rest of the evidence had been given that week he was entitled to reach a different view.

315. The Kings make various allegations of bad faith surrounding the advice given during the Tuesday Conference. They say that the lawyers deliberately failed to discuss the B Shares Mistake with Anthony King and instead displayed pessimism about their prospects of success in order to prime Anthony King for the subsequent advice to discontinue, which was done dishonestly to cover up that mistake. Indeed, as I explain elsewhere, their primary case was that the lawyers were motivated by an understanding reached with Mr Downes and Primekings to secure the withdrawal of the claim in return for Mr Downes and Primekings not pursuing the Kings' legal team for improper conduct in relation to the B Shares Mistake. Mr Newman found support for this case in the Tuesday Conference Note itself, which mentioned a discussion with Mr Downes (*"Told PDQC we definitely need until Monday – we may need to reassess"*). In her witness statement, after referring to her note of the Tuesday Conference Ms Connor said at § 50:

> "and accordingly, there must have been a discussion between Mr Downes and AHT (which AHT told us about) regarding how the Kings would be proceeding with the Primekings Litigation, in light of how the witness evidence, up to that point, had played out."

The Kings say it was, in any event, a breach of confidence and legal privilege for the Kings' legal team to inform their opponents about crucial matters of strategy.

316. There is no substance in those complaints. In the circumstances that had arisen, it was patently obvious that the Kings would be likely to have to seek to amend their case, if they had a case left to pursue at all, and it was inevitably necessary to inform opposing counsel about the likely timing.

317. After the conference, Mr Hall Taylor sent an e-mail at 19.03 to a third party unconnected to this case (identity unknown):

> "My apologies - I am literally just out of conference with my client (who came out of the witness box today after 5.5 days) - the trial is in a serious crisis which may result in discontinuance - and I am afraid has been occupying every moment of my days for some days now. I will catch up on emails on [redacted] matter asap but it may have to be later on this evening as the trial requires some immediate actions now. Would you still want to speak tonight even if it is very late on - or would you prefer to speak in the morning before court (the Judge is sitting at 10am so it would have to be concluded before about 9.30am)?" (emphasis added)

318. Again, at 23:02 (this time to a different third party):

> "Afraid I am a bit behind on [redacted] – but it is looking as if the trial may end early (next week instead of mid-June…) – so should be able to catch up very quickly (I may not have much else to do for a while!)

319. The Kings submitted that:

i) these emails showed the Kings' legal team had already planned to pressure the Kings into discontinuing the claim prior to advising them of this; and

ii) Mr Hall Taylor should not have been sharing privileged and confidential information about how the Kings would be proceeding with a third party. That third party may have been a solicitor (which would explain why Mr Hall Taylor said "*I will catch up on emails on* [redacted] *matter* […] *Would you still want to speak tonight*"); the legal community is a tightly knit one; it was therefore entirely possible that this information would have leaked to Primekings' legal team; and that would have been detrimental for the Kings' interests in any subsequent settlement negotiations.

However, neither email was definitive about whether the Misrepresentation Trial would end early, though in fact it must by this stage have been a strong possibility. It was not ideal to divulge this information to third parties, but the emails in my view have no real significance for the present case.

(15) Day 8 (Wednesday 10 May 2017): Lester Wilson's evidence

320. Mr Wilson gave evidence on 10 May 2017 (Day 8).

321. Paragraphs 35-36 of Mr Wilson's witness statement were supportive of the Kings' case on the Swain Representations (apart from the Evans Excluded Representation):

> "Mr Swain said to everyone in the room that he had just had a meeting with GE and GE had said to him that all of KSG's accounts were frozen, that GE had lost complete faith in the management of KSG and the Kings Group, that GE was no longer prepared to support KSG and the Kings Group and there would be no further funding.
>
> I have been asked by the solicitors for the King Family whether, during the telephone "conversation" with Mr Swain, Mr Swain used the words "unless a deal was done". I do not believe those words were used.
>
> I remember thinking that this was extremely odd at the time. There was something about it that seemed unnatural. Knowing what I know now, I firmly believe that the whole thing had been concocted by those seeking to invest in the Kings Group in an attempt to negotiate a far better position for themselves at the expense of the King Family. I'm also fairly certain we were not able to discuss matters with Teacher Stern in the morning as they had been instructed not to engage with us as the Defendants wanted to change the deal in their favour so it would be a waste of time to engage lawyer to lawyer."

322. However, Mr Wilson did not come up to proof:

> "Q. Now, doing the best you can, based on what you actually remember today - it's difficult, I accept -
>
> A. Yes.
>
> Q. - but just doing the best you can, what's your recollection of what he said, the words he used?
>
> A. I haven't actually quoted anything in my statement here because I can't remember the words he used. It was words to the effect of that I'd put in my statement, and I just cannot remember the actual words at all.
>
> Q. So he may not have even used the word "frozen"?
>
> A. Exactly, I don't know, I'm saying - that's my words.
>
> Q. He may have said that there was no more money unless the deal was done?
>
> A. I can't remember that.
>
> Q. Well, you say in your statement at paragraph 36: "I have been asked by the solicitors for the King Family whether, during the telephone 'conversation' with Mr Swain, Mr Swain used the words 'unless a deal was done'."

> Then you make a positive statement: "I do not believe those words were used."
>
> A. I don't believe it; I just can't remember.
>
> Q. Why don't you believe it, then, apart from the fact it would help your client's case?
>
> A. I don't believe it, I just can't remember.
>
> Q. Your evidence is, sitting here now: I do not know whether those words were used, isn't it, truthfully?
>
> A. I can't remember.
>
> Q. Therefore your evidence is today: I do not know whether those words were used?
>
> A. I think that's probably accurate, yes.
>
> Q. So you should not have put in this statement: "I do not believe those words were used." Should you? Because you can't say?
>
> A. No, I can't say that those words were used. I can't say."
>
> (emphasis added)

323. This was bad for the King case. Anthony King was disappointed with Mr Wilson, given that (he now knows) Mr Wilson re-read his witness statement in great detail over the second weekend of the Misrepresentation Trial but did not correct this point. Thus, during the lunch break, Anthony King emailed Mr Blakey (Mr Blakey was not present in court that day):

> Anthony: "Not gone good with Lester !"
>
> Jason Blakey: "O no! Why? What was bad or stood out as bad?"
>
> Anthony: "Everything!!! Call later"

324. As regards the B Shares Mistake, Mr Wilson confirmed that he was not paying particular attention to the emails circulating the draft MP POC to which he was copied into, because he was not in charge of the litigation. As a result, he did not notice the B Shares Mistake in the pleadings. Further:

> "Q. So if we go back to the pleading at paragraph 39. Did you see this document -
>
> A. I can't recall seeing it,
>
> Q. - before today?

A. I can't recall seeing it"

325. Mr Wilson also said that he advised the Kings on the Deferred Consideration issue prior to the Completion Meeting on 12 December 2013 (see above) and had told the Kings that the B Share Mechanism was present in the Initial Deal:

> "MR DOWNES: Can we agree that it is improbable, Mr Wilson, that the first time that Mr Anthony King understood or was told about redeemable B shares was at 3.00 in the morning on 19 December?
>
> A. I can say that he was certainly told about them before then. Whether he actually understood what they meant, I don't know."

326. After Mr Wilson gave his evidence in the Misrepresentation Trial, Anthony King accused him of lying on the stand. According to Anthony King's witness statement:

> "During the next break we came out of court I went into a conference room I believe with Ms Amy Franks, Ms Connor, Mr Morcos and Mr Hall Taylor. I said openly (and I admit probably quite passionately) Mr Wilson had just lied on the stand, he never explained to me or my father that the earn out was coming out of KSGL prior to the 19 December 2013. I remember Mr Hall Taylor saying to me something like: "I can't talk to you about it, DWF are my clients" and physically turned away from me. I can recall this quite clearly because it was so shocking to me that Mr Hall Taylor would not talk to me about it, I then again repeated that Mr Wilson had lied on the stand and Mr Hall Taylor became even more animated and agitated and wouldn't even discuss it and physically raised his hands in a defensive posture to signal I needed to stop talking about it. I do not believe there is a single note or email between the lawyers of me making this very serious allegation about Mr Wilson a Partner at DWF, I believe it was all taken "off the record"." (emphasis added)

327. This was a change from the Kings' pleaded case, which was that Anthony King had made this allegation to Mr Hall Taylor, not to others. Neither their Particulars of Claim nor their detailed Reply alleged that anyone from DWF was present. As to the evidence:

i) Mr Hall Taylor specifically recalls and accepts that Anthony King had said to him the words "*Lester just lied on the stand*", and in oral evidence was clear that no-one from DWF was present.

ii) Mr Morcos' witness statement, maintained in his oral evidence, was that this conversation only took place between him, Mr Hall Taylor and Anthony King.

iii) Ms Connor did not deal with the point in her witness statement because it had not been alleged in the statements of case that she was present. In oral

evidence, she said she was not, and that she would expect to have remembered an allegation of that kind being made against a DWF partner.

iv) Anthony King's complaint dated 31 August 2017 suggested that both Mr Blakey and Ms Connor were present, which cannot have been correct as Mr Blakey was not at court that day (10 May 2017). In oral evidence, Mr King said he had told Mr Blakey by telephone that Mr Wilson had lied in his evidence. However, that seems unlikely, given that (a) Anthony King's email to Mr Blakey at 12.30 that day, quoted in § 323. above, made no suggestion that Mr Wilson had actually lied and (b) Mr Blakey would be very likely to have remembered such an allegation and also done something about it, even if only by making a note of it.

v) Ms Franks did not give evidence before me. She provided a witness statement dealing with certain matters in relation to pleaded matters on which she could comment, and a hearsay notice was served in light of her pregnancy, expected due date and health (which were set out in evidence). There was no counter-notice. The Kings nonetheless suggested in their written reply closing submission (and their 29 August 2023 further reply document) that she refused to attend trial because she was *"unwilling to give false evidence on this point"*. I reject that suggestion.

In the light of the evidence as a whole, I conclude that no-one from DWF was present during this discussion.

328. The Kings contended that if no-one from DWF was present, then they must have been told about Anthony King's allegation of lying by someone else. Mr Hall Taylor at one point in his oral evidence said he "guessed" that someone at DWF had heard of Anthony King's allegation, and felt that Anthony King probably would have raised it again at some point but could not say when, in what context, or to whom it might have been said. He also said that he would be surprised if DWF was not aware and that he had a feeling that it came up on Friday 12 May 2017. However, (a) both Mr Blakey and Ms Connor denied being aware of the allegation, and would (as I have said) very likely have recalled it and done something about it, at the very least by noting it down; (b) Mr Morcos had no recollection of telling anyone about it himself; (c) Mr Wilson said he was unaware of the allegation until the Kings' complaint on 27 July 2017; (d) Anthony King sent emails to Mr Wilson on 11 May and after the end of the trial which made no mention of the allegation; and (e) there is no note of this issue being raised at the Friday Conference. In all the circumstances, I am satisfied, that no-one at DWF was told about Anthony King's allegation that Mr Wilson lied in his oral evidence.

329. The Kings suggested (in effect by way of further alternative) that it was wrong of the Barristers not to have then informed DWF that their client had just accused one of their corporate partners of lying on oath. Mr Hall Taylor's oral evidence was that at this point he was solely focused on the trial and that he told (or at the very least implied) to Anthony King that if he wanted to take issue with Mr Wilson's evidence, that could be done after the trial: now was not the time:

> "If you feel Lester advised you something or didn't advise you something, you're going to have to ask someone else about it.

> You know, here we are, firstly in the middle of this trial, dealing with this case, let's deal with that. If you want to go and ask someone about that, if there's something you can do about that, if you feel that you've got a claim against him about that, fine, it's nothing to do with this case but, you know, it's not for now. Deal with it afterwards. I can't advise you on it because I'm here dealing with -- firstly, I'm dealing with this case, which was constant in its need to be shepherded, and, secondly, I'm instructed by DWF, so it is not appropriate for me to go into that area which doesn't impact on this case."

330. So far as the Kings' pleaded case is concerned, the topic of the B Shares was the only one on which Mr Wilson was alleged to have given untrue evidence. However, Anthony King's witness statement in the present proceedings included an allegation that Mr Wilson's failure to come up to proof on the Mr Swain representations itself involved deliberately untruthful evidence given in order *"to help the discontinuance happen, because he had been tipped off about that plan by someone, possibly Mr Blakey",* rather than a genuine lack of recollection. This unpleaded allegation was scarcely put to Mr Wilson in cross-examination before me. He was referred to the statement in his witness statement in the Misrepresentation Proceedings that he did not believe the words 'unless a deal was done' were used, and confirmed that he must have been happy with that drafting when he signed his witness statement (adding that *"I think what I'm trying to say is I don't believe those words were used but I can't be sure"*). There was then this exchange:

> "Q. No, but as a lawyer and as a citizen you would expect if you make a statement in evidence, in written evidence, to be able to remember that statement when cross-examined, wouldn't you?
>
> A. Nobody's perfect. Nobody's perfect. I'm not sure what it means whether I'm a citizen or a lawyer.
>
> […]
>
> Do you accept, Mr Wilson, that if you have given evidence in a sworn statement such as "I do not believe those words were used" then it would be expected that that would remain your position under cross-examination?
>
> A. Not necessarily."

331. Mr Wilson was then asked about the topic of comfort letters and Anthony King's allegation during the Misrepresentation Trial that Mr Wilson had lied in his oral evidence about the B Share Mechanism. Mr Newman then referred to documents which he suggested showed that Mr Wilson was keeping a close eye on the proceedings. That was followed by this exchange:

> "Q. If we go on the left-hand side to {B/1/27} [in Anthony King's witness statement]. You can see at the top of the page it starts:

> "I now believe Mr Wilson lied on the stand to help the discontinuance happen, because he had been tipped off about that plan by someone, possibly Mr Blakey. It appears all the text messages have been deleted between Mr Wilson and Mr Blakey."
>
> A. No.
>
> Q. I have to put to you that is correct?
>
> A. No, no."

332. In circumstances where Mr Wilson had just been asked about the B shares allegation, and no further context was provided to him for the allegation in Anthony King's witness statement about lying on oath, that was a wholly inadequate way of seeking to put to the allegation to Mr Wilson. (It is irrelevant in this context that, as the Kings point out in their written reply dated 29 August 2023, Anthony King himself was asked questions about this allegation.)

333. Mr Newman's written closing on behalf of the Kings proceeded to devote a section to this unpleaded and inadequately put allegation. The closing first referred to submissions by Mr Croxford (on behalf of the Barristers) in opening in the present case suggesting that Mr Wilson's evidence was an example of *"the Gestmin problem"*, and that by the time he gave evidence he had no genuine recollection but only *"a reconstruction that had been put together in the course of litigation"*. The closing continued:

> "229. DWF's counsel did not object to that characterisation of what Mr Wilson did. For a person to sign a witness statement stating they believe a certain fact to be true when in fact have no genuine recollection of that fact is almost certainly a contempt of court under CPR32: "*Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth*."
>
> 230. To then affirm such statements on oath is almost certainly perjury:
>
> Perjury Act 1911 - If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false **or does not believe to be true**, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment . . . F1 for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

> R v Mawbey: "*In stating such a crime in an indictment, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purposes they agreed to certify the fact as true,* **without knowing that it was so**.".
>
> 231. Where there is no evidence of ill health, the Kings say that is far more likely on the evidence that Mr Wilson did in fact believe the facts in his witness statement to be true (they were supported by his own contemporaneous email, and he inputted into some of key passages using his own choice of words) and came under enormous pressure to assist a discontinuance as set out by Anthony King in his evidence paragraphs 86 and 87"
>
> (emphasis in original)

334. Mr Newman pursued the point again in his oral closing submissions on behalf of the Kings. The basis of the allegation appeared to be as follows:

i) It was "*Mr Wilson's own case*" that he had made statements in a witness statement, with a statement of truth, in which he had no honest belief. (That allegation was made solely on the basis of the suggestion referred to above made in opening made by Mr Croxford, who was not Mr Wilson's counsel and did not come close to suggesting that Mr Wilson lacked honest belief in the contents of his witness statement.)

ii) In fact, it was far more likely Mr Wilson did believe in the truth of his witness statement but decided to lie on oath when giving oral evidence, by pretending to forget whether the words 'unless a deal was done' had been used or not.

iii) The fact that to lie in a witness statement was just as serious as lying in court made the latter allegation more plausible.

iv) Mr Wilson decided to lie in that way because he had been 'tipped off' by someone that the Kings were being advised to discontinue (an allegation that had been neither pleaded nor put in clear terms to Mr Wilson).

v) It was *"impossible to know"* whether Mr Wilson had been told <u>why</u> the claim was being discontinued. However, knowledge of the mere fact that advice was being given to discontinue provided sufficient reason for Mr Wilson to commit perjury. In Mr Newman's words:

> "If he knows that the King case is going to be discontinued and that there is going to be advice saying that this was all the right thing to do because the case has failed essentially, then it is obviously going to help with that plan which is what the King case is that the evidence goes as badly as possible."

335. The chain of reasoning only has to be stated for its absurdity to be obvious. I advised Mr Newman to reflect carefully on this point, which he told me he would do.

Whatever the result of that reflection was, following Mr Newman's departure from the case in the middle of oral closings, the Kings chose to pursue the point. I unhesitatingly reject it. There is no basis for the suggestion that Mr Wilson lied in his evidence at the Misrepresentation Trial, and, having heard his evidence at the trial before me and considered all the surrounding evidence, I am satisfied that he did not. It is an allegation that should never have been made.

336. Finally as to Day 8, at 19:43 that day Mr Hall Taylor emailed yet another third party (whom he said was his brother):

> "My trial will rumble to a halt next week by the looks of things!"

(16) Day 9 (Thursday 11 May 2017): James King's evidence

337. On the morning of Day 9 of the trial and prior to the sitting day, Mr Hall Taylor sent two further emails to unconnected third parties:

i) At 07:22,

> "I'm afraid my trial went into crisis mode on Friday and over the weekend (and still is in crisis!) during my client's evidence. evidence. Basically his claim is in fraud and he failed to make out his case - we are still struggling on but I have had to work every hour to keep things from going off the rails whilst also advising that the trial needs to be stopped - not at all easy with millions at stake - frankly been in disaster mode and not come up for air for a week..." (emphasis added)

Mr Hall Taylor explained that this was an email to a personal friend whose engagement party he had missed the previous Friday (Day 5 of the trial), and that he felt it necessary to give a flavour of the serious nature of his reason for missing a personally significant event. The Kings suggested that the Friday being referred to was Day 5, the crisis cannot have been Anthony King's change evidence on Day 6 and must instead have been the B Shares Mistake. Mr Hall Taylor said he must have been referring to the problems that had arisen during the first week, such as Anthony King's unwillingness to implicate Mr Fisher in the fraud, which was why he said his client had "*failed to make out his case*". That seems to me far more likely than the notion that the B Shares Mistake had in some way led Mr Hall Taylor to miss an event on the evening of Friday 5 May. There is no indication of any follow-up activity or discussion in relation to the B Shares Mistake, nor any reason for there to be any significant such discussion, particularly in the context of the multiple serious problems that had already beset the case by the end of the first week.

ii) At 08:29 Mr Hall Taylor wrote,

> "My trial continues but looks to be coming to any early finish - probably by the middle of next week. As a result my diary is fairly clear until mid-June - do you have any days between Weds 17 May and Fri 9 June when you might be free to have our overdue lunch?"

Mr Hall Taylor explained that this was an email to a senior solicitor.

338. James King gave evidence on Day 9. He confirmed the contents of his witness statement and categorically denied that the Fisher Representations were made or that the words "*unless a deal was done*" were used at any point during the Completion Meeting:

> "Q: Let me ask you about this. Paragraph 55 of your statement: "*My solicitors have also asked me if Mr Swain or Mr Fisher qualified the statements made with the phrase 'unless a deal was done' as alleged ... in the amended defence. I can categorically confirm that neither Mr Swain nor Mr Fisher used this phrase at any time whether on the call, after the call or during the negotiations that followed*."
>
> I assume that remains your evidence, does it?
>
> A. Yes.
>
> Q. Yes. How sure are you about that?
>
> A. Absolutely."
>
> […]
>
> "Q. Possible -- what about this, possible that somebody later on says it's unless the deal is done, the position?
>
> A. I don't remember any of that.
>
> Q. But is it possible?
>
> A. Well, it certainly wasn't said in our room, it might have been said in theirs.
>
> Q. No, to you?
>
> A. No. No, it wasn't said at all.
>
> Q. Or Anthony?
>
> A. No.
>
> Q. Anthony maybe has another conversation with somebody and says to you, no, it's actually unless the deal is done; is that possible?
>
> A. He never left my side that night, apart from when I left him to go into Robin.
>
> Q. What about when he called GE himself?

> A. That day? That night?
>
> Q. He accepts that.
>
> A. Then I don't remember Anthony calling GE.
>
> Q. I know you don't, and I'm not suggesting you are being untruthful.
>
> A. No, I don't even remember him making a phone call to GE.
>
> Q. That surprises you, does it?
>
> A. Yes, if he phoned GE, yes.
>
> Q. If he did speak to GE - sorry, I've got that wrong. Let me just correct that. His evidence is that Mr Fisher spoke to GE and then Mr Fisher spoke to him. I'm so sorry.
>
> A. Right. That's - that's possible. But I didn't know Mr Fisher was speaking to GE.
>
> Q. No, well I see that. Is it possible that your son spoke to Mr Fisher about GE's position and then came to you and said, "Actually, it's unless the deal is done"?
>
> A. No.
>
> Q. If those words were used, let's just assume that for some reason you are wrong about that, either that Mr Swain said it or Mr Fisher said it, but in some way it was clear at some stage in the evening that the position was only that there was no more money unless the deal was done; do you still maintain that you have been misled?
>
> A. There was no mention that there was no money until the deal was done. None at all."

339. Because of the Embargo Order, James King would not have known that Anthony King changed his evidence on Day 6. Mr Hall Taylor's email to DWF on Day 6 after Anthony King's change in evidence expressly reminded them to "*emphasise this to Anthony*" to adhere to Marcus Smith J's order.

340. To reconcile his and his father's evidence, Anthony King said in these proceedings that the latter may not have heard the Fisher Representations being made. That seems very unlikely, given that James King said Anthony King never left his side during the Completion Meeting, apart from the time when James King went to see Mr Fisher. Anthony King also suggested that because it was not explicitly put by Mr Downes to James that Anthony had changed his evidence on Day 6, James' evidence cannot be said to have contradicted Anthony's. There was no need for Mr Downes to do so: he put the substance of the point fairly and squarely to James King.

341. This evidence added to the problems for the Kings' misrepresentation case. It meant that two of the claimants had given conflicting and contradictory recollections of the key event. There was, at its lowest, a real prospect that James and Anthony's evidence was simply irreconcilable, so that they would not have been able to sign a Statement of Truth to the same amended statement of case.

342. There is an undated handwritten note made by Ms Connor, which she said in her witness statement "*summarises the discussions amongst the legal team, and will have taken place at some point after James had given evidence*":

> "AK is a liar
>
> AK's recollections from Monday – not true – never said 'unless a deal is done'
>
> PS's statements fair statements.
>
> […]
>
> RF is not a fraudster
>
> AK accepts where we are
>
> If there is any case whatsoever he wants to continue"

Ms Connor said this reflected a discussion "*summarising how Anthony will have been seen to come across as a witness*", rather than her own personal views. I accept that evidence.

343. It is noteworthy, and somewhat perplexing, that in the present proceedings James King has supported Anthony King's version of events at the Completion Meeting.

344. Like Anthony King, James King was reluctant to implicate Mr Fisher in the fraud:

> "Q. You believe he is a fraudster, Mr King?
>
> A. No, I don't believe he's a fraudster. I believe that what happened that night was fraud. I believe that was wrong.
>
> Q. And that Robin Fisher was knowingly involved in that?
>
> A. No, I didn't say that. I said what happened that night. I didn't know that they were in possession of a letter from GE giving comfort. I didn't know that they were even talking to GE. I didn't know anything was going on between Robin and GE, and Teacher Stern, I didn't know.
>
> Q. I'll come to that. I'll come to that. So what you think, looking back, do you think that Robin went into a panic that he was play-acting?
>
> A. No, I think Robin was as stunned as we were."

345. James King was shown that his written evidence on the Deferred Consideration issue was mistaken:

> "Q. Yes. Can I tell you, it's not in dispute that the mechanism for the earnout was by way of redeemable shares at the outset.
>
> A. That wasn't my understanding.
>
> Q. And can I tell you that, and you can take it from me that as a matter of company law a company can't redeem shares unless it's got accumulated profits to justify that redemption?
>
> A. I was surprised that the company was paying for the shares.
>
> Q. That was always the case, Mr King.
>
> A. Well, I'm sorry, I was surprised that they were paying for the shares.
>
> Q. Yes, but I can tell you now, you can take it from me, we have gone through this in the documents, I put it to your lawyers, they both accepted, Mr Wilson and Mr Armitage, that right from 12 December that money was coming from the company.
>
> A. I'm sorry I didn't - I wasn't told that.
>
> Q. I'm not criticising you, Mr King." (emphasis added)

Thus, once again, Mr Downes made no criticism of any party's conduct on the basis of the B Shares Mistake.

346. There was an exchange in court about the possibility of recalling Anthony King:

> "MR HALL TAYLOR: My Lord, there is one potential issue there which my learned friend has raised, whether he might recall Mr Anthony King.
>
> MR JUSTICE MARCUS SMITH: Yes.
>
> MR HALL TAYLOR: For what needs to happen in the next few days, it is essential that we are able to speak to Mr Anthony King and that Mr James and Mr Anthony King can talk to one another.
>
> MR JUSTICE MARCUS SMITH: Yes.
>
> MR HALL TAYLOR: I hope that won't cause any issue. We won't cover the ground of what might be the subject of any recall, but we do need to talk about other matters and the evidence that's been given today.

> MR JUSTICE MARCUS SMITH: Given the fact that both Mr Anthony King and Mr James King have been cross-examined, Mr Anthony King in some detail, I'm not going to put any fetter of any kind.
>
> MR HALL TAYLOR: Thank you. They are both parties, which is the other issue.
>
> MR JUSTICE MARCUS SMITH: I quite understand that you need full latitude to discuss all matters.
>
> MR DOWNES: I do agree with that and would endorse that. There's one proviso I would like to suggest, is that if out of those discussions another recollection springs up, I would just ask that we have some sort of notice of that, some form of short statement or something, because it's inevitable in that process that the points that I've been making, and the way the evidence pieces together is discussed, and I don't complain about that, it is not inconceivable that somebody at some stage says: actually, hang on a moment, this is the answer. So I'm just asking that that is not sprung on me.
>
> MR HALL TAYLOR: No, and I understand that, my Lord."

Anthony King was never eventually recalled because the trial was discontinued. The Kings suggested that the decision not to recall Anthony King was taken because he would have had the opportunity to testify that Mr Wilson had "*lied on the stand*". There is no merit in this suggestion. The focus at this stage of the proceedings was heavily on the critical question of whether any case could be salvaged at all following the evidence of GE, Anthony King and James King. There was absolutely no reason why either side's counsel would have any reason to ask Anthony King more questions about the B Shares Mistake: it was a dead issue from the point of view of the Misrepresentation Trial, and the court would have had no interest in any attempt by Anthony King to use a recall as an opportunity to make irrelevant allegations against his own legal team about the Transaction.

347. After court that day, at 17.32 Anthony King sent a version of the 16 December Cashflow to Mr Hall Taylor, Mr Morcos and Mr Blakey saying:

> "I would like to understand if we can lodge a complaint about misleading the court and witnesses. We could have paid the wages and had money left over."

I address the 16 December Cashflow later, and consider Mr King's understanding of it to be incorrect. Mr Hall Taylor and Mr Morcos discussed Mr King's message the following morning (12 May 2017):

i) AHT: "Need to call Jason on way in – apparently AK has been on to him. Looks to me like irrelevant clutching at straws is going on…"

ii) PM: "Yes…if there was 700k cash at bank why wasn't it used to pay hmrc? If they weren't going to pay hmrc did they expect no winding up petition?"

iii) AHT: "Also…even if correct…so what?"

348. On the same day, Ms Connor emailed Mr Blakey asking whether DWF should *"try and prime* [James King]/*stave off any Chinese whispers"*, to which Mr Blakey responded: *"texted you. Not really. I don't know what was said today yet and I'd rather do it all together?"*. The Kings suggest that this was done pursuant to a plan to force the Kings to discontinue. However, a more natural and obvious interpretation is that Ms Connor was asking whether James King should be updated on events, given the important and unexpected evidence that had emerged but which (apart from his own evidence) he had been unable to hear.

349. Also on 11 May 2017, the trainee who worked on the case from time to time, Sophie Lipton, sent herself an email with the subject "*notes*". Although the version produced to the court was redacted, it is evident that it sets out brief summaries of a number of matters which DWF had handled or was currently handling, one of which was the Primekings case. One of the summaries included the phrase *"However, we argued there was no signed engagement letter for various reasons including the fact that the Chairman did not put his signature to the letter."* Another included the phrase *"The issue and worry for us is that, as a result of [redacted] the other lenders also called in their loans. So defamation! Eg. of the defamation [redacted] is saying that a highly experienced CFO of a listed company runs dual balance sheets... which is defamation."* The Kings suggested that the first entry showed that DWF were worried about whether in due course DWF would be able to rely on the £5 million liability cap in their engagement letter with the Kings; and that the second entry showed that the legal team *"were continuing to do work thinking about [the threats of defamation which Barry Stiefel had made in 2016 and repeated in 2017]"*.

350. Both of those suggestions typified the Kings' approach to this case in taking isolated words or phrases out of context in order to support groundless and far-fetched conspiracy theories. It is obvious from the tenor of the notes that they simply summarised a number of cases which DWF, and perhaps Ms Lipton herself, happened to be involved in. They did not remotely resemble any kind of work product that could be expected to arise from a request to research engagement letter or defamation issues in a way linked to the Primekings case. Mr Newman went so far as to suggest to Mr Blakey that "*Ms Lipton is not being called to give evidence about this…because she would have to accept that the Kings are right about the reason those issues are mentioned in that email*". However, as DWF point out, the Kings have pleaded no case regarding this email; the name 'Sophie Lipton' does not feature in any of the Kings' pleadings, nor are the above allegations mentioned in Anthony King's witness statement; and in those circumstances, there was no reason to consider that Ms Lipton had any relevant evidence to give.

(17) 12 May 2017: the Friday Conference

351. Court did not sit on Friday 12 May 2017, which allowed the parties to take stock of the claim. A conference took place between Mr Blakey, Ms Connor, Mr Hall Taylor, Mr Morcos, James King and Anthony King that day (the "***Friday Conference***"). A transcription of Ms Connor's notes included the following passages:

"We've come to the reality that this is over.

AK: If we got them to crack on the stand would it change?

AHT: No-GE's evidence. Can't even ask them. Professional misconduct.

Where we were Tues/Weds - we wouldn't have been able to continue.

(1) We'll look for any case Replead --> hard to see what it could be.

(2) Permission - application

(3) If there is nothing we can do - discontinue. - they will ask for indemnity costs, almost inevitable on fraud case.

Practically - not to resign + not convinced.

Apologise to them - I can do it in court.

Saving - more than £ 1/2 million (maybe more) if we stop now.

[…]

You have to do all you can to build bridges.

PDQC -> point in having W.P. discussion

all his clients -> discontinuance

You have to say "we were wrong" […]

The evidence isn't there [illegible] prove a fraud.

Another way of looking at it - relationship [took] a misturn since Dec 2013. This process given a basis to reestablishing a new relationship. All this process has been about is finding out you were wrong.

If you can put it behind you, which you can, let's hope we can always do what you intended to do by taking the Co to the next level.

We've decided --> the [foundation] the [cornerstone] has gone + that's fine.

Decision not to call Howard Smith.

AK: All done your best. It's the truth."

(emphasis added)

352. The Kings suggested that the phrase "*You <u>have</u> to say "we were wrong"*" (emphasis added) supports the Kings' primary case that Primekings via Mr Downes were putting pressure on the Kings' legal team to persuade their clients to discontinue the case in exchange for not exposing them for the B Shares Mistake. It seems far more likely, though, that this reflected what Mr Hall Taylor described as his encouragement to Anthony King to try to rebuild bridges with Primekings, particularly bearing in mind their common interest in KSG and Anthony King's continuing role there.

353. The notes support the view that the decision not to call Howard Smith was made by <u>both</u> the legal team and the Kings; and that this was because by that point, following Anthony King change of evidence, the Kings' claim was no longer viable. Moreover, whatever Howard Smith might have said about the GE position had been overtaken by the GE witnesses themselves. As Mr Hall Taylor said in oral evidence:

> "And it is certainly true that I indicated that I considered the judge thought the case was over, but that itself is something that needs quite a lot of explaining. But no, the reason for not calling Howard wasn't connected to either of those things really. It was that he couldn't really, at that point, make any difference, because the idea of that small part of Howard's evidence that we have looked at, in the context of him not being a willing witness, and it only being a witness summary, fundamentally shifting issues on which other witnesses had already given quite compelling evidence of their direct knowledge of what would have happened, was minimal. There was just no point." (Day 15)

354. Anthony King said at § 104 of his witness statement:

> "We were told that with the Judge indicating the case was over there was now no point calling Howard Smith from KPMG. I remember saying the Judge seemed to be helping us (as Judge Marcus Smith seemed very engaged and he even mentioned his "optimism" about the case not being held up) and I was told by Mr Blakey the Judge was just being 'polite'. I believe that was another lie in breach of fiduciary duty and that Judge Marcus Smith would not have been involved in some sort of pantomime court."

355. Mr Newman claimed to find support for Mr King's version of events in Mr Blakey's trial notebook. His notes made at the Friday Conference include these entries:

> "AK – this is over
>
> PS or RF?
>
> AHT – Can't ask them (in light of GE)
>
> AHT – <u>The J thinks its over.</u>
>
> Discontinue

Automatic costs consequences – indemnity" (emphasis added)

356. Mr Newman submitted that this was false (and at the very least, negligent) advice; the judge did not think the case was over. In fact, all the indications from Marcus Smith J on the previous day (Day 9) had been that he expected the case to continue, despite Anthony King's change in evidence, the problems that presented for the pleaded case and the possible need of having to seek an amendment. Mr Newman placed particular emphasis on this exchange between counsel and judge on the logistical issues of witness scheduling for the next week:

> "MR HALL TAYLOR: […] Now, that may be that we need to present an amended case of some kind. It may be possible to do that before we hear Mr Smith, or it may have to be at some point on the day on Monday. But, whatever happens, my learned friend is going to need time to consider that and consider with his clients what they wish to do about any application we may make to amend at that stage. […]
>
> MR JUSTICE MARCUS SMITH: That is, of course, assuming there is an application.
>
> MR HALL TAYLOR: Assuming there is.
>
> MR JUSTICE MARCUS SMITH: It may be that there is not.
>
> MR HALL TAYLOR: It may be that there is not, my Lord, but in light of the way the evidence has developed I think it is inevitable that some recasting of this case would have to happen.
>
> MR JUSTICE MARCUS SMITH: Yes.
>
> MR HALL TAYLOR: And so, my Lord, I think it's quite - let's put it this way: it's quite likely that either that will happen or something else will happen.
>
> MR JUSTICE MARCUS SMITH: Mm.
>
> MR HALL TAYLOR: My Lord, I just don't want there to be a situation in which we are looking -- or people are making arrangements to be here to give evidence on a day when they are very unlikely to be needed.
>
> MR JUSTICE MARCUS SMITH: I understand. I'm minded to give an indication that apart from Mr Smith and Mr Evans, who I assume we are not dealing with now, but at the same time as Mr Smith on Monday, there will be no further evidence on Monday?
>
> MR HALL TAYLOR: Yes.

> MR JUSTICE MARCUS SMITH: I would like to keep the position open as to Tuesday, ever the optimist, it may be that even if, and I understand why, there may be changes to your clients' pleaded case, that may not be as much of a hold up as one might think." (emphasis added)

357. It is evident that the judge was proceeding on the basis that the case would (or might) continue into the following week. However, if and to the extent that Mr Hall Taylor indicated that "*The J thinks its over*", I would take that to indicate counsel's view that the judge thought the case was lost. Part of counsel's job is to read judicial signals and advise the client appropriately. Mr Hall Taylor was clear that the judge was at all times judicious and scrupulously fair. At the same time, and in no way inconsistently with that evidence, Mr Hall Taylor gave the following explanation:

> "Q. It wasn't true, was it, that the judge was indicating that the case was over?
>
> A. It depends what you mean. I mean, did he say: Mr Hall Taylor, would you mind just standing there for a moment while I tell you that the case is over; no, he didn't do that. Judges don't do that. But they do other things. And, I mean, Mr Justice Marcus Smith was a very new judge at the time of this trial, I can't remember even -- it may even have been his first trial. He'd only been appointed quite recently beforehand. He -- as a judicial personality, he fits a more modern mould of judges, that he is not terribly interventionist. He keeps his own counsel to a large degree. I mean, to be fair, I have only appeared in front of him on this occasion, so this is me judging him from that trial. He doesn't weigh in a lot, or didn't weigh in a lot, but there were a number of things which, if you add them together over the course of standing where you are standing and looking up at the bench as you do from time to time, and put them together, you as an advocate at least sense the mood of the court. And the mood of the court was, I think, a sort of gentle surprise at where we were, because I don't think anyone would suggest that this was a normal situation to arrive at in any trial. It was very, very unusual. I think there was a degree of sympathy from him for the position that we as counsel and the Kings as parties found themselves in. I mean, whatever you may think of someone's evidence and whether it was truthful or credible or whatever, you know, it's not hard to have sympathy for people who find themselves in an awkward situation. And you could see from the way he was questioning, when he did intervene and when he did question, he was -- his angle was all one way, which was against us. […]
>
> Q. So you accept that neither during the cross-examination nor the oral submissions, had the judge given any indication that he'd made up his mind?

> A. That he had reached a decision about the case, is what I say. He gave some indications as to some of the difficulties, and his questions, if you look at them carefully, give an idea of what he might have been thinking, but, no, it doesn't give an indication that he had reached a final decision, no."

358. Mr Hall Taylor was leading the Kings' case before the court and in the best position to judge how he felt the court to be reacting to the unfolding case; and caution needs to be exercised before attempting to second guess his judgment based solely on a review of the transcripts. However, the transcripts in the present case in my view provide clear support for Mr Hall Taylor's assessment. Naturally, the judge took care to approach the case with an open mind and will have refrained from making any decision until after the end of the case. Nonetheless, as every advocate knows, lines of judicial questioning may provide indications of concerns in the court's mind about aspects of a party's case. The interventions quoted in §§ 247., 304., 305. and 309. above provide examples. They can reasonably be read as indicating that the court was wondering whether the evidence meant that, failing a cash injection from Primekings in very short order, by 20 December 2013 or thereabouts, time would have run out for KSG. Counsel for Mr Hall Taylor and Mr Morcos put the matter in this way in their written closing:

> "Given the disaster unfolding in front of him, any advocate would have expected Marcus Smith J to have appreciated the serious difficulties the case was in, and it is therefore hardly cause for comment that trial Counsel formed the view that he was so aware. His interventions in the evidence were (with respect) scrupulously fair, but revealed (again with respect) a keen and consistent appreciation of points of difficulties for Cs' case, and as a result tended to clarify matters in a way which was adverse to the Kings. A number of damning answers given by C1 were direct results of judicial interventions: ..."

That is, in my view, a fair summary of the position.

359. More generally, Mr Hall Taylor will have been in a good position to judge how the court viewed the fundamental shift in Anthony King's evidence on the morning of Day 6, and how to interpret the judge's observations about the possibility of an amendment to the Kings' case. It seems inherently likely that the judge would indeed have been inclined to view the shift in the evidence as extremely problematic for the Kings' case. In the light of the evidence as a whole, including the transcripts and Mr Hall Taylor's oral evidence, I am entirely satisfied that – far from being a deliberate attempt to mislead the Kings in order to pressurise them into discontinuance for extraneous reasons – the assessment Mr Hall Taylor gave of the judge's reaction reflected his genuine view, and was an entirely reasonable view to take in the circumstances.

360. I also do not accept the Kings' suggestion that the judge's 'ever the optimist' remark showed that he would be likely to accede to any application the Kings might have made to amend their case so as to plead the Mr Fisher Representations. Any attempt to amend would have been strongly opposed by Primekings, who had just put to Anthony King that he was making that evidence up. The judge would in my view

have been far more likely to have concluded that it would not be just to allow such an amendment, in the middle of a fraud trial, particularly in circumstances where the new fraud allegation involving the Fisher Representations was unsupported by any other witness and flatly contradicted by James King's evidence.

361. Ms Connor's and Mr Blakey's notes indicate that discontinuance was being discussed during the Friday Conference, by both the Kings and the legal team, as a very real possibility at least. Mr Hall Taylor nonetheless decided to put his advice down in writing. At § 67(g) of his witness statement he explained why:

> "At the end of the conference, we agreed to reconvene on Monday morning. I insisted on following through with preparing the written advice. I was conscious that the discussion had been a lot to take in, and I wanted everyone, including us, to have time to take stock and make sure they were comfortable with the decision. I also wanted one last chance to reflect privately on whether there was any way we could plead a case and go through the discipline of committing our views to writing. I also perceived Anthony King to be capable of participating in a discussion, but leaving with a different understanding of what had been discussed and agreed, so I felt that committing it to writing could be important for the others who were involved in the client decision-making process."

362. The Kings were not keen for the Barristers to incur the cost of doing so. At 16:37 Anthony King texted Mr Blakey as follows: "Please ask Alex and Peter not to spend any unnecessary time this weekend. We need to get back as much as we can on the refreshers fees". Mr Blakey advised that the Barristers would "focus on what are the main/key points and have Anthony's comments in mind".

363. Ms Franks' manuscript notes taken at the Friday Conference include the (unattributed) phrase: "Robin & Barry do not believe they are fraudsters. Think about whether Robin and Barry did not know about this and it was Peter." It was suggested to Mr Hall Taylor in cross-examination that he was trying to persuade the Kings that Mr Fisher and Mr Steifel were not responsible for anything, though Mr Swain might have been. He responded that, rather than any attempt to persuade, this was no more than part of a discussion about how the evidence had come out, and an attempt to come to terms with what had emerged so far in the trial. The Kings also suggested that the only way in which Mr Hall Taylor could have known that Mr Fisher and Mr Stiefel did not believe they were fraudsters was a communication with them or one of their representatives such as Mr Downes. Mr Hall Taylor replied, "No, not at all. That came out of the way they behaved, the correspondence and what Anthony said about them, because he's had dealings with them himself". I accept his evidence on these matters.

(18) Weekend of 13-14 May 2017: Advice to Discontinue

364. Over the weekend of 13/14 May 2017 the Barristers wrote a 35-page note (the "***Advice to Discontinue***"). Their reasons for advising discontinuance included the following points.

365. On Anthony King's evidence in general:

> "Anthony's evidence was extremely disappointing. We have previously advised by email sent at the conclusion of his evidence and need not repeat the detail of that here. Unfortunately Anthony came across as an evasive witness, and at least some of his evidence will not be considered to have been credible. He is at risk of not being found to have given honest evidence. The likelihood is that wherever his evidence conflicts with that of another witness, that other witness evidence will be preferred. In addition, Anthony "gave away" parts of our conspiracy, causation and rescission arguments. Most significantly, however, he had a late recollection of a conversation between Robin Fisher and James an hour or so after the Peter Swain phone call. That both undermined the existing pleaded case and (if maintained) would require an amended alternative case to be advanced going forward. Unfortunately, on that James' evidence contradicts Anthony's and therefore it would be impossible for us to seek to amend where two of our clients have independent and contradictory recollections of key events. Any application would also be doomed to failure" (§ 3a)

366. As to Mr Wilson's evidence:

> "Lester Wilson did not come up to proof. On the question of the representations he effectively now had to say that he did not recollect what was said, and therefore his evidence did not provide the support expected for that of Anthony and James. However, for reasons that we will make clear, the question of exactly what was said on the Swain phone call became less important as a result of the evidence of GE" (§ 3f)

367. On David Armitage's evidence:

> "David Armitage was a stronger witness, and credible. He did, however, allow for the possibility that the statements made on the Swain call were as the Defendants allege, allowing the Judge to find in the Defendants' favour on that without necessitating a finding that he disbelieved Mr Armitage." (§ 3g)

368. As to the GE witnesses' evidence:

> "The impact of that evidence is, regrettably, entirely to undermine the case in misrepresentation, fraud and conspiracy.
>
> In effect the GE witnesses have given evidence that Mr Swain could have had a reasonable belief that the statements he made over the phone were true. That destroys any prospect of success in the claim and leaves the Judge with no choice but to dismiss it." (§ 12-13)

369. On Anthony King's change in evidence by introducing the Fisher Representations:

> "This relatively short passage of Anthony's evidence has numerous consequences.
>
> First, because it undermines the existing pleaded claim and all witness statements supporting it. This is because it has always been our instructions and case that the words "unless a deal was done" were never used by anyone that day in connection with GE, and that the Kings did not know that GE had indicated that they would be prepared to continue support. Therefore, if believed, that evidence immediately caused our existing pleaded case to fail and would, if accepted, necessitate amendment to the claim at the close of our evidence and before proceeding any further with the trial.
>
> Second, because it supports the Defendants' case that the words "unless a deal was done" were used that day, albeit that they have said so far that it was in a different context. That will not cause them any difficulty if, as may well have proved to be the case, they were to adjust their case to accommodate it in the event that Anthony's evidence was believed. They could say (and Robin might well have confirmed in the witness box) that the words were used later in the day as Anthony says, and that then lends credibility both to their case that Peter used the words earlier on the phone call and to their case that the Kings knew or would have known that GE's support would be there if a deal was done.
>
> Third, because it conflicts with all other witnesses' recollections and evidence. Of particular significance here is that James confirmed (in conference on Friday) that the conversation Anthony now recalls did not in fact take place as he has recalled it. In evidence in court he also confirmed, unequivocally, that the words were not used that day at all. His evidence on that under cross-examination was as follows:
>
> […]
>
> It seems to us certain that James' evidence will be believed over Anthony's.
>
> Fourth, as a consequence of that conflicting evidence and the fact that Anthony and James are both Claimants and our clients, it is now impossible for any statement of truth on an amended pleading to be signed without effectively conceding that one of Anthony or James should not be believed. Neither of them would be able to sign a statement of truth to a pleading which contained a version of events that differed from their evidence. If Anthony's recollection were to be included, he could sign the statement of truth but James could not. If James' recollection

> were to be the basis for the claim, then Anthony could not sign it. In addition to that difficulty, we would also face a conflict of interests between them and could not realistically act for and advise them both whichever case was advanced.
>
> This new evidence therefore was one of the most significant turning points in the case, although because of later evidence from Tom Weedall and Andy Cole from GE which undermined the misrepresentation case, the claim was in any event doomed for that reason alone. Anthony's evidence is therefore not the principal cause for us having to give advice to discontinue. However, it leaves our main witness as a witness unlikely to be believed on anything critical to success in the claim. Without him, again the claim fails." (§§ 21-27)

370. On counsel's professional duties to the court, in light of the damage the evidence thus far had done to the misrepresentation claim (pursued primarily in fraud):

> "It is important to emphasise that, in addition to our duties to our clients and in particular to act and advise competently, there are professional duties that we cannot ignore. Breach of them is a disciplinary offence that may lead to us being disbarred.
>
> Our professional conduct rules require that:
>
> a. we must not make a serious allegation against any person, or suggest that a person is guilty of a crime unless we have reasonable grounds for the allegation;
>
> b. we must not draft any statement of case, witness statement or other document containing any allegation of fraud, unless we have clear instructions to allege fraud and we have reasonably credible material which establishes an arguable case of fraud.
>
> The seminal case on counsel having a sufficient evidential basis for pleading and advancing a case in fraud is the House of Lords' judgment in *Medcalf v Weatherill* [2002] UKHL 27. That case makes clear the importance of counsels' professional obligations and their inability to advance a case in fraud without a credible evidential basis for doing so. It is not enough merely to have instructions to advance a fraud claim, counsel must themselves exercise objective professional judgment as to whether such a case can be advanced on the facts. The following excerpts make that and how the professional obligation may compete with duties and obligations to clients very clear."

The Advice to Discontinue went on to set out extracts from *Medcalf* which were materially similar to those in the email titled "*Medcalf excerpts*" sent by Mr Hall

Taylor to Mr Morcos on the evening of Day 6. (§§ 44-46)

371. On the possibility of amending the claim to account for the oral evidence thus far:

> "We have considered very carefully, as we said we would, whether there is now any alternative case that could properly be pleaded and advanced for the remainder of this trial. Our conclusion is that there remains no credible case that we could now plead and advance. Further, the existing case is undermined by the collapse of the key witnesses.
>
> If an application to amend were to be made on Monday (as it would have to be in light of the departure of the evidence from our existing case), then it would almost certainly be opposed on the basis that any revised claim would be unsustainable in light of the evidence heard to date. It is our view that we are not able to plead or put our name to any alternative pleading and that any application would fail, on the basis that any alternative claim would not now enjoy any realistic prospect of success. Upon the failure of that application, the Kings would certainly then face an application from the Defendants to dismiss the existing pleaded case which, on the evidence, would succeed and result in the claim then being dismissed. It is better, in our view, to take a sensible and pragmatic view now as to the certainty of that outcome no matter what we might seek to do." (§§ 47-48)

372. In conclusion:

> "It follows that our advice is that the Claimants should now discontinue the claim. In fact, as counsel we are unable to continue to advance any claim as it is no longer based on any credible supporting evidence. Should the Claimants want to proceed further then we would be professionally obliged to cease to act for them any further in this trial." (§ 49)

373. The B Shares Mistake was not mentioned in the Advice to Discontinue.

374. Counsel also advised the Kings to issue a public apology to the Primekings defendants for the following reasons (the "***Apology Advice***"):

> "We do consider that rebuilding bridges with Robin Fisher and Barry Stiefel is important. It is in the Kings' interests to attempt to avoid an overly aggressive approach on enforcement of the adverse costs order, to seek to preserve the value in the remaining shareholding in the company, to obtain as much as possible of the £2 million to be paid to Mr and Mrs King in the event that there are distributable profits, to preserve Anthony's employment and income, and to give the best prospect of increased (and not diluted) value in the Kings' shareholding in the company." (§ 61)

375. They also advised the Kings to agree to pay indemnity costs to the Primekings defendants (the "***Costs Advice***") because:

> "where serious allegations of the nature made in this claim are made and are not made out on the evidence, it is extremely likely that upon the withdrawal of the claim the general approach of awarding costs on the indemnity basis will prevail, irrespective of whether the Judge in fact has any sympathy for the Kings' position.
>
> The Judge will not want to be appealed so early into his judicial career and ordering costs on the standard basis would inevitably provide a reasonable basis for appeal which would no doubt be pursued by the Defendants, almost certainly successfully. Of course that would then simply put the Kings to further and unnecessary expense. It may therefore be better simply to agree to indemnity costs at the same time as making the apology, not just to avoid an appeal, but also as part of the process of rebuilding bridges with the Defendants. This is something we can discuss when we meet on Monday." (§ 59-60)

376. The Kings allege that the Advice to Discontinue was given in bad faith, solely in order to cover up the B Shares Mistake:

> "The transaction recommended to the Kings, a discontinuance accompanied by an apology and agreement to pay indemnity costs, gave an obvious practical benefit to the Ds. All the problems Ds would have had to face if they had acted lawfully were conveniently avoided.
>
> In particular, the legal team never had to mention (let alone advise on) their own conflict of interest, or the fact that they should have stopped acting on day 4, or the need to deal with an embarrassing amendment to the pleaded claim**,** or explain to their clients why an aspect of the quantum claim worth up to £2m was unsustainable, or explain how the plea came to be made in the first place, or explain to the clients what the claim that Mr Downes has pointed out on day 2 was, or explain the obvious need for independent lawyers to advise on that claim against DWF urgently." (Kings' Opening Submissions, §39-40)

In other words, they allege that the decision to discontinue the claim was already made by the legal team on Day 4. For the reasons given elsewhere in this judgment, I entirely reject those allegations.

377. On the morning of Day 10 (Monday 15 May 2017), a final conference was held where the Advice to Discontinue was discussed. Notes made at the meeting including the following entries:

> "AHT, PM, JBL, GAC, AK, JK

> Any questions arising from advice? No.
>
> AHT – I did think about dropping AK – but the problem is then the GE guys
>
> JK – we have to ignore the scheming behind the scenes?
>
> AHT – I think we know that P.S. is a scheming, conniving, git + A.L. is a professional, those in insolvency – always slightly conflicted. A.L. pushing a pre-pack agenda. A.L. encouraged P.S.
>
> He wanted to give you guys a bad impression. They were sharp but not dishonest.
>
> […]`
>
> They exaggerated but didn't lie – but took advantage of the situation
>
> What they'd said in statements was consistent with what they'd said to A.K. Nothing you can do.
>
> Couldn't re-examine G.E."

378. The Kings discontinued their Misrepresentation Claim on Day 10. They agreed to pay costs on an indemnity basis and Mr Hall Taylor read out in open court a public apology formally withdrawing every single allegation in the case.

379. Upon discontinuance, Primekings sought, and obtained, an order for a payment on account of £1.7m.

380. Immediately following the trial, Anthony King sent an email to his legal team (both DWF and the Barristers) dated 15 May 2017 at 15.02:

> "Guys sorry we dashed off, as you can imagine that court room has not become our favourite place to hang out and right now we just wish to get home to our families and loved ones.
>
> Once again I would like to thank you all for your hard work on this, you have been diligent and hard working, but we just got it wrong, a very expensive and hard lesson to learn and as hard as it is to say about 'others', this was the right and just outcome for Barry and Robin.
>
> It has been a pleasure to work with you and alongside you, even Alex's gallows humour ! But it will be a relief however to return at least to some normality, whilst we do however now face new challenges."
>
> (emphasis added)

(E) EVENTS FOLLOWING THE MISREPRESENTATION PROCEEDINGS

(1) Alleged work done after trial

381. Emails from Mr Hall Taylor to unconnected third parties suggested that he still seemed to be engaged on the Kings' case even after it was discontinued on 15 May 2017:

i) Email on 16 May 2017 at 09.50: "pressure continues but the trial from he'll [sic hell] should hopefully end today!"

ii) Email on 16 May 2017 at 11.20: "the trial has ended – we had to discontinue after our client's own evidence wrecked his case… anyway just dealing with aftermath […]"

382. Mr Hall Taylor said in his oral evidence that he was probably buying himself some time vis a vis the third parties in question, or recognising that he would probably sleep until midday the next day and then tidy up the myriad of stowaways that had come back from court. Either is plausible, and it is difficult to see what sinister implication could sensibly be drawn from these emails.

383. The documentary record suggests also that Mr Hall Taylor had a call with Mr Blakey on 19 May 2017. Mr Blakey said that Mr Hall Taylor called to find out how Anthony King was doing because Mr Hall Taylor was concerned about him given how the trial had ended.

384. On 31 May 2017, it seems that Mr Blakey, Ms Connor and Mr Hall Taylor had a call with criminal defence solicitors Taylor Goodchild; but I accept their evidence that this concerned a different matter on which DWF were planning to instruct Mr Hall Taylor.

385. On 1 and 2 August 2017, Ms Connor emailed the Advice to Discontinue and selected extracts from James King's cross-examination to Mr Wilson. Mr Wilson explained that by this point Anthony King had filed formal complaints against DWF (see below) and they were therefore preparing to answer it.

386. It seems that Mr King became aware in 2022 of (what he says was) the additional work done by the Kings' legal team after the discontinuance. He wrote in a letter dated 16 March 2022 to Mr Blakey:

> "I am now aware that you did not go straight back to Leeds on the 15 May 2017, the Monday after court when we were forced to discontinue our case. I now know that you stayed over that night travelling back on Tuesday, 16 March 2017. I am also aware that that was a day when some members of the legal team still felt under continuing personal pressure, even though the trial had ended the day before. I have good reason to believe that matters arising from the case were still continuing and discussions were still on going, all completely hidden from my family. This meant no draft order was circulated until Friday 19 May 2017.
>
> Please can you let me know:

> • 1. What time was your train back to Leeds on 16 May 2017 and why did you not travel back on 15 May 2017.
>
> • 2. The details of the further work that continued after the trial had ended on 15 May 2017, and why it was not brought to my attention. As a client, I am entitled to know everything that happened.
>
> • 3. DWF have told me that your mobile and text messages all have gone missing - is that your understanding as well, have you really lost every text with all your contacts?
>
> • 4. How far back do your text records go, with Lester and Alex Hall Taylor, do you have any at all?
>
> • 5. How far back do your text messages go with your other contacts go.
>
> • 6. Do you recall when you lost the mobile phone and the data and how it happened?"

387. Mr Blakey did not respond to this letter, a fact from which I do not consider it appropriate to draw any inference, particularly in circumstances where the Kings had by then made claims against DWF.

(2) Charge over Menston Property for DWF's fees

388. As mentioned earlier, the Kings had already agreed in principle to grant DWF a charge over the Menston Property to secure payment of their legal fees. However, Anthony King had not yet signed it when the Misrepresentation Trial began, and DWF were chasing for it on Day 6. They continued to request Anthony King to sign the charge after the trial.

389. On 17 May 2017 Graham Dagnall emailed Mr Blakey:

> "Can you update on the charge please. Its imperative that is signed asap."

390. The next day Joel Heap emailed Mr Blakey again:

> "We haven't communicated directly on this but I've seen the fringes of the fall out from kings from graham [Dagnall – another senior litigation partner].
>
> I think that needs to be your priority in the immediate term and let's catch up when we have that under control please"

391. Finally, with James King's encouragement (for example, an email of 13.28 on 14 June 2017), Anthony signed the charge on 16 June 2017.

392. One of his subsequent complaints to DWF was that he was unduly pressured into signing the charge.

393. On 19 June 2017, Anthony King recorded his dissatisfaction with the way the charge came about in an email to the DWF banking team:

> "I need to place on record that I feel very uncomfortable about what happened on Friday. I signed the papers without any legal explanation about what I was signing. I asked what all the paperwork was and was informed it was a standard legal charge.
>
> I was simply told to sign and was placed under tremendous pressure to do so by those present. It was put to me that DWF wants to help us but this needed to be done in order for that to happen.
>
> A lawyer was then sent to my home to see my wife and explained that DWF now basically own the property and anything in it.
>
> Can you please explain what would be the position now for the other debts that I have who are also secured on this equity."

394. DWF then entered into a deed of priority with Julie Kenny on 12 January 2018. When the Menston Property was sold in or around July 2018 the proceeds were divided equally between her and DWF. In fact, the £112,725.09 that DWF received from the sale of the Menston Property was returned to the Kings on 23 December 2019. That was because DWF's insurers had in early August 2019 compensated DWF for the outstanding debt owed by the Kings, and DWF considered that it should therefore account to the Kings for the sums it held on its client account. The Kings suggested that the money was retained until December 2019 in an attempt to stifle the present claim. However, having heard the evidence of Mr Radcliffe I am satisfied there was no such intention, and in any event any delay in paying it did not prevent the Kings from sending during the relevant period three lengthy letters of claim prepared by solicitors (Fieldfisher) and/or counsel, or from issuing the present claim on 6 December 2019.

(3) Negotiations on costs with Primekings

395. The Kings had agreed to pay indemnity costs, and negotiations about their quantum ensued. DWF initially assisted the Kings during the negotiations, until formal complaints were made against them in late July 2017.

396. The Kings met with Primekings and Teacher Stern on 9 June 2017, following which a without prejudice and subject to contract letter (dated 13 June 2017) was received:

> "Following our meeting on Friday 9 June, I am writing on behalf of my clients Primekings Holding Limited ("PKH") to let you have their proposals.
>
> As you are doubtless aware, the date for payment of the sum of £1.7 million on account of the indemnity costs awarded in favour of PKH is now due. The estimated costs […] come to a

> total of £2.7 million which is likely to be your total liability to PKH. […]
>
> At the meeting we discussed the amount outstanding to DWF and what steps you might take in view of the fact that you tell us that there was, a) no engagement letter, b) no written advice as to the merits of your case, c) a verbal opinion that your prospect of success were around 100% and d) that costs were incurred by DWF way and beyond their original estimate and your ability to pay them, or any awarded against you.
>
> In order to achieve the objective of a 'clean break' PKH propose as follows: […]
>
> In conclusion I wish to make clear that this offer is on the basis that you have made full and frank disclosure to Barry Stiefel and Robin Fisher. They have no intention of seeking to enforce their rights against any other party such as your funders and must leave you to take whatever action you see fit in respect of DWF." (emphasis added)

397. It seems therefore that during that meeting Mr King told Primekings that their legal team had advised them that the prospects of succeeding on liability were 100%. DWF obviously disputed that. Thus, Mr Blakey emailed Anthony King that day:

> "(a) There was an engagement letter provided to you. It was sent in the post on 9 September 2016 to James/Susan and Anthony.
>
> (b) The merits of your case were discussed at length with you in conference and on the phone and including emails about the same on many occasions. As I reminded you Anthony, you actually got to the point where you did not want to hear from Alex any further on the merits.
>
> (c) We did say that we thought we would win on liability but we never said (and would never say) that our prospects of success were 100%. Again, you were well aware of the risks and prospects. Of course, our opinion was on the basis that Anthony and GE particularly came up to proof.
>
> (d) You knew about the costs; Anthony you came to the hearings including the costs one and were sent the costs budgets (including TS's budget). You also appreciated the position on costs if you lost.
>
> (e) "whatever action you see fit in respect of DWF." I'm not sure what this refers to our means."

398. Mr Hall Taylor was sent a copy of the Teacher Stern letter, and said in an email to DWF:

> "it does sound as if a not entirely accurate picture was presented to TS - so thank you for correcting - particularly the point re not wanting to hear my advice.
>
> Of course (at least in terms of advice I gave or that you gave that I know about) the picture is much broader and more nuanced than just a question of "winning" or "losing" as if there is only one issue in the whole case - they were advised by both of us that the "misrep" facts were only one part of the case […]
>
> On everything else (which made up the other necessary "rungs" of the ladder to get the case to a win) I repeatedly advised that we had the weaker side of the arguments - and indeed highlighted the three main problem areas on a number of occasions. They always downplayed the concerns about that and failed repeatedly to do anything about the necessary evidence in those areas. My recollection is that you always agreed with me on those areas being problematic for us, albeit perhaps you were not quite as harsh as I was about it at times no doubt to maintain reasonable client relations! […]
>
> In any event - on the critical issue of the misrep - as you say it could not have been foreseen that both AK and GE would do such a hatchet job on our factual case. We (you and I) had anticipated risk being there - and had said so - but Anthony was absolutely convinced they would "win" on that point. Had he come up to proof, not changed his evidence, and not come up with the late recollection which his father then shot down, and had GE actually supported rather than torpedoed the case then we would have had a decent shot - still subject to exactly the problems previously identified. But that is not where we ended up. […]
>
> Sorry - rant over - I am just displeased and disappointed to see the way things are being put across to TS (perhaps I shouldn't be too surprised in light of how things panned out...but it is saddening to see that kind of thing)."

The Kings allege that Mr Hall Taylor sent that email in order to give a false impression about the advice he had given to the Kings. There is no merit in that allegation. The email was a fair reflection of the course of Mr Hall Taylor's advice taken as a whole.

(4) Complaints to DWF

399. On 26 July 2017 and 27 July 2017 Anthony King sent two emails to DWF making formal complaints against Mr Wilson and the litigation team in charge of the Misrepresentation Proceedings over the B Shares Mistake, Mr Wilson's evidence surrounding it and the fact that he says he was pressured to sign a legal charge over his property to secure DWF's fees.

400. The complaints initially went to Sue Malia, a DWF partner in charge of complaints. They were then escalated to Claire Graham, a litigation partner at DWF, who apparently met with Anthony and Susan King in mid-August 2017. In an email dated 21 August 2017, she wrote to Anthony King:

> "Having considered the specifics of your/ your family's concerns I do not consider that they fall within the aspect of a client service complaint but rather you have intimated that you have a potential professional negligence claim against the firm. [….]
>
> As solicitors we have a duty to act in the best interest of a client and given the intimation that you may have a claim against this firm I do not consider that it would be in your/ your family's best interests for us to attempt to continue to act, especially given that you have made serious allegations concerning undue influence, which for the avoidance of doubt is disputed […]
>
> Should you wish to pursue a claim you should send us a letter of claim pursuant to the pre-action protocol."

401. Anthony King replied:

> "whilst I did mention we had considered if we, as the King family had a potential negligence claim against DWF, we also went to great lengths to say that we would prefer not to pursue that line and would like DWF to consider a proposal to help the King Family in this very stressful and distressing time.
>
> I'm saddened that you have not even considered tabling a proposal to assist us, but instead have chosen to effectively 'dump' us."

402. The complaint was then escalated to Greg Morris, Head of Risk Management at DWF, who wrote to Anthony King on 31 August 2017 regarding in particular the allegations made against Mr Wilson:

> "Mrs Graham had reviewed your complaint in respect of the service provided to you by DWF LLP. Whilst I do not wish to repeat the contents of Mrs Graham's email in full, may I please draw your attention again to the following points made in it:
>
> - This firm can no longer act for you or your family, as your intimation of a possible claim against DWF LLP has had the immediate result of causing a conflict to arise between DWF LLP and you/your family.
>
> - It is extremely important that you seek your own advice on this matter from another firm.
>
> However, your complaint also contained an allegation about the conduct of Mr Lester Wilson of this firm, to the effect that he

had lied whilst giving evidence during the trial at the High Court in London which started on 28 April 2017. It is with regard to that aspect of your complaint that I am now contacting you.

Your allegation was worded as follows: "I'm afraid I have to suggest that Lester lied on the stand to cover his own failings, you will find no record of any meetings with my father and I between the 12th and 18th December, or telephone conversations, in fact you will find records of chasing and requesting updates and information and frustration at the lack of engagement." I have taken your reference to dates to mean 12th and 18th December of 2013. Please let me know if that is not correct. […]

I have concluded that there is no evidence to support your allegation that Mr Wilson lied whilst giving evidence at the High Court, and therefore that there is no evidence that Mr Wilson has breached the SRA Principles.

In particular, I have found that:

• Mr Wilson had discussed the structure with you prior to 12 December 2013, as evidenced by email correspondence. He also did so at the meeting with you which took place on 12 December 2013 and subsequently. Each of these is also evidenced by email correspondence. You were made aware of the 'B' shares prior to 12 December 2013 and you negotiated the terms of these shares with Mr Wilson on 12 December 2013;

• There is no evidence to support the contention that Mr Wilson was unaware of the 'B' Shares nor that he "simply missed it"; and

• The contention that Mr Wilson was shown evidence of the 'B' shares in the High Court whilst giving evidence and that he was unaware that there was a reference to those shares in the draft documents, is not supported. In fact Mr Wilson provided this information to the Court in his amending note at the commencement of him giving evidence.

In summary, I do not find that there is any evidence to support the contention that you were not made aware of the 'B' shares prior to 12 December 2013, nor any evidence to support the very serious allegation of professional misconduct to the effect that Mr Wilson lied whilst giving evidence at the High Court."

403. Mr King wrote back that day, concluding that:

> "I'm sorry I do not accept your explanation and to date you have offered no evidence or proof to support your position, I would ask you to do so."

404. The complaint against DWF was subsequently escalated to the Legal Ombudsman.

405. One of Anthony King's complaints in his email of 26 July 2017 was that:

> "Recently on the 16th of June I was pressured and put under duress at DWF's offices to sign legal charge papers over this property. I was told DWF wanted to help our family through this mess, but could not do so without these papers signing, I asked what I was signing and what did it all mean and was simply told it was a standard legal charge."

That was untrue: the documentary record shows that Anthony King had agreed to grant DWF the legal charge to secure their fees prior to the Misrepresentation Trial (see earlier).

(5) Legal Ombudsman and Preliminary Notice of Claim

406. On 21 August 2017 the Kings complained to the Legal Ombudsman regarding DWF's conduct of the Misrepresentation Proceedings. After reviewing all the evidence provided, the Ombudsman concluded that "*the level of service provided by the firm to Mr King was not of the standard he was entitled to expect*." This was primarily because:

> "The poor service I have identified is firstly that this instruction – the decision to sue the defendants – should not have got off the ground. My view is that the evidence shows it went too far before the allegations were properly examined and tested. In particular, and in light of counsel's opinion of 14 May 2017, I am critical that evidence from GE was not available to support Mr King's claim.
>
> My conclusion as to why this was the case is because of the involvement of Lester Wilson of DWF in the litigation. He was present at all key stages of the building of the case, and at no stage challenged Mr King's version of the events of 18/19 December 2013. In fact his witness statement (which did not come up to proof) unequivocally supported it. The allegation of misrepresentation was a serious matter and the basis for those allegations should have been tested much more rigorously before any significant costs were incurred by either side.
>
> It is more likely than not, in my view, that if Mr King had instructed a firm other than DWF they would have advised him that considerably more evidence to support what went on in the completion meeting of 18/19 December 2013 was required."

407. In line with the Ombudsman's conclusions, the Kings had also instructed specialist solicitors (Fieldfisher) and sent a Preliminary Notice of Claim, dated 13 July 2018. That alleged that the Misrepresentation Proceedings "*should never have been commenced*", that there had been an "*effective collapse of the Kings' case during cross examination*" and that the chance of obtaining rescission was "*on the facts… extremely low*".

408. It is of course apparent that the Ombudsman's conclusions on the DWF's 'wrongdoing' and the Kings' own Preliminary Notice were diametrically opposed to the Kings' present claim, namely that DWF and the Barristers dishonestly or otherwise wrongly advised the Kings to drop a claim that had a high chance of success.

409. On 27 September 2018, the Ombudsman dismissed the Kings' complaint, expressly because a Preliminary Notice of Claim had been sent to DWF.

410. In October 2018, DWF made payment of around £2.1m to the Kings. That payment was referred to by the Particulars of Claim in these proceedings. The Kings have alleged the payment was an admission of liability by DWF. I reject that suggestion. The payment was made on a without prejudice basis with an express statement that there was no admission of liability. Moreover, the claim that the Kings had made, at that stage, bore no resemblance to, and indeed was entirely contrary to, the claim advanced in these proceedings.

(6) The Kings' alleged realisation of the conspiracy

411. The Kings say that it was only in the Christmas period of 2018-19, reading over certain trial bundles, that they fully realised what had happened to them. In particular, they saw documents which they say demonstrated to them that the misrepresentation claim had, contrary to the Advice to Discontinue, a high chance of success.

412. The Kings say they did not realise what the motive the Defendants had for throwing away a powerful case, until they started thinking about the Deferred Consideration and Mr Wilson's list of corrections, a copy of which they eventually obtained on 30 March 2020.

(7) Other proceedings

413. In 2020-21 the Kings sued Primekings, Teacher Stern and Mr Downes alleging unlawful means conspiracy in the Misrepresentation Proceedings (the "***Conspiracy Proceedings***"). The Kings made two allegations. First, that the Defendants conspired to provide false and inflated costs information, to improperly pressurise the Kings into settling the dispute and to obtain more costs than were deserved. Secondly, that Primekings and their lawyers identified the B Shares Mistake and threatened to "*expose the full extent of the legal team's negligence to the Kings and the Court if the legal team did not cause the Kings to discontinue the case on terms specified by Primekings*".

414. The defendants in turn applied for strike out and/or summary judgment. The case was heard by Cockerill J in February 2021, who struck out the Kings' action: *King v Stiefel* [2021] EWHC 1045 (Comm). Cockerill J made an order dated 10 June 2021

reciting that the claim in the Conspiracy Proceedings was totally without merit and ordering the Kings to pay costs on the indemnity basis.

415. The Kings complain that, in the course of those proceedings, DWF provided a copy to Primekings' solicitors, Macfarlanes, of the Kings' Preliminary Notice of Claim against DWF dated 13 July 2018. However, there is no basis for the allegation that that was done in order to discredit the Kings; and it is notable that the Notice is not mentioned in Cockerill J's judgment. The Kings' allegation is in any event irrelevant to the present claim.

416. Mr Downes' rights in respect of the costs order were assigned to his insurer, Bar Mutual Indemnity Fund. BMIF then served a Statutory Demand on the Kings.

417. On 12 October 2021 the BMIF sent a "without prejudice" letter proposing a settlement. They agreed to withdraw the Statutory Demand if the Kings ceased to pursue the present proceedings against Mr Hall Taylor and Morcos, who are also insured by the BMIF.

418. The Kings successfully applied to set aside the statutory demand: *King v BMIF* [2023] EWHC 1408 (Ch). HHJ Kelly concluded that the claim in the present proceedings against Mr Hall Taylor and Mr Morcos was a cross-demand sufficient to set aside the statutory demand, on the basis that in both cases BMIF was the 'real defendant'.

(F) APPLICABLE LAW AND REGULATIONS

(1) Duties owed by barristers: general

419. The Bar Standards Board Handbook (3rd ed., April 2017), in force at the relevant time, imposed the following regulatory duties on counsel:

> "rC3 You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role (with the exception of Rule C3.1 below, which applies when acting as an advocate):
>
> .1 you must not knowingly or recklessly mislead or attempt to mislead the court,
>
> 2 you must not abuse your role as an advocate;
>
> …
>
> .5 you must ensure that your ability to act independently is not compromised.
>
> rC4 Your duty to act in the best interests of each client is subject to your duty to the court.

…

rC6 Your duty not to mislead the court will include the following obligations:

.1 you must not:

.a make submissions, representations or any other statement; or

.b ask questions which suggest facts to witnesses

which you know, or are instructed, are untrue or misleading.

.2 you must not call witnesses to give evidence or put affidavits or witness statements to the court which you know, or are instructed, are untrue or misleading, unless you make clear to the court the true position as known by or instructed to you.

rC7 Where you are acting as an advocate, your duty not to abuse your role includes the following obligations:

…

.2 you must not make a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination;

.3 you must not make a serious allegation against any person … unless:

.a you have reasonable grounds for the allegation; and

.b the allegation is relevant to your client's case or the credibility of a witness;

rC8 You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).

rC9 Your duty to act with honesty and integrity under CD3 includes the following requirements:

.1 you must not knowingly or recklessly mislead or attempt to mislead anyone;

2 you must not draft any statement of case, witness statement, affidavit or other document containing:

> .a any statement of fact or contention which is not supported by your client or by your instructions',
>
> .b any contention which you do not consider to be properly arguable;
>
> .c any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud;

…

rC17 Your duty to act in the best interests of each client (CD2) includes a duty to consider whether the client's best interests are served by different legal representation, and if so, to advise the client to that effect.

…

gC51 Your duty to act in the best interests of each client (CD2) includes a duty to consider whether the client's best interests are served by different legal representation, and if so, to advise the client to that effect. If you consider that your professional client, another solicitor or intermediary, another barrister, or any other person acting on behalf of your client has been negligent, you should ensure that your client is advised of this.

…

rC21 You must not accept instructions to act in a particular matter if:

> …
>
> .5 your instructions seek to limit your ordinary authority or discretion in the conduct of proceedings in court; or
>
> .6 your instructions require you to act other than in accordance with law or with the provisions of this Handbook; or
>
> …
>
> .10 there is a real prospect that you are not going to be able to maintain your independence.

gC51 CD2 and Rules rC1 5.5 and rC1 7 require you, subject to Rule rC1 6, to put your client's interests ahead of your own and those of any other person. If you consider that your professional client, another solicitor or intermediary, another barrister, or any other person acting on behalf of your client has

> been negligent, you should ensure that your client is advised of this."

420. In *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, Lord Bingham explained that:

> "… The parties to contested actions are often at daggers drawn, and the litigious process serves to exacerbate the hostility between them. Such clients are only too ready to make allegations of the most damaging kind against each other. While counsel should never lend his name to such allegations unless instructed to do so, the receipt of instructions is not of itself enough. Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation. At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn. I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay. …" (§ 22)

Lord Hobhouse said:

> "The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice; the public interest, covering the litigants themselves as well, is now also expressed in CPR Pt 1. (See also paragraph 9 of the Practice Direction, Statements of Case supplementing CPR Pt 16.) The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable

> competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles. These include the provisions relevant to barristers which preclude them from making allegations, whether orally or in writing, of fraud or criminal guilt unless he has a proper basis for so doing. Paragraph 606(c), which has already been quoted by my noble and learned friend, requires express instructions and reasonably credible material which as it stands establishes a prima facie case of fraud. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice." (§ 55)

421. As to legal liability for negligence, two questions arise: (i) was the particular advice or other act or omission complained of "*wrong*" in the light of the instructions and information placed before him?; and (ii) if so, did the error amount to negligence? (*Jackson & Powell on Professional Liability* (9th ed.) at § 12-028).

422. In considering whether the error amounted to negligence, the following points have to be borne in mind:

i) *"Much if not most of a barrister's work involves exercise of judgment—it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed." (Saif Ali v Sidney Mitchell Co* [1980] A.C. 198, 214F).

ii) In considering claims against barristers, the courts *"[would] take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables" (Hall v Simons* [2002] 1 A.C. 615, 681G).

iii) Counsel in concluding that they could no longer properly pursue a case are engaged in the forming of a difficult professional judgment (see e.g. *Medcalf* at § 35, *Richard Buxton (a firm) v Mills-Owens* [2010] EWCA Civ 122 § 43).

iv) Where counsel is exercising a professional judgment, the courts have readily recognised that it is not sufficient that the judgment reached may be regarded as 'wrong' by another lawyer. For it to constitute negligence, it must not only be an erroneous judgment, but an error "*as no reasonably well-informed and competent member of that profession could have made*" (*Saif Ali* at pp 218-219; *Moy v Pettman Smith* [2005] 1 WLR 581 § 62). A barrister who has reached a judgment acting honestly and carefully is unlikely to be held to be negligent: *Saif Ali* at pp. 214, 230; *Hall v Simons* [2002] 1 AC 615, 681-682, 726, and 737; *Moy* at § 59).

v) The Court will make allowance for the circumstances in which the impugned decision was made, and it will only be negligent if it was outside the range of

possible courses of action that in those circumstances reasonably competent members of the profession might have chosen to take: *Saif Ali*, at 220-221.

(2) Duties owed by solicitors: general

423. At the time of the Misrepresentation Proceedings trial, version 18 of the SRA Code of Conduct 2011 was in force. Chapter 1, on client care, included a requirement to achieve various outcomes including:

> "O(1.2) you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice;
>
> …
>
> O(1.5) the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances"

424. As to legal liability for negligence, the following principles apply where a solicitor instructs counsel:

i) in general, a solicitor is entitled to rely upon the advice of counsel properly instructed;

ii) for a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar;

iii) however, he must not do so blindly, but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it.

(See *Locke v Camberwell Health Authority* [1991] 2 Med LR 249, 254, approved in *Ridehalgh v Horsefield* [1994] Ch 205, 237, and cited as common ground in *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230 § 85).

(3) Conflicts of interest

425. At the time of the Misrepresentation Proceedings trial, version 18 of the SRA Code of Conduct was in force. Chapter 3 of the SRA Code of Conduct related to conflicts of interest, which were defined in the Glossary as:

> "any situation where:
>
> (i) you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "client conflict"); or
>
> (ii) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may

> conflict, with your own interests in relation to that or a related matter (an "own interest conflict").”

426. Chapter 3 included these provisions:

> “You can never act where there is a conflict, or a significant risk of conflict, between you and your client.
>
> …
>
> **Outcomes**
>
> You must achieve these outcomes:
>
> …
>
> **Prohibition on acting in conflict situations**
>
> O(3.4)
>
> you do not act if there is an own interest conflict or a significant risk of an own interest conflict;”

427. Chapter 1, on client care, included a requirement to achieve various outcomes including:

> “O(1.1) you treat your clients fairly;
>
> …
>
> O(1.11) clients' complaints are dealt with promptly, fairly, openly and effectively;
>
> …
>
> O(1.16) you inform current clients if you discover any act or omission which could give rise to a claim by them against you.”

428. The Bar Standards Board Handbook imposed the following duties on counsel:

> “rC21 You must not accept instructions to act in a particular matter if:
>
> …
>
> .2 there is a conflict of interest, or real risk of conflict of interest, between your own personal interests and the interests of the prospective client in respect of the particular matter”; or
>
> .3 there is a conflict of interest, or real risk of conflict of interest, between the prospective client and one or more of

> your former or existing clients in respect of the particular matter unless all of the clients who have an interest in the particular matter give their informed consent to your acting in such circumstances;
>
> …"

> "gC69 Rules rC21 .2, rC21 .3 and rC21.4 are intended to reflect the law on conflict of interests and confidentiality and what is required of you by your duty to act in the client's best interests (CD2), independently (CD4), and maintaining client confidentiality (CD6).You are prohibited from acting where there is a conflict of interest between your own personal interests and the interests of a prospective client. However, where there is a conflict of interest between an existing client or clients and a prospective client or clients or two or more prospective clients, you may be entitled to accept instructions or to continue to act on a particular matter where you have fully disclosed to the relevant clients and prospective clients (as appropriate) the extent and nature of the conflict; they have each provided their informed consent to you acting; and you are able to act in the best interests of each client and independently as required by CD2 and CD4."

(4) Fiduciary duties

429. The Kings also alleged that all the Defendants owed fiduciary duties to them, as follows:

i) a duty to act in good faith in the best interests of their clients at all times (see, e.g., *Bristol and West Building Society v Mothew* [1998] Ch 1, 16-18);

ii) in consequence of the above duty, a duty not knowingly or recklessly to mislead their clients;

iii) a duty to avoid conflicts of interests, as summarised in *Grant & Mumford on Civil Fraud* §§ 11-081 – 11-084

> "(3) <u>The Obligation to Avoid Conflicts Between Duty and Interest</u>
>
> The Nature of the Obligation. A fiduciary is obliged not to place himself in (or, if he has come into it inadvertently, allow himself to remain in) a position where his duty to his or her principal conflicts or may conflict with his or her own personal interest:
>
> *"…it is a rule of universal application that no one having [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest*

> *conflicting or which possibly may conflict with the interest of those whom he is bound to protect."*
>
> This is a "prophylactic" duty, which is concerned with the risk that a fiduciary may be tempted to act contrary to the interests of his principal in breach of other obligations owed to him.
>
> The duty is engaged not just in cases of actual conflict, but in any case where a reasonable person would regard there as being "a real sensible possibility of conflict". A risk of conflict which is conceivable, but not a significant or real possibility, should not suffice. Nor (obviously) can the duty be engaged where the fiduciary owes no other duty to the principal with respect to a particular dealing with which his self-interest in that dealing could conflict.
>
> Because the duty is concerned with deterrence, in establishing a breach
>
> (1) It is not necessary to demonstrate that the fiduciary has in fact breached some other duty owed to the principal by reason of his self-interest;
>
> (2) It is irrelevant that the dealing in question was fair to, or has benefited, the principal;
>
> (3) It is also irrelevant that the fiduciary's potentially conflicting interest is not one that the principal could himself have exploited;
>
> (4) It is not necessary to demonstrate that the fiduciary acted in bad faith, let alone dishonestly."

430. I am not persuaded that the Defendants were acting in fiduciary roles in relation to the conduct of litigation (save perhaps as regards the non-misuse of confidential information). The essence of a fiduciary relationship was neatly encapsulated by Ribeiro J in *Libertarian Investments v Hall* [2013] HKCFA 93 §§ 53-69. A fiduciary is someone who is given power or control over some property, or may himself act materially to affect the affairs of a principal, and who in the exercise of that power or control is made subject to a fiduciary duty to exercise it solely in the interests of the principal. That is not generally an apt description of a barrister acting the ordinary course of being a trial advocate or a solicitor instructing counsel or advising a client at trial. A barrister must make their own professional judgments as to what submissions they may properly advance having regard to their professional duties, in which respect the interests of the principal are irrelevant. Both counsel and solicitors must exercise skill and care when advising the client about the case. Neither, however, have in this context power or control over the property or affairs of their clients: their role is to give advice. It is then up to clients to decide what to make of such advice and then to take their own decisions and themselves exercise power over and/or control their own property or affairs.

431. There have been suggestions that barristers, for example, do owe fiduciary duties: see, e.g., Hollander, "*Conflicts of Interest*" (6th ed.) §16-003:

> "It is surprisingly difficult to identify an authority which holds in terms that a barrister owes a fiduciary obligation of loyalty to the client. Perhaps barristers do not often nowadays seek to buy property from their clients. Although the barrister does not handle client money, it seems clear that the barrister does owe a fiduciary duty to the client, and no-one seems to have doubted
>
> it. The Code of Conduct imposes what amounts to a fiduciary obligation on the barrister at rC15 by providing:
>
> " Your duty to act in the best interests of each client, to provide a competent standard of work and service to each client and to keep the affairs of each client confidential includes the following obligations:
>
> "l .you must promote fearlessly and by all proper and lawful means the client's best interests
>
> 2. you must do so without regard to your own interests or to any consequences to you (which may include, for the avoidance of doubt, you being required to take reasonable steps to mitigate the effects of any breach of this Handbook)
>
> 3 .you must do so without regard to the consequences to any other person (whether to your professional client, employer or any other person)
>
> 4 .you must not permit your professional client, employer or any other person to limit your discretion as to how the interests of the client can best be served."
>
> The professional obligations of the barrister and his duty to the court require him to exercise a measure of discretion in the manner in which he presents his client's case, even if the client has contrary views. This is another hallmark of a relationship of trust and confidence. The existence of a duty to the court does not affect the existence of a fiduciary obligation — it merely subjugates the duty to the client to that owed to the court." (footnotes omitted)

432. I would hesitate before concluding that those regulatory duties on barristers, and similar duties applicable to solicitors, necessarily mean that they owe fiduciary duties as a matter of law. However, it is unnecessary to decide the point. The fiduciary duties the Kings allege do not, in the context of the present claim, add anything to the duties I have already summarised above arising from the Defendants' common law legal obligations and regulatory duties.

(5) Claims in fraud

433. The key principles of relevant concerning fraud claims were summarised by Bryan J in *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) as follows:

i) It is generally correct that, absent other information, the more serious the wrongdoing, the less likely it is that it was carried out, because most people are not serious wrongdoers.

ii) The standard of proof remains the balance of probability, but more cogent evidence is required to prove fraud than to prove negligence or innocence because the evidence has to outweigh the countervailing inherent improbability, though when considering what is or is not probable it is necessary to have regard to the facts of the particular case, (or, in statistical terms, "the probability of **A** *given that* **B**").

iii) Given the fallibility of memory, where possible a court should rely on documentary evidence and any other objectively provable facts. Bryan J also cited the well-known comments of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyds Rep 1 (CA) at p.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."

iv) Cases of civil fraud tend to rely on circumstantial evidence. The nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than individual parts. Further, circumstantial evidence *"works by cumulatively, in geometrical progression, eliminating other possibilities"* (Lord Simon of Glaisdale in *R v Kilbourne* [1973] AC 729 at 758) (albeit in the context of the criminal standard of proof).

434. Fraud can be found to have been committed by a person, whatever their status or profession. The Kings cited the following as examples:

i) *Crawford v Crown Prosecution Service* [2008] EWHC 854 (Admin): "*the public profile of a person is not a material consideration……. That is because it is fundamental that all persons are equal before the law of England and Wales, as embodied in our common law, our legislation and the Conventions to which this country has subscribed. … No person in this country can enjoy a different status because he holds a public position. It is important to stress that. ….. Even if there was a perception that this might be so, particularly in the case of a person who holds any form of judicial office, it would inevitably undermine confidence in the open and public administration of justice and the fundamental principle of equality before the law."*

ii) *Takhar v Gracefield* [2020] EWHC 2791 (Ch): *"I should add that the point was made by Mr Sullivan in submissions that the Defendants as professional people would not have forged the document, and that they did not object to the Claimant's application for permission to call expert handwriting evidence made shortly before the trial before Judge Purle. However, though the court will naturally be slow to find fraud, it is not limited to the manual classes."*

435. The Kings also point out that motive is not part of the cause of action in breach of fiduciary duty, and therefore does not need to be proved (*Goldman v Zurich Insurance plc* [2020] EWHC 192 (TCC) § 39, quoting § 11.4 of the judge's earlier judgment in the same litigation). On the other hand, as the judge observed in the following paragraph:

> "However, as I said in the course of submissions whilst it is not necessary to show a motive, as a matter of common sense the court is likely, when considering the issue of dishonesty, to ask itself why Mr Mather should knowingly or recklessly have made a false representation. If it is difficult to answer the question: what motivated someone such as Mr Mather, a man with an unblemished reputation, to write something which was untrue, either knowing that it was untrue or not caring … whether or not it was true, then it is difficult to conclude in a case where there is genuine scope for doubt that it is not simply an innocent or careless mistake."

436. A claim in fraud must be distinctly alleged and distinctly proven, and *"[t]he hope that something may turn up during the cross-examination of a witness at the trial does not suffice"* (*Three Rivers District Council v Bank of England* [2001] UKHL 16 [2003] 2 AC 1 §§ 55, 160 and 184).

(G) THE KINGS' PRIMARY CASE

(1) The allegation

437. The B Shares Mistake is at the heart of the Kings' pleaded case against the Defendants. They allege that:

> "At some point in the period between lunchtime on 4 May 2017 and 10:00am on 10 May 2017, Primekings sought to exploit the mistakes which had been made by Mr Hall Taylor, Mr Morcos and Mr Blakey and the fact Mr Wilson's evidence was wrong. Primekings had chosen not to reveal the facts demonstrating those things prior to the trial to maximise their psychological impact on the Kings' legal team. Primekings did so by intimating to the Kings' legal team the possible personal consequences for them if the case continued to a judgment. In breach of fiduciary duty, such matters were not disclosed to the Kings."

438. The Particulars of Claim then set out a primary, secondary and tertiary case about the resulting impact on the Defendants' conduct of the Misrepresentation Proceedings,

the primary case being as follows:

> "The Kings' primary case is that that led to Mr Hall Taylor at some point in the period between lunchtime on 4 May 2017 and 10:00am on 10 May 2017 reaching an informal understanding with Primekings that the Kings' legal team would not be accused of improper conduct by Primekings if Mr Hall Taylor caused the case to be withdrawn following the close of the Kings' evidence. Mr Morcos and Mr Blakey were aware that that understanding had been reached. That understanding was, in breach of fiduciary duty, never disclosed to the Kings. Mr Hall Taylor has (in breach of fiduciary duty) not been willing to tell the Kings pre-action when he first made Primekings aware of the possibility of a discontinuance because he knows that answering that question will tend to support this claim."

(2) Position of Mr Downes KC

439. This alleged chain of events involves, among other things, an express or implied threat by opposing counsel, Mr Downes, to accuse the Defendants of 'improper conduct' unless the Defendants caused their clients to discontinue the claim. One of a number of possible starting points is the inherent probability of Mr Downes having made such a threat.

440. For Mr Downes to have done so would in itself have been grossly improper conduct that one would not ordinarily expect from a legal professional of Mr Downes' standing. It is also a course of action that he would, as a general matter, have no reason to wish to take: it is a barrister's lot to win some cases and lose others. So the suggestion that Mr Downes would abandon his professional ethics merely in order to win this or any other particular case is inherently unlikely.

441. The allegation also assumes that Mr Downes would have regarded the B Shares Mistake as having involved improper conduct on the part of the Defendants which was, moreover, so serious that the Defendants might themselves have been ready to abandon their own professional and ethical principles in order to avoid personal exposure. However, it is wholly unrealistic to suggest either that that was the position, or that Mr Downes would have believed it to be the position.

442. As to the actual position:

i) The B Shares Mistake had no bearing on the Kings' primary claim, which was for rescission of the Transaction. It was relevant only to the quantum of the Kings' alternative claim for damages, in that it reduced the potential claim for damages. That rescission was the Kings' primary goal is evidenced by §1 of the MP POC and the initial instructions sent to Mr Hall Taylor at §12: "*in a nutshell, the Claimants have had enough of the current situation and want the Defendants out*".

ii) Even in relation to the contingent damages claim, the B Shares Mistake could have caused no loss to the Kings, because the reduction reflected what was actually agreed in the Initial Deal. In other words, the B Shares Mistake had

for a time resulted in the claim appearing to be larger than it really was. There was and is no suggestion that, but for the B Shares Mistake, the Kings would not have sued Primekings in the first place.

iii) The B Shares Mistake did not involve any "*improper conduct*": insofar as it led to the claim having been inflated, there was and could be no suggestion that that had arisen through anything other than mere error. I have already rejected the suggestion that Mr Wilson deliberately allowed the Particulars of Claim and his witness statement to be filed knowing that they were false as regards the B Shares.

443. Mr Newman suggested in oral closings that, had the Kings known about the B Shares Mistake and that it had been covered up, then they would not have agreed to discontinue. That was an unpleaded suggestion, unsupported by evidence, and in my view highly improbable. By the time of the Advice to Discontinue, the B Shares Mistake had been canvased in open court several times, including by having been the specific topic of one of the corrections to Mr Wilson's witness statement. It had no bearing, in any event, on the question of discontinuance.

444. As to Mr Downes' understanding of the position, his cross-examination of Anthony King, Mr Wilson and James King about the B Shares Mistake is quoted in §§ 248., 325. and 345. above respectively. It contains not the slightest suggestion that any of the Defendants might have behaved improperly in relation to the matter. It is clear from the cross-examination of Anthony and James King in particular that Mr Downes regarded the position about the B Shares as something that was clear from the documents and simply needed to be got out of the way. The judicial interventions quoted in § 248. suggest that Marcus Smith J saw it as a documentary point that scarcely needed to be put to the witnesses at all.

445. Further, having made no suggestion of impropriety to any of the witnesses in relation to the B Shares Mistake, Mr Downes would have been unable – even if he had wished to – to suggest that the Defendants had in some way acted improperly in relation to it. The Kings submitted that Mr Downes was considering recalling Anthony King in order to expose the alleged conflict of interest that had arisen between the Kings and the Defendants as a result of the B Shares Mistake. However, recalling Anthony King would not have enabled Mr Downes to submit that Mr Wilson or any other members of the Kings' legal team had acted improperly, and Mr Downes (had the matter crossed his mind at all) would have known that. Moreover, it is evident from the transcript that the possibility of recalling Anthony King had nothing to do with the B Shares Mistake:

> "MR DOWNES: I also should mention that there has been further material evidence, both this morning but also before that, about the whole Steve Evans exclusion from the meeting after Mr Anthony King gave his evidence, and I've said to -- I've explained the point to my learned friend, in fact there are other points now after Ms Kehoe's evidence -- those are matters, if it's going to be said I need to put them to Mr Anthony King, I do want to put them to Mr Anthony King, but I have left that with my learned friend to decide whether he thinks it is necessary to put them to Mr King.

> MR HALL TAYLOR: That is all under consideration, my Lord, and we will clear the position up." (Day 9 p.17)

446. It is likely that the specific passage of Gaynor Kehoe's evidence which Mr Downes was referring to was a passage where Ms Kehoe recalled that Anthony and James King had attended the Kings' offices on 19 December 2013 and Ms Kehoe had told the Kings that "*I had to contact Steve [Evans] to say that he wasn't wanted at the meeting"*, which she believed came as news to the Kings at that point. That point had not appeared in Ms Kehoe's witness statement.

447. In any event, as DWF submit, it is clear that the question of whether Anthony King was to be recalled was being left to be decided by Mr Hall Taylor, suggesting that Mr Downes was perfectly happy to deal with these matters in submissions, unless Mr Hall Taylor insisted that they had to be put to Anthony King. That is entirely consistent with Mr Downes emailing Mr Hall Taylor on the afternoon of Saturday 13 May 2017, asking, among other matters, "*are we recalling Anthony King?*"

448. The same points apply to the later discussion, on Day 9, about recalling Anthony King (see § 346. above): it concerned a topic entirely unrelated to the B Shares Mistake, and was left to Mr Hall Taylor to decide.

449. Accordingly, there is no support for any suggestion that Mr Downes was contemplating an application for Anthony King to be recalled for further questioning about the B Shares Mistake. The judge's interventions mentioned above in any event would have indicated that he would have been unlikely to accede to such an application. The B Shares issue had already fallen by the wayside by this time.

450. The alleged understanding with Mr Downes is also belied by contemporary documents showing that he was continuing to work on the case in the expectation that it would continue. An email he sent Mr Hall Taylor on 13 May 2017 (the Saturday on which the Barristers started to write the advice to discontinue) stated:

> "What is happening on Monday afternoon? Are you admitting the point about Steve Evans departure from Manchester in time to arrive for a meeting at 130pm, which would put his departure at about 1245pm?
>
> If not I assume that I will be recalling him to deal with the parking ticket point?
>
> Are we recalling Anthony King?
>
> Also when will we know what is happening about the pleadings and whether you want to XX Robin Fisher on Tuesday?"

451. Similarly, a fee note shows that on both 13 May 2017 and 14 May 2017 Mr Downes was working on written closings, contrary to the Kings' case that by 8 and 9 May 2017 Mr Downes had reached an informal understanding with Mr Hall Taylor and "*already knew that the case would not require a judgment*" (PoC §§ 51 and 62). Mr Downes' junior, Joseph Sullivan, also submitted a fee note including work on written closings on Sunday 14 May 2017.

452. The foregoing consideration of the position of Mr Downes in itself shows the implausibility of the Kings' primary case. The course of conduct alleged against him would have involved improper conduct which (a) one would not ordinarily expect someone in his position to commit, (b) he had no reason to commit, (c) he showed no indication of committing or even considering committing, (d) he would have been unable to carry through (having put no suggestion of impropriety to any relevant witness) and (e) documents indicate he did not commit (since they show he was continuing to work on the substantive case well beyond the stage by which the Kings suggest the understanding had been reached).

(3) Position of the Defendants

453. Turning to the position of the Defendants, several of the same points apply again, as well as additional points.

454. The Kings' allegation, if true, would have required a deliberate decision by at least three legal professionals (Messrs Hall Taylor, Morcos and Blakey), and probably four (since it is hard to see how Ms Connor could have been unaware of any such agreement, given her close involvement in the case at trial), to abandon their clients' interests in order to protect themselves. That would have been an unusual occurrence. Those individuals had, in any event, no reason to do any such thing. The B Shares Mistake was just that – a mistake – and had caused their clients no loss. There was no indication that Mr Downes or Primekings wished to make anything of the B Shares Mistake beyond disposing of it in the way Mr Downes had already achieved during his cross-examination about it. There was, moreover, no question of seeking to conceal it: the point was already out in the open as a result of the cross-examination of Anthony King on Day 4; and Mr Wilson went on to address it explicitly in one of the corrections to his witness statement.

455. Moreover, whether or not DWF might be said to have been at fault, Mr Hall Taylor was not responsible for the B Shares Mistake. He had specifically requested that enquiries be made about the contents of the Initial Deal (see §§ 139.-140. above) and was reasonably entitled to rely on the information provided to him. Mr Morcos – who is alleged to have been part of the conspiracy, and would have to have been at least complicit in it given his involvement – had even less involvement in the making of the B Shares Mistake. He was not involved in the Transaction nor in the drafting of the Kings' statements of case or witness statements. His involvement began shortly before trial. At worst, it was suggested that he drafted opening submissions repeating the mistake. There is no realistic basis on which he could be said to have had any motive for committing the gross breach of duty alleged against him. Yet if Mr Morcos was not party to the conspiracy, that is a further factor making the whole conspiracy allegation untenable.

456. On top of all those considerations, the Defendants' own evidence clearly rebutted the Kings' allegation. For example, Mr Hall Taylor's oral evidence included this:

> "Q. You said "the allegation that Mr Downes put pressure on me or that we reached some sort of understanding is completely untrue".
>
> A. It is completely untrue. We did not.

> Q. Last week –
>
> A. I barely spoke to him during the trial, as I think is pretty obvious from the documents. We probably spoke maybe three to five times in the entire course of the trial, most of which took place in court and is on the transcript."

457. The Kings submitted that that evidence was contradicted by the notes of the Tuesday Conference on Day 7 (9 May 2017) referred to in §§ 311.-315. above. The notes, and Ms Connor's reconstruction in oral evidence, suggested that Mr Hall Taylor had told Mr Downes that the Kings needed at least until Monday to indicate how they would be proceeding with the case. However, following the radical change in the Kings' evidence brought about by Anthony King on Day 6, it would have been obvious to everyone, including the Primekings legal team and the judge, that the Kings would – at the very least – need to reassess their position and decide whether, at least, they would have to apply to amend their statements of case. Any opponent in the position of Mr Downes would want to know as soon as possible whether an amendment would be sought, and (at an even more basic level) what factual case was now being advanced against his clients. The fact that such a discussion may have taken place between Mr Hall Taylor and Mr Downes provides no support at all for the Kings' 'informal understanding' case.

458. The Kings also relied on the phrase as showing that an informal understanding had been reached:

> "PDQC -> point in having W.P. discussion
>
> all his clients -> discontinuance"

in the notes made at the Friday Conference quoted in § 351. above. Mr Hall Taylor explained in his witness statement, and in oral evidence, that it reflected his having advised the Kings about how to position their discussion with the Primekings side after the discontinuance, and what he could say to Mr Downes to tee that up for them. He said he did have that discussion, but only after the discontinuance had occurred. I accept that evidence, which is in my view consistent with the notes and with the overall context of the discussion. By contrast, had Mr Hall Taylor reached an improper understanding with Mr Downes to force or persuade his own clients to discontinue a valuable claim, it seems very unlikely that he would openly have referred to it in a conference with the clients.

459. Mr Hall Taylor's evidence was that the B Shares Mistake was not a major pleading issue:

> "I think a judge might have said: well, it's become clear on the documents what the real position was, do we really need to go through the effort of it, we all know what we're talking about now and the pleadings have been overtaken by the way things have developed at trial. So I want to make it pretty clear, I don't think that's a very major pleading issue, and I didn't at the time"

460. Likewise, Mr Blakey said:

> "The mistake in the pleadings and in his witness statement was unhelpful in terms of making us look a bit amateur, but it appeared irrelevant. The deferred consideration was not the main issue; it was a side issue, so even if we had been wrong about it, it was just a change to what had been pleaded about one element of the structure of the Transaction. As it did not seem to me to make any significant difference to the case, I didn't think any more about it." (§ 66 Jason Blakey Witness Statement)

Nor did Mr Morcos or Ms Connor recall the B Shares Mistake being viewed as having any real significance.

461. The Kings cited several contemporaneous documents written by the Defendants which they suggested showed that the Defendants were concerned about the B Shares Mistake:

i) The email from Mr Hall Taylor on 6 May 2017 discussed above referred to "*part of our case*" having to be discontinued. For the reasons given earlier, that was most likely a reference to the allegations against Mr Fisher, and was nothing to do with the B Shares Mistake.

ii) An email from Ms Connor to herself on 8 June 2017 attached the mediation statement in the Kings' case. Ms Connor said in evidence that this was likely because she was using it as a precedent for an unrelated matter. That seems entirely plausible. In any event, even on the theory advanced by the Kings (that DWF were 'covering all the bases' in case the Kings brought a claim against them), there would be no reason to see any connection with the B Shares Mistake as opposed to the failure of the case as a whole.

iii) On 17 August 2017 Ms Connor emailed herself (with the subject: "*Email GE Andy/Tom not wanting to speak to us*"), attaching an email from Mr Cole of GE. Ms Connor was asked about this and thought she was probably updating the file. Again, no link with the B Shares Mistake can be inferred.

iv) On the same day Ms Connor emailed herself with the subject "*email referring to posting engagement letter*". It was suggested that this was because she knew that DWF was exposed to a very large claim which might exceed the liability cap of £5 million in DWF's retainer. Ms Connor could not recall why she sent this email. However, by this stage the Kings had made complaints to DWF about various matters, including but not limited to the B Shares Mistake. No relevant inference can be drawn.

462. In addition, the Kings referred to differences between two disclosed notes of a conference that had taken place on 30 April 2015 (referred to in § 46. above) which they contended were significant. A version containing the watermark 'DRAFT' read in material parts:

> "*It was discussed that whilst the £1m payment to JK and SK had not been nailed down it had never been discussed that this would be coming from the*

> *company. It was also said that there had been no provision for the B shares and those coming out of the business.*"

Another version, which did not contain the watermark, read:

> *"It was discussed the fact that the £1m payment to JK and SK had been ..... but that it had never been discussed that this would be coming from the company. It was also said that there had been no provision for the ..... shares and those coming out of the business."*

DWF's billing for the trial showed that on 19 May 2017 (after the case was discontinued) the Kings were charged for "*Updating Attendance Notes"* attributed to Amy Franks, a trainee at DWF.

463. The Kings suggested that: (a) the latter document was the finalised version and (b) the missing words had been deleted from the draft retrospectively so that there would be no clear record about how the B Shares were discussed.

464. This extremely serious allegation has never been pleaded, despite the Kings having had disclosure in this case since October 2021, and is therefore not addressed in Ms Franks' witness statement. However, the allegation is entirely baseless and, in my view, should never had been made.

i) The internal document management system number at the bottom left of each document is higher on the watermarked 'draft' version than on the other version: an obvious indication that the former, fuller, version is the later one.

ii) There are several other examples of *"..."* having been replaced with text in the watermarked 'draft' copy, none connected with the B Shares, which supports the view that that is the later version.

iii) Had Ms Franks intended to remove material from an attendance note, there is no explanation for why she left both documents on file, or why she has recorded a time entry for such an obviously dishonest act.

iv) There is a clear and separate explanation for Amy Franks' time entry on 19 May 2017. Amy Franks had taken 19 pages of handwritten notes on the morning of the Friday Conference on 12 May 2017. On 18 May 2017 she asked DWF's document production unit to type up the notes; they were subsequently typed up and returned to her on 19 May 2017, upon which Amy Franks presumably checked the transcript for accuracy.

v) DWF subsequently provided metadata demonstrating that the watermarked 'draft' version was indeed the later version.

465. The Kings referred, as context, to what they suggested was a pattern of threatening conduct by Primekings. This was based mainly on letters sent to DWF by Macfarlanes, on behalf of Barry Stiefel, alleging defamation in 2016 and early 2017. Mr Blakey was taken through these in cross-examination, and said he regarded them as standard litigation-style correspondence. I accept his evidence that that is how he would have viewed them at the time.

(4) Alleged conflict of interest

466. The Kings sought to overcome the point that the B Shares Mistake caused them no loss by contending that it created or led to a conflict of interest. Their pleaded case is as follows:

> SSOC § 13:
>
> "**a) Not telling their clients what they had realised on Day 4**
>
> 13. In breach of the duty to inform the Kings and the duty to disclose misconduct, the legal team failed to tell their clients [POC 44, 45, 46] what they realised on Day 4. That failure created a conflict of interest which caused the legal team to breach the duty to avoid a conflict. Those breaches continued for the duration of the case."
>
> Particulars of Claim §§ 44-46:
>
> "44. Mr Hall Taylor's email at 17:58 [on day 4] led to discussions between at least Mr Hall Taylor, Mr Morcos and Mr Blakey about [the B Shares Mistake], the possible consequences for them personally, and what could be done. The Kings were never told about such matters in breach of fiduciary duty. Pre-action the defendants have in breach of fiduciary duty failed to address directly the issue of what conversations followed the 17:58 email because each of them does not wish the detail of what happened to emerge.
>
> 45. By the end of the first week of the trial, each of Mr Blakey, Mr Hall Taylor and Mr Morcos were aware that: (i) the pleading, witness statements and opening submissions were wrong, as a result of incorrect and (at minimum) negligent instructions given by Mr Wilson; (ii) Mr Hall Taylor had been negligent by pleading a case and approving witness statements which were inconsistent with the contemporaneous documents; and (iii) Mr Morcos had been negligent by drafting opening submissions contradicted by the contemporaneous documents.
>
> 46. Each of Mr Blakey, Mr Hall Taylor and Mr Morcos, in deliberate breach of fiduciary duty, chose not to bring those matters to the attention of the Kings."
>
> SSOC §§ 14, 15, 22, 23.3 and 23.5:
>
> **b) Not telling their clients about steps to fix Mr Wilson's evidence, and misleading the Court pursuant to that**
>
> 14. The whole team were in further breach the duty to inform the Kings and the duty to disclose misconduct when they concealed what they had realised [POC 49] from their clients. The following improper steps were taken without informing the

> Kings (and in breach of the duty to inform the Kings) to ensure that Mr Wilson's evidence was made consistent with the documents in the trial bundle:
>
> 14.1. Steps taken to contact Lester Wilson to bring the problem to his attention. [POC 47]
>
> 14.2. The production (with the assistance and input of Mr Blakey, Mr Hall Taylor and Mr Morcos) of a List of Corrections to Mr Wilson's witness statement to ensure it was consistent with the document in the trial bundle. [POC 48] [Request for Further Information 1]
>
> 14.3. Mr Hall Taylor misleading Mr Justice Marcus Smith by representing to the Court that he not previously read through the List of Corrections, when that was untrue. [B Reply 127]
>
> 15. The undisclosed conflict of interest [POC 127] continued throughout the case in breach of the duty to avoid a conflict and the duty to inform the Kings, and in breach of the duty to disclose misconduct." (SSOC § 13)
>
> …
>
> **C. Remedy**
>
> 22. Each breach of fiduciary duty (which is a wrong in itself) is relied upon to show that the defaulting fiduciary is liable to account in equity and liable to pay equitable compensation.
>
> …
>
> 23.3. If matters had not been concealed from the Kings as set out in paragraph 14 above, the Kings would have been aware of matters which would have shown that the legal team were changing Lester Wilson's evidence, and then they would have sought independent advice [DWF Reply 108.1(3), B Reply 102.2], and had they done so competent advice would have revealed that a new legal team was needed, with DWF paying the costs of the change.
>
> …
>
> 23.5. If the conflict of interest had been disclosed, as it should have been, the Kings would have sought independent advice, and had they done so they would have been advised to continue with the case making use of the evidence that was available to win the case."

467. I reject this aspect of the Kings' case for three reasons.

468. First, I do not consider that any conflict arose. A mistake by a legal professional may, of course, give rise to a conflict of interest. A typical example is where the mistake impairs the client's legal rights, whether in the context of a transaction or litigation, for example by negligently failing to plead a properly recoverable loss. The lawyer will then be unable to give, or be seen to give, objective advice about how the client should best proceed (which may, indeed, include making a legal claim against the lawyer). Other mistakes, however, may be readily correctable or otherwise give rise to no loss. The B Shares Mistake fell into that category. As already stated, it did not cause any loss to the Kings: it merely meant that their potential monetary claim had been overstated (in principle, though never actually quantified) for most of the duration of the case. The mistake was corrected, in substance, by the evidence given at trial accepting that the B Shares feature of the transaction had predated the alleged Primekings misrepresentations. Accordingly, there was no need for further advice about the matter, nor any question of a potential compensation claim against the Defendants.

469. Secondly, there was no concealment. The mistake became obvious, in court, and in the presence of the Kings (including when Anthony King and James King were giving evidence). Moreover, far from concealing the matter, Mr Wilson took the initiative to correct his witness statement – which was internally inconsistent on the matter as discussed earlier – to make the position clear. The Kings submitted in the present trial that the Defendants nonetheless never fully explained the consequences of the B Shares Mistake. However, there were no consequences to explain other than those I have already mentioned, which were obvious. I also specifically reject the allegations made in this regard in SSOC § 14:

    i) No improper steps were taken to bring the B Shares Mistake to Mr Wilson's attention: Mr Wilson realised the problem in his witness statement by himself and decided to correct it (along with other corrections).

    ii) There was no need to give the Kings advance notice of the correction, since it merely brought Mr Wilson's evidence into line with the position that Anthony King and James King had both accepted and which was indisputable on the documents.

    iii) The corrections were produced by Mr Wilson alone, without assistance or input from Mr Blakey, Mr Hall Taylor or Mr Morcos.

    iv) Mr Hall Taylor told the judge on Day 8 that he had only just read the corrections. There is no basis for the allegation that that was untrue.

470. Thirdly, the alleged conflict would not have given the Defendants any reason to fear such adverse consequences that they would have a motive to advise their clients to discontinue the claim against Primekings. Mr Newman, on behalf of the Kings, suggested that if the Defendants had fully explained the consequences of the B Shares Mistake to the Kings, then the Kings would have had the ability to instruct new lawyers, and so DWF "*will have been conscious that if they stopped acting, the adjournment necessitated by that would have been paid for by DWF, because the mistake was obviously their responsibility*". However, it would be entirely reasonable to anticipate that any independent lawyer asked to advise the Kings about the impact of the B Shares Mistake would have advised that:

i) the mistake in the Particulars of Claim had absolutely no bearing on the outcome of the Misrepresentation Trial or what the Kings wanted to achieve from that litigation. Therefore, if there was an arguable case at the Misrepresentation Trial, they were best advised to continue with their current legal team; and/or

ii) the question of whether Mr Wilson had or had not advised on the existence of the B Share Mechanism prior to 3am on 19 December 2013 was entirely irrelevant to the outcome of the Misrepresentation Trial. If there was any claim arising out of that advice, or lack thereof, then it would be a matter for different proceedings (which were not urgent, because the six-year limitation period would not expire until December 2019).

471. Nor is it realistic to suggest that any of the Defendants would have been motivated by fear that an adjournment would have been necessary in order for independent advice to be taken at all, and that they would have been liable to pay the costs of the adjournment (by reason of their involvement in the B Shares Mistake). Since the Defendants – correctly in my view – did not regard the B Shares Mistake as having any consequence for the conduct of the trial, any question of a need for independent advice or an adjournment would not have been in their minds at all. Accordingly, there is no basis to conclude that they perceived any consequences of the B Shares Mistake that would have motivated them to persuade the Kings to discontinue the case. Even if the Defendants had turned their minds to the matter, they would surely have concluded, again correctly, that any application for an adjournment would have been opposed by Primekings, for obvious reasons, and refused by the judge (who would clearly have seen that the B Shares Mistake and any related advice were irrelevant to the conduct of the trial).

472. For essentially the same reasons, any suggestion that the Barristers or other members of the DWF team were professionally required to tell the Kings that the B Shares Mistake had involved negligence leads nowhere in the context of the present claim. The mistake was out in the open by the time Anthony King and Mr Wilson had given their oral evidence, and it had no consequence for the Kings, except to show that that part of their pleaded claim could not (and never could have been) sustained.

473. At the present trial, the Kings also put forward an unpleaded case that Anthony King's allegation that Mr Wilson lied about the B Shares issue while giving evidence gave rise to a conflict of interest that should have led DWF to cease acting. The alleged lie was to the effect that Mr Wilson had advised the Kings about the B share feature of the Initial Deal. It is unclear how this is said to support the Kings' primary case: presumably the argument would be that DWF's awareness of that conflict, and of the resulting need to cease acting (thereby incurring large wasted costs which the Kings would look to DWF to pay), caused DWF to decide instead to persuade the Kings to discontinue their claim. I am sure that Mr Wilson did not lie: as I have already found, the B Share Mechanism and its implications (in terms of protecting the company's ability to redeem the shares) were discussed with and in front of Anthony King, and Mr Wilson had ample reason to believe that Anthony King understood the position. The suggested conflict therefore arose from a bare accusation with no actual merit. In any event:

i) I have found earlier that DWF were not in fact told about the accusation of lying; and

ii) even if they had been told, it was not a matter that would have made it necessary to cease acting in the litigation. The alleged failure to advise, and alleged lie, related to the transaction in 2013, and did not impact on the conduct of the litigation. Nor did Mr Wilson himself have the conduct of the litigation. Even if the Kings had been correct about the matter, they would at best have had a potential claim against DWF for loss of the chance to bargain with Primekings for the Deferred Consideration to be paid by Primekings rather than from the company. Any risk of such a future claim could not reasonably be expected to have any impact on the way in which DWF handled the trial against Primekings: the outcome of that trial would on any view not include compensation by reference to a position where the Deferred Consideration would have come from Primekings itself. I agree with the view of Mr Hall Taylor, who said he "*did not consider it to be relevant to the conduct of the trial or any necessary advice or decisions*".

474. Finally on this point, SSOC § 23.5 alleges that if the conflict of interest had been disclosed as it should have been, then the Kings would have sought independent advice, and had they done so they would have been advised to continue with the case making use of the evidence that was available to win the case. That allegation does not appear to be directly connected with the Kings' primary, secondary or tertiary cases, which all concern the Defendants' own advice to discontinue and/or other conduct of the case at trial. It depends on establishing both (a) that there was a conflict which should have resulted in the Defendants ceasing to act and (b) new legal representatives would have continued with the trial and won. I have already rejected (a) for the reasons above. As to (b), I deal in section (K) below with the Kings' case in negligence, concluding there that in light of the evidence given at trial by the Kings and GE, the case was doomed to fail and could not properly be continued. In those circumstances, the allegation in SSOC § 23.5 cannot assist the Kings. In case the point has any relevance, I would (for the same reasons) not accept that an independent legal adviser, asked to advise on the merits of the claim against Primekings at the time of the Misrepresentation Trial, would have advised the Kings to carry on instead of discontinuing. The Kings in their written reply closing submission appeared to suggest that the merits of the claim are shown by the willingness of Mr Solomon QC and their former solicitors, Fieldfisher, to advance it. However, (i) the Kings have not provided the waiver of privilege or disclosure that might show what instructions or advice might have been given to/by their former lawyers, and (ii) any view those previous lawyers might have taken would not affect my conclusions as to the state of the case, the duties of the Defendants at the relevant times and the merits of the advice the Defendants gave.

(5) Alleged cessation of work

475. The Kings allege that, following the realisation on Day 4 about the B Shares Mistake, the whole legal team stopped taking steps to advance the Kings' case. I deal with this allegation here since it appears to be put forward *inter alia* as evidence in support of the Kings' primary and secondary cases as to the impact of the B Shares Mistake. SSOC §§ 16 and 17 set out the following particular of the allegation:

> "16. 1. They chose (in breach of the duty to inform the Kings and the duty of good faith) not to discuss with their clients further relevant disclosure received from the opponents on Friday 5 May 2017 [POC 54, 56 – to be amended in due course from 6 7 May 2017 to 5 May 2017] and Tuesday 9 May 2017 [POC 57 – to be amended in due course from never received to received on 9 May 2017].
>
> 16.2. Mr Hall Taylor in breach of the duty of good faith told the Court that the case had narrowed when that was untrue [B Reply at 115], and by doing so made a concession which damaged his clients' case. [POC 59]
>
> 16.3. Mr Hall Taylor in breach of the duty of good faith did nothing to stop Mr Downes misleading witnesses about the cash flow spreadsheet. [POC 84, and DWF Reply at 156 – 158]
>
> 16.4. The legal team in breach of the duty of good faith did nothing to correct the misleading impression given to the Court about the cash flow spreadsheet even after clients asked them to on 11 May 2017. [POC 85]
>
> 16.5. Mr Wilson (on whose evidence the claim was in part based) in breach of the duty not to mislead purported to forget seeing the Particular of Claim [Particulars of Claim 77,], and Mr Weedall's evidence [POC 78], both of which he knew he had seen, and wrongly stated he had explained the B Shares to the Kings [Particulars of Claim 79].
>
> 16.6. In breach of the duty of good faith, from around 4 May 2017 the legal team began to plan steps to move Howard Smith in the timetable to 15 May 2017, a day he would not be needed, and then told him on 12 May 2017 that he would not be required to give evidence, before the Kings had been given the choice either to discontinue or continue with the case as litigants in person. [B Reply 14, 15, 16, 17, 18, 93, 134.2, 161, 162, DWF Reply at 185],
>
> 17. Each of those acts was done in breach of the duty of good faith because the legal team intended to force their clients to discontinue. [POC 51, 52, 53]"

476. SSOC § 16.1 relates to the 5 May 2017 Weekend Disclosures and the 9 May 2017 Fisher Disclosures discussed in §§ 260.-267. above. There is no merit in the allegation. The disclosure was not particularly helpful to the Kings' case, and in my view risked damaging it by supporting the genuineness of Mr Swain's view that GE had in substance frozen the account. Moreover, the Barristers' internal response to the disclosure belies the Kings' allegation that they had ceased to advance the case by this stage: on the contrary, it shows counsel continuing in their efforts to do just that.

477. SSOC § 16.2 alleges an untrue statement by Mr Hall Taylor to the judge about the case having narrowed, which Mr Hall Taylor is said to have done *"because he wished to encourage the Judge to make comments which Mr Hall Taylor could later tell the Kings indicated that the Judge thought the claim would fail"* (Particulars of Claim § 60). It is thus a very remarkable allegation that leading counsel deliberately attempted to damage his clients' case in front of the court. Even more remarkably, it was not put to Mr Hall Taylor in terms at trial. It is, in any event, an entirely baseless allegation that should never have been made. The context was the late morning of Day 6, immediately following the damaging evidence given by Anthony King referred to in §§ 295. ff. above. This had led Mr Downes, in a short break, to suggest to the court that there might be a need for the Kings to revisit the pleadings, but that it might be best to see what the Kings' other witnesses said first. He continued:

> "He then has the long weekend to decide if he wishes to make any amendment to his pleading and, if so, what it is. My only request is that we do get to see that case before my witnesses go in the box. I don't intend to be difficult about it. If we can deal with the case as matters stand, obviously it is in the interests of everybody to do so. So long as it doesn't bring in some huge other factual issue that we need to investigate. If that doesn't happen, I do reserve the right at the end of the day case to say: this new case isn't pleaded and you can't succeed on it, so I am just giving everybody fair warning."

478. In response, Mr Hall Taylor accepted, as he was bound to, that in light of some of the evidence Anthony King had just given, the position was different from how it had been put previously in pleadings and witness statements. He would need to take instructions after Anthony King had finished his evidence, and agreed that if the Kings were to change their case then that would need to happen before Primekings' witnesses went into the witness box. By way of reassurance, Mr Hall Taylor added:

> "For my part, having now heard a lot of Mr King's evidence at perhaps some length and seeing how his recollection has developed, I do think my cross-examination of witnesses is actually more curtailed than it would have been without having heard what he has said in the witness box. I don't think I will be as long with some witnesses as I might have thought I would be, because in fact, the case has narrowed, I think, quite considerably in some respects. So I don't think it will disrupt us too unduly if we need to spend some time dealing with that on Monday, but, yes, I accept what my learned friend is saying, and that this needs to be revisited before any of the defendants' witnesses are called. We will deal with it as soon as we can and we will let my learned friend know as fast as we can."

The judge regarded that as "*a helpful indication*."

479. Mr Hall Taylor was clearly correct to consider that the case had narrowed somewhat, since it would very probably be necessary to abandon the longstanding case that Primekings never used the words *"unless a deal was done"* at the Completion Meeting, and it might be necessary to withdraw the conspiracy allegation against Mr

Fisher (in whole or in part). The Kings' suggestion that the case had actually widened because they could now rely on both the Swain Representations and the Fisher Representations is unreal: a key tenet of the Kings' case, now lost, had been that they ended the Completion Meeting having been led to believe that GE's support had been unconditionally withdrawn. Further, in circumstances where there must have been obvious concerns about whether the court would allow a significant amendment to the Kings' case in the middle of trial, it was entirely understandable that Mr Hall Taylor would wish – in the Kings' best interests – to provide as much reassurance as possible about the potential impact on the trial process. Conversely, there is not the slightest reason to believe that anything Mr Hall Taylor said in this exchange would have been liable, still less was designed, to cause the judge to comment adversely on the Kings' case. The reverse is plainly the case.

480. SSOC §§ 16.3 and 16.4 concern questions asked at the Misrepresentation Trial about the 16 December Cashflow, which was a cash flow spreadsheet attached to an email from KPMG to GE on that date. It suggested that KSG's available funds (shown in the "*Company forecast closing available funds/(shortfall)"* line) were projected to deteriorate sharply in the week of 16 December 2013, and that KSG would have had a projected shortfall of (£859,082) on 20 December 2013, which could only be rescued by the proposed Primekings cash injection of £2 million on 23 December 2013. The Particulars of Claim in the present case allege:

> "84. On Thursday 11 May 2017 at 17:47 Anthony King provided Mr Blakey, Mr Hall Taylor and Mr Morcos with evidence provided by the KSSL company secretary ('the Cash Flow Evidence') which showed that witnesses had been misled by the questions of Mr Downes concerning cash flow and the alleged inability of KSGL to pay employee wages. Those misleading questions had given rise to seriously contaminated evidence.
>
> 85. Anthony King requested at 18:33 that DWF and counsel take steps to remedy that. In breach of fiduciary duty Mr Blakey, Mr Hall Taylor and Mr Morcos did not try to use the Cash Flow Evidence because they had already decided that they would ensure that the Kings would discontinue the case, and in light of that they did not perceive it to be in their interests for the state of the evidence to be improved in any way."

481. The Kings' written opening made the following suggestions:

i) that on Days 6, 7, 8 and 9 Mr Hall Taylor allowed six witnesses (Anthony King, Mr Evans, Mr Weedall, Mr Cole, Ms Kehoe and James King) to be asked misleading questions which made the cash flow position look weaker than it really was: Mr Downes put to witnesses that the cash flow forecasts showed an over-advance position of around £1.2 million without the £2 million from Primekings and thus the company would have been unable to pay the wages at the end of December 2013;

ii) that Anthony King said he could not agree with what Mr Downes was saying "*without understanding the assumptions*", and Mr Downes expressly recognised that his line of questioning was dependent on the spreadsheet being "*taken at face value, if I have described them in the right way -- I accept that may not be right, but provided I have described them and analysed them in the right way*";

iii) that Mr Downes, who is an accountant by training, knew what he had done was wrong; and that he knew that Howard Smith was due to give evidence that *"[w]e informally agreed that there appeared to be sufficient funds available to enable staff salaries to be paid for December"*;

iv) that Mr Downes knew that two numbers on the spreadsheet should have been shown to each witness, but he had only showed one; and

v) that what Mr Downes did contaminated the oral evidence shown on the transcript, hence (for example) Mr Weedall said "*I think administration wasn't 100 per cent the final outcome, but clearly it was a significant possibility given the cash flow forecast that we have just seen*".

482. The way in which the matter was put to Mr Hall Taylor in the present trial was that in cross-examining Anthony King, Mr Downes made the point that the "*Company forecast closing available funds/(shortfall)"* line for 31 December 2013 showed a positive figure of £764,252. He suggested that if one subtracted the £2 million money that the forecast assumed would come in from Primekings on 23 December, then the figure would have been a negative one, i.e. an over-advance, of about £1.3 million. When Mr Downes came to cross-examine Mr Evans, he started instead from the figure of £812,001, which was the "*GE position – availability / (overadvance)"* figure for the same date; with the result that after taking away the Primekings £2 million the overadvance would have been about £1.2 million. Mr Newman then questioned Mr Hall Taylor as follows:

> "Q. … So the question Mr Hall Taylor is this: why didn't you stand up and say, hang on, if we have to take account of the 764 and the 812 then surely both numbers should be put to each witness?
>
> A. Well, it is a matter for Mr Downes putting questions based on the documents that are in front of the witness. There is nothing particularly significant or objectionable in it. They have the opportunity to answer him by saying, this is what I read or -- you have got to remember these are two people who should know the financial position of this company and be able to speak to it."

I see no difficulty about that answer. The difference between the two figures reflected anticipated invoice discounting drawdowns each day. Either way, though, without the £2 million from Primekings there would have been a large negative figure, resulting from a projected sharp deterioration in the week commencing 16 December 2013.

483. Mr Newman also suggested to Mr Hall Taylor that he should have complained to the court about the cross-examination, based on a reworking of the figures which Ms Kehoe had produced. Mr Hall Taylor responded that that analysis was wrong to suggest that (even without the Primekings cash injection) the company could have paid the wages and had money left over. Ms Kehoe's reworking was not in evidence in the Misrepresentation Trial, and she was not called to give evidence in the present trial (apparently because she has continued working for Primekings). However, Mr Hall Taylor and Mr Morcos pointed out in their Defence and submissions that:

i) even if Ms Kehoe's figures were otherwise correct, the figures indicated that without external investment KSL would have been able to pay its December 2013 wages bill only if (a) GE advanced further funds (contrary to GE's stated position that it would not), and (b) supplier, KPMG, and tax payments totalling £842,000 were deferred, which would have prompted HMRC to commence winding up proceedings; The company would accordingly have been trading while insolvent;

ii) Mr Downes was entitled to ask questions of witnesses on the basis of the contemporaneous documents in the trial bundle and he had done so. Answers given were not 'contaminated' in any sense by misleading questions;

iii) given the Kings' highly damaging evidence, any dispute over KSGL's cash flow simply fell by the wayside: even if the court could be persuaded that KSL's cash flow position before the Final Deal was dramatically healthier than the cross-examination to date (based on contemporaneous documents) had suggested, the Kings would still not have a viable claim on liability.

DWF made the further point that, at the Misrepresentation Trial, Ms Kehoe had been given the opportunity to consider the spreadsheet overnight and tell Mr Downes if the conclusions he had put to her were wrong, but she had been unable to do so.

All of these points are in my view well made.

484. The Kings in their Reply alleged that Mr Downes, in putting the £812,000 figure to Mr Cole, "*failed to mention to Mr Cole the £764,252 of money predicted to be in the bank 2 cells above that*"; and that the same approach was adopted with Ms Kehoe at Day 8 pp 206-209. However, essentially the same points apply again. The two figures measured the position from slightly different perspectives, but on either basis there would have been a large cashflow deficit absent the cash injection from Primekings. I would not accept Anthony King's apparent suggestion in evidence that the two figures had to be added in order to show the company's position. Both lines are impacted by the £2 million cash injection projected on 23 December 2013, and the £2 million figure cannot be counted twice. The two lines performed separate functions and could not simply be added together.

485. For all those reasons, I do not consider the Kings' complaints about the use of the 16 December Cashflow spreadsheet to support their case against the Defendants, either as evidence supporting a lack of good faith on the Defendants' part or in any other respect.

486. SSOC § 16.5 is linked to Particulars of Claim §§ 75-79, which allege as follows:

> "75. During his evidence Mr Wilson told the Court that as a result of reading his statement over the weekend, he had noticed that it contained some mistakes, and that it needed clarification. That evidence was misleading. In fact Mr Wilson knew that his statement was wrong when he signed it, and he changed his evidence because he was prompted to do so by members of the legal team as set out above. The List of Corrections detailed a substantive change to the Kings' case, not clarifications.
>
> 76. Mr Wilson was now aware that facts had emerged in Court on Day 4 which showed that the Particulars of Claim, witness statements and opening submissions based on his instructions were wrong, and so (in an attempt to protect his own position) he sought to distance himself from the preparation of the case by giving two pieces of evidence which he knew were misleading.
>
> 77. In relation to the Particulars of Claim which he had approved he said he could not recall seeing it. In fact Mr Wilson could recall seeing it - he had given instructions to Mr Hall Taylor about it, had been the overseeing partner at the time, and he had signed the Statement of Truth on the Claim Form attaching the Particulars of Claim as detailed above.
>
> 78. In relation to the witness statement of Mr Weedall, Mr Wilson said that he had not seen or looked at it. That was wrong and Mr Wilson knew it was wrong. He had been sent Mr Weedall's witness statement by Jason Blakey on 23 November 2016 and he must have read it and discussed it with Mr Blakey as it contained important evidence. He had also been copied into the subsequent emails about it from Anthony King and Mr Hall Taylor, and it was discussed at the mediation which he attended on 8 February 2017.
>
> 79. Mr Wilson then gave evidence that the term providing for the Deferred Consideration to be paid by KSGL had been in the documents prior to the Swain Representations, and that he had explained it to the Kings prior to the Swain Representations. That evidence was false and Mr Wilson knew it was false for the reasons set out above."

487. As to those points:

i) I have already rejected the allegation that Mr Wilson knew his witness statement was wrong when he signed it.

ii) I have also rejected the suggestion that members of the legal team prompted Mr Wilson to change his witness statement. He realised by himself the need to make the corrections, and prepared the corrections himself.

iii) Mr Wilson was not aware of the evidence that had been given on Day 4.

iv) The existence of the B Shares Mistake in the Particulars of Claim, witness statements and opening submissions did not derive from incorrect instructions from Mr Wilson.

v) Given Mr Wilson's minimal involvement in the preparation of the Particulars of Claim, as set out earlier, it is unsurprising that he could not recall seeing § 39 of that document. There is no reason to believe that that was anything other than truthful evidence.

vi) Given his peripheral involvement in the litigation generally, it was entirely credible that Mr Wilson could not recall seeing Mr Weedall's witness statement.

vii) Mr Wilson's evidence that the term providing for the Deferred Consideration to be paid by KSL had been in the documents prior to the Swain Representations, and that he had explained it to the Kings prior to the Swain Representations, was true.

488. As to SSOC § 16.6, I have dealt with the timing of Howard Smith's attendance at trial in §§ 174.-179. above. For the reasons I give there, the Kings' allegation is without merit.

489. The allegation in SSOC § 17 that each of the acts alleged in §§ 16.1 to 16.6 was done in breach of the duty of good faith, because the legal team intended to force their clients to discontinue, is entirely without foundation. The decisions taken were taken for good reason, and were wholly unrelated to the subsequent advice to discontinue.

(6) Conclusion on primary case

490. For all the reasons set out under headings (1) to (5) above, I reject the Kings' primary case.

(H) THE KINGS' SECONDARY CASE

491. The Kings' secondary case is that Mr Hall Taylor, Mr Morcos and Mr Blakey were made to feel so professionally exposed by what had been communicated to them by Primekings (about the B Shares Mistake and its possible consequences for them personally) that they collectively came to the view that a discontinuance on whatever terms Primekings insisted on was the only way to avoid significant personal consequences for them.

492. There is no substance in this secondary case, for essentially the same reasons as I set out in §§ 442., 445.-449., 453.-455. and 461.-489. above. The B Shares Mistake had no significant consequences for the Kings or for any of the Defendants personally; nor did Primekings communicate any such supposed consequences to any of the Defendants; nor is there any evidence that any of the Defendants believed the B Shares Mistake to have any such consequences; and nor is there any evidence that the B Shares Mistake resulted in any view to the effect that the case should be discontinued.

(I) THE KINGS' TERTIARY CASE

493. The Kings' tertiary case is that Mr Hall Taylor, Mr Morcos and Mr Blakey felt so professionally exposed by their own negligence in relation to the B Shares Mistake (all of them being aware of the threatening conduct which Primekings had engaged in) that their judgment was clouded, giving rise to grossly negligent conduct with reckless disregard for professional duties as set out elsewhere in the Particulars of Claim.

494. This tertiary case is equally devoid of merit. As I indicate in § 492. above, the B Shares Mistake had no significant consequences for the Kings or for any of the Defendants personally; nor did Primekings communicate any such supposed consequences to any of the Defendants; and nor is there any evidence that any of the Defendants believed the B Shares Mistake to have any such consequences. There is no reason for the B Shares Mistake to have clouded their judgment, and no evidence that it did. Further, for the reasons set out elsewhere in this judgment, there is no evidence of any negligent conduct, nor any reckless disregard for professional duties.

(J) ALLEGED FALSE STATEMENTS

495. The Kings allege that, in breach of duties not to mislead their clients, the Defendants made a series of untrue statements to the Kings to pressurise them into accepting the advice to discontinue and apologise to Primekings. I understood this allegation to be relied on in support of the primary, secondary and tertiary cases considered above. In addition, it is apparent from the Kings' written closing that they also rely on these allegedly misleading statements as freestanding breaches of fiduciary duty entitling the Kings to claim equitable compensation for the resulting losses. They state in § 9.5 of the written closing that, since motive is no part of the cause of action for breach of fiduciary duty, the court does not need to consider why the misleading statements were made, and in particular whether it was due to internal or external pressure.

496. The pleaded misleading statements are as follows:

> "In breach of the duty not to mislead, the following untrue statements were made to the Kings to pressurise them into accepting the advice to discontinue and apologise:
>
> 20.1. The Judge had indicated that the case was bound to fail. [POC 102]
>
> 20.2. That even though the defendants had exaggerated, been sharp and taken advantage of the situation [POC1I4] it would involve professional misconduct to ask any questions of the defendants in cross-examination [POC 101] and the Court process should be viewed as having been about the Kings finding out that they were wrong. [POC 104]
>
> 20.3. It was best for the Kings to refrain from trying to analyse the evidence. [POC70].

> 20.4. It was relevant that Mr Stiefel and Mr Fisher did not subjectively consider themselves to be fraudsters. [POC93],
>
> 20.5. The barristers were professionally embarrassed and the Kings would have to represent themselves if they wanted to continue with the trial. [POC 99 and 110.2]"

497. In their written closing, the Kings couple these allegations with two further pleaded allegations:

i) an alleged failure, from 4 May to 15 May 2017, to tell the Kings that DWF had been negligent in relation to § 39.4 of the Particulars of Claim, i.e. the B Shares Mistake (SSOC § 13); and

ii) an alleged failure, from 4 to 15 May 2017, to tell the Kings that they needed to seek independent advice about that (SSOC §§ 13 and 23.5)

each of which the Kings refer to as *"actionable non-disclosures"*.

498. I consider these allegations in turn.

499. SSOC 20.1: I have already considered in §§ 357.-360. above Mr Hall Taylor's assessment at the Friday Conference on 12 May 2017 of the judge's reactions. There is no merit in the Kings' allegation.

500. SSOC 20.2: The Kings refer to the handwritten notes quoted in § 351. above, and Anthony King's evidence that, at the Friday Conference, he asked what would happen in Primekings 'collapsed on the stand', and was told that not one question could be asked of a defence witness, and even doing so would be professional misconduct.

501. It is true that Mr Hall Taylor accepted that the Kings had some good points and documents that could have been used to cross-examination the Primekings witnesses, and that they (particularly Mr Swain) had in his view "*behaved in an unattractive and opportunistic way when they realised the precarious nature of KSG's finances shortly before the scheduled completion of the transaction*". However, those matters do not in themselves amount to a viable cause of action. When Anthony King's evidence was put to him in cross-examination, Mr Hall Taylor said:

> "A. No. I mean, it is not correct. We wouldn't have said not one question. It was not one question about the case in fraud effectively and the misrepresentations.
>
> I mean, as it were, not one question about our case, you know, the actual core elements of our case. I mean, you can ask -- if you're able to advance a case, you can go and ask witnesses questions about other things and what did you mean by this document, and you know, did you have cornflakes or Frosties for breakfast that day, and things like that that don't make any difference. What you can't do is advance a case which doesn't have an evidential foundation by the time you get there, which ours didn't."

I am sure that that was the point Mr Hall Taylor made at the Friday Conference. He had formed the view that the case no longer had an evidential foundation, and on that basis considered that it could no longer properly be advanced. In my judgment, he was correct in that view; and, at the very least, it represented his genuine view and a view which a reasonably well-informed and competent practitioner could have formed.

502. SSOC 20.3: Particulars of Claim § 70 alleges that, at the Tuesday Conference (9 May 2017), "*Mr Hall Taylor told Anthony King that he should not try to analyse the evidence. Mr Hall Taylor said that because he wished (in breach of fiduciary duty) to dissuade Anthony King from analysing the case as Mr Hall Taylor knew that any logical analysis would tend to demonstrate that Mr Hall Taylor was misleading his clients and acting in bad faith*". The Kings rely on the manuscript notes quoted in § 311. ("*You are an observer - just watching, don't worry about it, don't over analyse it*") and Anthony King's recollection of the discussion.

503. There is nothing in this point. Insofar as Mr Hall Taylor may have made any such suggestion to Anthony King, there is no reason to believe he was doing any more than pointing out that his role as a witness was finished, and he needed to stand back and let the rest of the evidence play out and the legal team work out how to cope with the unexpected change in his own evidence.

504. SSOC 20.4: Particulars of Claim § 93 alleges that, at the Friday Conference (12 May 2017):

> "In an improper attempt (in breach of fiduciary duty) to persuade the Kings that the claims lacked merit, Mr Hall Taylor made the wholly irrelevant assertion that Mr Fisher and Mr Stiefel did not subjectively consider themselves to be fraudsters, and implored the Kings to think about whether Mr Fisher and Mr Stiefel might have not known about what was going on, and that it was only Mr Swain."

I reject that allegation for the reasons given in § 363. above.

505. SSOC 20.5: Particulars of Claim §§ 99 and 110.2 allege that the Kings were told, at the Friday Conference, that there remained no claim that could properly be advanced, and that the Kings would have to represent themselves if they wished to continue the case; and that that advice was knowingly wrong because they had not been instructed to act in any way contrary to the BSB Handbook and no view could be taken about the arguability of the claim prior to the cross-examination of Primekings' witnesses.

506. I agree with Mr Hall Taylor and Mr Morcos that that allegation reflects a fundamentally mistaken view as to counsel's obligations, which is incompatible with the BSB Handbook provisions quoted earlier and the statements in *Medcalf v Mardell*. In a claim in fraud there is no scope to proceed without the requisite basis of evidence in the hope that something might emerge. The purpose of cross-examination was not to allow counsel speculatively to see if the Kings might after all have an arguable case. It would not have been proper to continue the trial, including by embarking on a cross-examination of the Primekings witnesses, without having a viable case and

reasonably credible admissible evidence to support the very serious allegations being put.

507. SSOC 13 and 23.5: I have dealt with these allegations in §§ 466.-474. above. There is no merit in them.

(K) THE CASE IN NEGLIGENCE

508. The primary, secondary and tertiary cases summarised in §§ 51-53 of the Particulars of Claim each depend on the B Shares Mistake operating on the mind of the Defendants. However, although the Particulars of Claim and SSOC are not entirely clear, they do in my view include a freestanding fallback case to the effect that the advice to discontinue was negligent. This is encapsulated in SSOC § 18 read with § 19, as follows:

> "18. In breach of the duty of good faith the legal team advised their clients in a written advice provided to the Kings on 14 May 2017 that it was in their best interests to discontinue, apologise and agree to pay indemnity costs [POC 110.3 and 110.4] when they knew that was wrong [POC 1ll]. Particulars showing the legal team knew that was wrong:
>
> 18.1 DWF had advised the case on liability stood 100% likelihood of success [POC 26], and the legal team knew that the strength of the case had only increased in early 2017 when Mr Swain filed a witness statement stating that the word frozen had not been used by GE bank. [POC 39]
>
> 18.2. The written advice made no mention at all of any of the positive evidence [POC 110.1, 148, 149, 150, 152, 154, 155, 156, 157, RFI 16], showing the case to be overwhelmingly strong, all of which could have been used to cross-examine the witnesses. In particular no mention was made of:
>
> (1) An email in which Mr Swain admitted that Kings had been lied to. [B Reply 70.4].
>
> (2) The fact that it was common ground that Mr Evans had not been excluded from the meeting by GE, and the fact that the evidence that Mr Swain had said that had gone unchallenged by Primekings. [POC 149, 155]
>
> (3) Emails on 10 and 17 December 2013 showing that GE were supportive and Primekings considered their support was secured. [POC 152]
>
> (4) The KPMG note showing the Kings had been set up by Primekings. [POC 152]
>
> (5) Emails showing Ms Lord was not independent. [B Reply 70.4(2)-(6)]

> (6) Documents showing the Defendants lying in their witness statements. [B Reply at 19, 245.1(4), DWF Reply at 46.1(3) 96.6 and RFI at 16]
>
> (7) Mr Weedall's unchallenged oral evidence that he had stressed to Mr Swain that the account was not frozen: [B Reply 74.2(1)] [POC 163]
>
> (8) Mr Cole's oral evidence that GE was not closing the account. [B Reply 211.2 and 213 and 255 and 10] [POC 163]
>
> (9) The matters in Schedules A to U of the Kings' letter before action which could have been used to cross-examine and make closing submissions. [POC 165]
>
> (10) The fact that the 'unless' defence made no sense when the deal changed after the representations made, as Mr Hall Taylor said in his written opening [B Reply at 85(ii)].
>
> 18.3 The advice made no mention of the undisclosed problem of the legal team which the barristers have admitted might have been actionable after the trial [B Reply 90 and 102.2]
>
> 18.4 The advice made no mention of Howard Smith's evidence, which showed the factual case being put to witnesses by Primekings was wrong. [POC 1 05, B Reply 134.2(2)]
>
> 18.5 The advice did not address ways in which the case could be continued, such as trying to settle the case on compromise terms, or seeking a second opinion on the professional embarrassment point [POC 151]
>
> 18.6 The falsity of the advice is further shown by the fact the legal team had to mislead the Kings to persuade them accept it, as to which see below.
>
> 19. If the legal team did not know the advice was wrong, then it was in breach of the duty of reasonable skill and care for the same reasons: [POC 129]."

509. I therefore go on to consider this part of the Kings' case.

(1) Merits of the Advice to Discontinue: the state of the claim on Day 10

(a) Swain Representations

510. To recap, the Kings had alleged at § 28 of the MP POC that over the course of the Completion Meeting, Mr Swain made false representations dishonestly and that the Kings relied on them when entering into the Transaction on the less advantageous terms of the Final Deal. The alleged false representations were Mr Swain's statements that GE had said that:

i) all KSG's accounts were frozen;

ii) GE had lost complete faith in the management of KSG and the Kings group of companies (and on that basis GE had excluded Mr Evans from participation in the meeting and would not let him in the building); and

iii) GE was no longer prepared to support KSG and the Kings group of companies and there would be no further funding.

511. As to the first alleged representation, as I noted earlier, the Kings' case against Primekings was that the words "*frozen*" and "*no further funding*" indicated a permanent and immovable rather than temporary state of affairs.

512. As to the second alleged representation, in the present proceedings the Kings have suggested that the Evans Excluded Representation was to be treated independently as a fourth representation, though in fact it was put forward merely as a facet, in parentheses, of the loss of faith representation.

513. There were two limbs to Primekings' Defence in the Misrepresentation Proceedings ("***MP Defence***").

514. First, they contended at §28 of their Defence that the representations made by Mr Swain were in important respects different from those the Kings had alleged:

> "As to paragraph 28 of the Particulars of Claim, it is admitted that Mr Swain spoke on the telephone with Mr Fisher at approximately 15:50 and related what he had been told by GE as to its position at the meeting he and Ms Lord had attended with them. Whilst the exact words used in the Statements (as defined) are not admitted the gist of them is admitted save that:
>
> a. He stated that GE had told him that KSG's account was frozen and would remain frozen unless a deal was done.
>
> b. He did not say the words in parentheses in paragraph 28.2 of the Particulars of Claim or any words to similar effect, and probably used the words "Kings" as opposed to "the management of KSG and the Kings".
>
> c. He stated that GE had told him that there would be no further funding support unless a deal was done.
>
> For the avoidance of doubt Mr Swain's statements were true and in all material respects represented the position that GE had taken with them at the meeting. Save as aforesaid paragraph 28 is denied."

515. Secondly, Primekings contended that (their version of the) Swain Representations were true and in all material respects represented the position which GE had adopted in the GE Meeting with Mr Swain.

516. There was an important dispute of fact during the Misrepresentation Proceedings as to what representations had been made, at least until Day 6 of the trial. Most prominently, the Kings were adamant that the qualifying words *"unless a deal was done"* were never used. By contrast, Mr Swain said at § 104 of his witness statement that:

> "Robin then asked me how the meeting with GE had gone. I do not recall the precise order of my response but I believe it was as follows. I told Robin that GE were annoyed because they expected the deal to have been completed by 14:00. I then told Robin that they had said they had lost faith and confidence in Kings' management, expressing concerns about the performance of the account. I told him that the account remained frozen and that GE had said that there would be no more money from GE unless a deal was done. I cannot be completely certain of the exact words that I used but this is certainly the gist and meaning of what I said."

517. Alison Lord (who attended the GE Meeting and was in the car with Mr Swain) confirmed Mr Swain's evidence at § 71 of her witness statement:

> "I have a very clear recollection of the next part of the conversation. I clearly recollect (although I am not entirely certain of the exact words that Peter used, I clearly recollect that he said words to this effect) that Peter then said that GE had told us that they had lost confidence in Kings' management and that the account was frozen unless the deal was done."

There was a degree of debate about how independent Ms Lord was as a witness, with the Kings relying on a late-disclosed email dated 6 December 2013 to suggest that she was in some way a business confidante of Mr Swain. Nonetheless, she remained independent in the sense of not being employed by or dependent on Primekings, and her evidence had to be weighed in the balance. It was clearly adverse to the Kings' case as to what representations were made.

518. There was significant documentary evidence against the Kings' case that the words 'unless a deal was done' had not been mentioned.

i) As noted earlier, the only contemporaneous record of the meeting, the notes made by Ms Rollo at the Completion Meeting itself, contained the line *"GE frozen – unless py tax + do deal"*. Although the reference to an additional condition of paying tax was not part of either side's case, the note clearly tended to suggest that the freezing of the account applied only in the absence of a deal.

ii) On 20 December 2013, Anthony King referred in an email to *"the perceived uncertainty presented on Wednesday of* [GE] *potentially pulling the account is not there"*, consistently with Primekings' case that Mr Swain represented GE's position as conditional.

iii) James King's draft email of the same day stated that *"Peter reported to Robin that they were considering withdrawing their funding"*, which phrase appeared unaltered in the final draft of the email sent on 4 January 2014.

iv) The final draft of that email also included the phrase *"all because of GE's threats to withdraw funding"*, which tended to emphasise the conditionality of GE's position.

v) The email from Mr Swain dated 26 January 2014 to Mr Fisher referred to in §§ 260. and 261. above was, in my view, more consistent with Primekings' position than with the Kings'.

519. There were also problems as to the plausibility of the Kings' case in relation to all of the alleged Swain Representations:

i) The Kings said that the qualified version of the Swain Representations made no sense given that the parties were there to do the deal anyway, and yet the Transaction was changed to the disfavour of the Kings following its being made. Their opening submission for the Misrepresentation Trial said:

> "To suggest that the Statements were caveated with the proviso that they represented GE's position "unless a deal was done" is belied by the fact that D3's first reaction was to adjust the deal on the basis of the £4.5 million needed immediately to replace GE" (§ 148)

However, the renegotiated deal did not include any provision to replace GE's funding (which was in excess of £4 million), so the point in fact counted significantly against the Kings' case.

ii) It is unclear why would Mr Swain have lied in circumstances where it would have been so easy for the Kings almost immediately to verify the truth with GE.

iii) If GE's position had been absolute, it is unclear why negotiations with Primekings continued at all after the Swain Representations.

iv) It is unclear why Primekings would have perpetrated such a risky fraud for relatively modest gain (given that the main difference between the Initial Deal and the Final Deal was a change in Primekings' shareholding from 60% to 76%, but with a contractual mechanism to return to 60%).

520. The Kings' case that Mr Swain never used the words 'unless as deal was done' was then seriously undermined by Anthony King's change of evidence on Day 6, because (a) such a late and fundamental change in his apparent recollection seriously undermined the reliability of his recollection and his credibility as a witness, and (b) it amounted to an acceptance that those words had been used at the meeting by at least one of the Primekings representatives.

521. Further, the Evans Excluded Representation, even if it could be regarded as freestanding, had very poor evidential support. First, the contemporaneous documentary evidence was adverse:

i) James King's draft email of 20 December 2013 did not suggest that Mr Swain had said anything about Mr Evans, nor that the Kings had any awareness that GE were involved in standing down Mr Evans from the meeting.

ii) The email stated that the Kings learned of Mr Evans' absence from the GE meeting because Anthony King telephoned Mr Evans after the Swain Representations ("*Anthony then telephoned our Director Mr Steve Evans… only to be told that our Director Mr Evans was contacted five [minutes] before arriving at GE that he wasn't wanted at the meeting, and that only Peter was to represent Kings and our future funders*"). That is hard to square with Mr Swain having made the Evans Excluded Representation. The same account appears in the final draft of the email sent on 4 January 2013, with minor differences in language and detail.

522. The Kings submit that Anthony King's email of 20 December 2013 quoted in § 110. above shows by implication that Mr Swain must have represented that Mr Evans had been excluded from the meeting by GE. I disagree. In my view it goes no further than implying that, as some stage prior to the telephone conversation with Mr Weedall referred to, Anthony King seems to have understood that someone had asked Mr Evans not to attend the meeting. The discussion with Mr Weedall had then indicated that it was not GE who had done so.

523. Secondly, the witness evidence, taken as a whole, was clearly adverse.

i) James King accepted in cross-examination that he was not saying that the Evans Excluded Representation was made.

ii) Mr Wilson never said that the Evans Excluded Representation was made, either in his witness statement or in oral evidence.

iii) Anthony King's witness statement, in the passage quoted in § 293. above, indicated that the Evans Excluded Representation was made in response to a question Anthony King had asked, rather than being something Primekings had volunteered: which would have made it harder to view it as part of a plan by Primekings to procure an advantage by means of misrepresentations. Anthony King's evidence was also internally inconsistent. In his first witness statement he said he had asked Mr Swain whether Mr Evans had been at the meeting and Mr Swain stated that GE had refused to let him into it. In his second witness statement, he said Mr Swain had reported that GE *"wouldn't even let Steve in the building"*. In oral evidence he could not categorically confirm that Mr Swain had made the latter statement, but said that was the *"impression inferred"*.

iv) David Armitage stated in his witness statement that he "*specifically*" recalled the representation about Mr Evans, and the Kings say that was not challenged. However, Mr Downes had asked Mr Armitage an open question as to what he recalled about the Swain Representations: *"without looking at your statement…what do you remember about what Mr Swain – just what stuck in your mind here and now, what Mr Swain said?"*. The answer given said nothing regarding Mr Evans. That was at least arguably sufficient to give the witness a fair opportunity to respond without mechanistically having to

challenge each and every statement of fact (cf. *Hussain v Mukhtar* [2016] EWHC 424 (QB) § 45).

v) Gaynor Kehoe (KSG's company secretary) was shown to be wrong about her assertion that Mr Swain called her to tell her that GE did not want Mr Evans at the meeting, since Primekings' phone records on 18 December 2013 were in evidence and they did not show a call from Mr Swain to Gaynor Kehoe (or the KSG office) at any point that day. Further, her recollection about Mr Swain telling her that Mr Evans was no longer needed did not include any reference to that having been an instruction from GE. She also said at one point in her evidence that she told Anthony King and James King the following day, 19 December 2013, that Mr Evans had been excluded from the meeting, and that she did not believe they had been aware of that.

vi) Mr Evans' own recollection of his call with Gaynor Kehoe made no reference to GE being responsible for the decision.

vii) Ms Lord's statement that she had telephoned Mr Evans to inform him that he was no longer needed at the GE meeting made no reference to that having been GE's decision.

524. For all these reasons, by the time the evidence had emerged, the Kings in my view had no viable case that the Swain Representations, as alleged by the Kings, had been made.

(b) Truth of the Swain Representations

525. It was common ground that Mr Swain had used the word *"frozen"* when reporting GE's position to the Completion Meeting. In his first witness statement he said:

> "I did precisely what Robin had asked and repeated as accurately as I could what I had just reported to Robin. I said that we had had a meeting with GE. I reported that GE had said that they were not happy with the running of the account and had lost confidence in Kings, the account remained frozen and there would be no more money from GE unless the deal was done. These are, I believe, the words I actually used although I cannot be exactly certain of that […] I believe I did use the word "frozen""

526. It was also common ground that GE did not use that word in their meeting with Primekings. In Mr Swain's supplemental witness statement he said:

> "I believe that Mr Weedall is correct to say that he did not use the word "frozen" in relation to KSG's facility with GE at our meeting on 18 December."

527. The Kings submitted that that was conclusive as to the making of a misrepresentation. I do not agree. A representation can be not entirely correct without amounting to a misrepresentation, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce

a reasonable person in the position of the claimant to enter into the contract: see *Avon Insurance plc v Swire Fraser Ltd* [2000] 1 All E.R. (Comm) 573 § 17. As DWF point out, if that were not the case, then anything but a verbatim report of a third party statement would always be a misrepresentation.

528. I do not consider there to have been any substantial (or any substantive) difference between what Mr Swain reported, when using the words *"frozen"*/no further funding, and GE's actual position:

i) GE had indeed refused to provide further funding, in the email at 12:34 earlier that day, unless they were given reassurance that a deal would be done.

ii) In response to questions from the court, Anthony King himself accepted that *"frozen"* was a fair description of the position as described in the 12:34 email.

iii) Mr Weedall and Mr Cole of GE essentially accepted that the refusal to provide further funding that day would have been discussed in the meeting with Mr Swain.

iv) Mr Weedall explained that, from a banking perspective, the word *"frozen"* meant termination of a banking facility, but accepted that the account could fairly be described as *"frozen"*:

> "Q: And so, if [Peter Swain] goes away and says to somebody: the account's been frozen, and he means by that temporary suspension, you wouldn't say that he's taken away an unfair impression from the meeting, would you? A: No, just a difference of words"

v) Mr Cole said he did not consider that Mr Swain would have been lying by using the word *"frozen"* to describe the situation.

529. Even if Mr Swain had <u>not</u> used the words *"unless a deal is done"*, when reporting the GE position to the meeting, the representations he made very probably did not have had the absolute meaning that the Kings alleged, and (in any event) he would be unlikely to have been found to have intended them in that sense:

i) I agree with DWF that *"frozen"* would be more likely to be understood by non-bankers in a suspensory manner, rather than in a final sense.

ii) Mr Swain had used the word 'frozen', in an intra Primekings email discussion on the evening of 17 December 2013, in the suspensory sense (*"The reality is GE froze the facility today, no more cash they await our completion to support Kings continuation…"*).

530. Nor did the evidence support the view that the Kings had understood the word 'frozen' in the 'permanent' or absolute sense alleged:

i) Mr Armitage accepted in his oral evidence that, if Mr Swain was saying there was no more money from GE, then implicitly everyone took that to mean if the deal didn't go through;

ii) It was put to Mr Wilson that it was his and everyone's assumption he that if a transaction went through, one way or another, GE would continue support, to which he replied *"I think it's got to be, yes"*.

iii) The contemporary documents written by the Kings referred to in § 518. above indicated that the Kings did not understand there to have been any permanent freezing of the GE facility.

iv) As noted earlier, the Final Deal did not involve new funding to replace the GE facility.

531. The oral evidence of Mr Weedall and Mr Cole, referred to earlier, strongly supported the view that the lost faith representation was substantially true.

(c) The Fisher Representations

532. The Kings suggest that Anthony King's recollection of the alleged Fisher Representations "*strengthened the case and made commercial sense of the facts"* (Reply to DWF § 45.2(4)). In my view, the opposite was true and, at the very least, reasonably competent and well-informed practitioners in the position of the Defendants could have formed that view. In circumstances where the Kings had consistently denied that the words 'unless a deal is done' had been used at the meeting, Anthony King's extremely late change of evidence was bound, at a minimum, to shed serious doubt on his reliability as a witness. That in itself created very serious doubt about whether his new case – that Mr Fisher had said Mr Swain had been correct about the account being frozen but that Mr Fisher had talked GE round provided a deal were done – would have any chance of being accepted. There was a clear risk that Anthony King's new evidence would be regarded as a late attempt to explain away the problems highlighted the previous week about how the Kings' case fitted with the contemporary documents, or with the fact that the deal was not changed so as to replace the GE funding.

533. Moreover, the alleged Fisher representations were not supported by any other witness, most notably James King. That was particularly problematic given that, on Anthony King's evidence, James King and Anthony King were together at the time that the Fisher Representations were made; and James King said that Anthony King *"never left my side that night, apart from when I left him to go into Robin"*. It could not, therefore, be credibly suggested that James King had simply not heard the Fisher Representations. Nor could the problem be sidestepped as a mere difference of recollection. As Mr Hall Taylor said, James King's oral evidence was *"very clear and very specific as well about what did and didn't happen that afternoon, and his evidence does not allow at all – there is not even a sort of wafer-thin gap in his evidence that allows for Anthony's revelation"* and that *"the questions that Mr Downes asked [James King] exclude any prospect of what Anthony said having happened"*.

(d) Reliance

534. Even before his late recollection of the alleged Fisher Representations, Anthony King's evidence was that he was aware that the GE facility *"was working as normal"* on 19 December 2013 when he attended the Kings' offices, and that so he must (on

his case) have realised that he had been lied to. If accepted, that evidence would have undermined any case of reliance on the Swain Representations when concluding the Transaction on 20 December 2013.

535. Moreover, once Anthony King had given evidence on Day 6 about the Fisher Representations, his acceptance that Mr Fisher used the words *"unless a deal is done"* (or similar) meant he could not have believed that GE's position on withholding funding was absolute (i.e., regardless of whether a deal was done or not) at the time of completion. It followed that even if Mr Swain had represented that GE had definitively frozen the account and withdrawn funding, the Kings now knew from Mr Fisher that that was no longer the position. The basis of the core misrepresentation had therefore vanished. At the trial before me, Mr Newman suggested on behalf of the Kings that a false representation by Mr Swain about the account having been frozen would still be important, even if GE had been talked round, because it would suggest that GE's support had 'wobbled'. However, that was not a case the Kings had ever advanced, and would self-evidently have been very weak, particularly as Anthony King had in cross-examination accepted that there was always some risk of GE withdrawing support:

> "Q: I think you have accepted that there was a potential that GE would withdraw support altogether.
>
> A: If the deal fell away, yes.
>
> Q: Well, on any basis. There's always a potential, isn't there?
>
> A: There's always a potential.
>
> Q: Yes. And if all Mr Swain had said was that there was a real risk that GE would withdraw their support, you couldn't have any complaint.
>
> A: Probably not.
>
> Q: Your complaint is he went further than that?
>
> A: Yes.
>
> Q: Because simply saying there is a real risk that they will withdraw their support was obvious in any event.
>
> A: Yes."

536. The Kings in their written closing reply submission suggest that, once the Primekings deal was done, there was no risk to the GE facility because it required GE to give 6 months' notice of termination. However, the facility terms also entitled GE to terminate without such notice in the event of an event of default, two of which had already occurred (concerning EBITDA projections and tax arrears).

(e) Rescission

537. There was always a high risk that the Kings would be held to have lost any right to rescind, by reason of affirmation.

538. The Kings' case was that Anthony King learned of the alleged falsity of the Swain Representations between 19 and 20 December 2013. Anthony King knew about the concept of misrepresentation in early December 2013 (when he was considering alleging it against Co-op) and accepted in oral evidence that he had always understood that one of the remedies for fraud was seeking to unwind a transaction. (I mention in parentheses that the Kings in their written reply closing submissions made the suggestion that Mr Armitage of DWF lied when giving evidence at the Misrepresentation Trial, when he said he believed he gave the Kings some advice shortly after the Transaction about rescission for misrepresentation but could not remember any of the details. No such allegation has ever been pleaded, and Mr Armitage did not give evidence in the present trial, there being no need for him to do so. Those facts are not affected by the Kings' point (in their 29 August 2023 reply) that they were merely responding to a forensic point made by DWF in their written closing. I therefore disregard the suggestion.)

539. Nevertheless:

i) Anthony King persuaded his father not to walk away from the transaction and, by 4 January 2014, his position was: *"we look forward to working together with you in the future"*.

ii) Anthony King's emails of 8 and 16 April 2014 referred to earlier asked Primekings to put the disagreement behind them, and promised that the events of 18 December 2013 would not be mentioned again.

iii) Anthony King made demands for payments to be made to his parents under the Final Deal, attended board meetings and was drawing a salary of £250,000 per year from KSG.

iv) Perhaps most compellingly of all, the Variation Agreement executed in November 2014 specifically provided that "*The provisions of the Agreement [ie the Kings-Primekings SPA] shall, save as amended by this variation agreement, continue in full force and effect*."

540. In addition, KSG had entered into a loan agreement with KIF to draw down up to £3 million, as part of the transaction package. By the time of the Misrepresentation Trial, KIF had in fact advanced £4 million to KSG. Even if rescission had in principle been an available remedy, the KIF loan could not be left in place and would have had to be repaid. There was no evidence that the Kings were in a position to do so.

(f) Innocent misrepresentation

541. The Kings suggested that they ought to have been advised that they still had a viable case of innocent misrepresentation, even after the evidence given by their witnesses. I do not agree. For the reasons summarised under headings (a)-(d) above, there was no viable misrepresentation case left at all. Further, a claim for innocent representation

would have been of benefit to the Kings only if they could establish a right to rescind which had not been lost (see *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 § 17), which as indicated under heading (e) above would have been extremely unlikely.

(g) Economic Duress

542. The Kings' pleaded case on the ways in which they were placed under economic duress had no prospect of success once the Swain Representations could not be established. As DWF point out:

i) The pre-existing financial circumstances of KSG on their own were not caused by Primekings, and there was no evidence that those circumstances had been *"taken advantage of"* by Primekings; the evidence showed only that Primekings were keen to secure a deal they were comfortable with, which was entirely within *"the rough and tumble of the pressures of normal commercial bargaining"* (*DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] B.L.R. 530 § 131).

ii) The refusal of Primekings to do a deal, except on changed terms, could never have amounted to improper pressure. In light of the position taken by GE on 18 December 2013, as well as the other matters that were of concern to Mr Fisher, Primekings' stance was reasonable.

iii) As to the lack of practical alternative of doing a deal with anyone else, that could not have been attributed to Primekings, particularly as Primekings had not insisted on an exclusivity agreement.

(h) Unlawful Means Conspiracy

543. The Kings' case on this depended on their cases in deceit and economic duress. Their allegations of criminal liability under sections 89 and 90 of the Financial Services Act 2012 also mirror their misrepresentation claims. Once the Kings' misrepresentation claim became untenable, so too did those further aspects of their case.

(i) Absence of alternatives to discontinuance

544. I quote key passages from the Advice to Discontinue in section (D)(18) above. In short, I consider the advice to have been correct for the reasons it set out. In any event, it is advice that a reasonably competent and well-informed practitioner could have given. In summary, there was no legally and professionally sound way in which to continue the claim:

i) Pleading the Fisher Representations would have required an application to amend the pleadings to allege fraud against Mr Fisher. The Kings say there was no need to amend because Anthony King's late recollection of the Fisher Representations did not affect the pleaded Swain Representations, which were sufficient for the case to succeed, and that §§ 30 and 39 of the Particulars of Claim adequately covered Mr Fisher adopting the Swain Representations as he expressly did. In fact, though, the Swain Representations were no longer sufficient, because in Anthony King's new evidence the key representations about the GE facility being frozen and no more funding being available had in

effect been removed by Mr Fisher. The only reference to a possible representation by Mr Fisher in §§ 30 and 39 of the Particulars of Claim was the allegation in § 39 that *"Mr Fisher made it clear that Primekings could not proceed on the terms of the Original Deal since it now required additional funding effectively making it a £9 million deal"*. However, that did not reflect the Fisher Representations as now put forward in Anthony King's evidence: it reflected the original case, was inconsistent with his new evidence, and was in any event untenable as the Final Deal did not involve £9 million of funding (in aggregate) so as to cover the loss of the GE facility.

ii) Any application to amend would have created a clear professional difficulty, given the conflict in instructions on the Fisher Representations between Anthony King and James King, which meant that: (a) James King could not have signed any amended pleading referring to the Fisher Representations, and (b) the Barristers could not have continued to act for both, in any event, because James King's instructions were that the Fisher Representations were not made.

iii) To continue to act for Anthony King (only), the Barristers would have had to be satisfied, as a matter of professional obligation, that they could properly make an application to amend to plead the Fisher Representations. It is clear, from their advice, and the reference to *Medcalf v Mardell* that they did not consider they had credible material to plead an amended case. They were correct in that view, and in any event it is a judgment that a reasonably competent and well-informed practitioner could have made. Accordingly they were professionally bound <u>not</u> to continue to advance the case against Primekings, whether in its present or an amended form.

iv) To continue to act for James (and possibly Susan) King on the existing case was hopeless, as the existing case no longer had any real chance of success. Indeed, the Barristers were entitled to take the view that they could no longer act in such circumstances.

545. For completeness, I would accept DWF's submission that it was entitled to rely on the advice to discontinue even if it was (contrary to my findings) negligent. It concerned the type of issue where a solicitor would be entitled to rely on the view reached by trial counsel, given the complexity of the case and the evidence, and especially when the advice related to counsel's view as to their professional obligations.

(j) 'Positive' evidence listed in SSOC § 18.2

546. It is necessary to return briefly to the list of matters set out in SSOC § 18.2, quoted in § 508. above, and certain other allegations made in § 18.

547. I have dealt with § 18.1 (100% advice) in §§ 181.-183. above.

548. Paragraph 18.2 is a miscellany of points which the Kings say were 'positive evidence' that the advice to discontinue ignored. Some of these points made are simply wrong or overstated, for reasons I have already given: these are §§ 18.2(1) (Swain admission of lying, see § 262. above), 18.2(2) (Evans Excluded Representation, see § 521. above), § 18.2(4) (KPMG note, see § 81. and above), § 18.2(5) (Ms Lord's

independence, see § 517. above) and § 18.2(10) (whether the 'unless' defence made sense, see § 519.i) above). Others (§§ 18.2(3), (7) and (8)), relating to the position of GE, focus on points of wording or detail which ignore the totality of the evidence GE had given at the Misrepresentation Trial: which was highly adverse for the reasons given earlier and summarised in the Advice to Discontinue. The remainder highlight inconsistencies and other matters on which Primekings witnesses could have been cross-examined had the trial continued. However, the trial could not continue once the Kings no longer had a viable case that could properly be pursued, and the existence of possible lines of cross-examination is not a substitute for viable case.

549. As to SSOC § 18.3, there was no undisclosed problem that merited mention in the Advice to Discontinue. If negligent advice had been given in relation to the Transaction (and I have concluded that there is no evidence of that), then it might have been actionable separately, but that had no relevance to whether the Misrepresentation Trial should or must be discontinued.

550. SSOC § 18.4 alleges that the Advice to Discontinue should have mentioned Howard Smith's evidence, *"which showed the factual case being put to witnesses by Primekings was wrong"*. However, by the time Anthony King, James King and the GE witnesses had given evidence, there was no misrepresentation case left. In those circumstances, any evidence from Howard Smith about his recollection of the facts could be of no assistance. The alleged misrepresentations related to what GE had told Primekings, not the underlying actual position.

551. In any event, Howard Smith's evidence was of very limited import. The final paragraph of the witness summary prepared for him read:

> "As the Christmas break approached, I recall that I discussed with GE the likely strategy if the investment from [Primekings] was not forthcoming, I cannot recall specifically who I spoke to but it would have been either Tom Weedall or Andy Cole as they were my key contacts at GE. We informally agreed that there appeared to be sufficient funds available to enable staff salaries to be paid for December. Once these were paid, KSG was likely to be able to trade through to January. Accordingly, KPMG would have a small number of staff on standby to re-commence a marketing process but not to take an administration appointment over KGS [sic]. Another factor taken into account was the nature of KSG's business i.e. providing security, in some cases, to banks. If security systems at certain client's premises had been withdrawn during the final week of December, this could have caused significant disruption that would impact on GE's major asset, book debts."

552. Even assuming Mr Smith would have given this evidence at trial, the timing of the conversation with GE to which he refers is unclear. The documentary evidence available at the Misrepresentation Trial suggested that GE had taken the view from 3 December 2013 onwards that a deal for KSG would need to be done by 20 December 2013 (or perhaps at the latest by 25 December 2013 as suggested in KPMG's report for GE of 6 December 2013 (under "*cash management*": "*a resolution to the current position is required prior to 25 December 2013*")). Further, the actual position on 18

December was different from that indicated by Mr Smith. GE initially refused to permit any drawdown on 17 December 2013, and repeated this refusal on 18 December 2013. The 16 December Cashflow forecast discussed earlier showed the position to be critical. Finally, it is very unlikely that the court would have preferred Mr Smith's evidence about what GE would have done, absent the Primekings deal, to that of the GE witnesses themselves.

553. SSOC § 18.5 complains that the Advice to Discontinue did not explore other routes such as trying to settle the case on compromise terms, or seeking a second opinion on the professional embarrassment point. However, having taken Primekings all the way to trial, making the most serious allegations against them, the Kings would have had no realistic prospect of reaching any compromise with Primekings as at the date of the Advice to Discontinue. In any event, the Kings could not properly have continued the trial, putting a case to the Primekings witnesses, in the circumstances that had arisen. There was therefore no question of carrying on whilst simultaneously opening settlement negotiations. Nor was it necessary, in my view, to seek a second opinion about the professional problem that had arisen about continuing to advance a case against Primekings. The problem had arisen in the middle of a trial, and seeking a second opinion would have been wholly impracticable. Counsel simply had to form their own view on the matter.

554. Finally, SSOC § 18.6 is based on the allegations, which I have rejected, that the Defendants made false statements to the Kings in order to persuade them to discontinue.

(2) Merits of Apology Advice

555. In his witness statement Anthony King said at § 111:

> "We were told that it was in our best interests to apologise to 'build bridges' and that's what PKH wanted and that we should agree to indemnity costs. I can recall Mr Hall Taylor stated something along the lines of "I want encourage Mr Downes to encourage them to be mature". I also remember Mr Hall Taylor saying the Judge would actually expect us to apologise, given the discontinuance, as my father and I were very reluctant to do this, as we still had no doubt about the facts showing our case was correct, but we were being told by those we trusted that GE were to blame for the collapse of the case, and that we needed to 'build bridges'. However we insisted that the pre-drafted apology about Peter Swain was changed to remove the words "the Kings no longer believe that he fraudulently represented GE's position or that they themselves were subject to an unlawful means conspiracy". We did not want to say any of it, but that sentence about Peter Swain and the conspiracy was just a step too far and unacceptable to us, on reflection I can't believe our legal team even proposed we should agree to say that."

556. His oral evidence was that this was very bad legal advice because he lost his job anyway and in any event he could have done it privately; there was no need to have

done so in open court. That was, he said, especially so in circumstances where the Kings' legal team knew that the Primekings defendants were extremely aggressive and would have used this apology against the Kings. For example, an email from Anthony King to Mr Hall Taylor, Mr Blakey and Ms Connor on 17 March 2017 recorded:

> "Met with Barry today (at his request) thought it might have been some sign of movement, but he basically sat and told me how we had zero chance of winning, his words were 'not a snow balls chance in hell!' How our family came from nothing and will go back to nothing and be ruined and destroyed. Said we had been badly advised and they were 100% certain they will win. I didn't realise he was so worried !!"

557. Primekings aside, the Kings also said that the public apology was not in their best interests because it led to Mr Downes describing their claim as being "*shameful*", and to their forever after being treated as vexatious litigants. As an example, Anthony King said that during the proceedings before Andrew Lenon QC (sitting as a Deputy Judge of the Chancery Division), in which it was alleged that he had taken bribes from one of KSG's suppliers (TCH Leasing), the opposing counsel Mr Downes attacked his credibility from the outset by referring to the public apology. I note, however, that whilst the judge eventually held that Mr King had taken a bribe from TCH ([2021] EWHC 325 (Ch)), it is evident from the judgment that he reached that conclusion on the basis of the documentary evidence.

558. Immediately after discontinuing the claim (15 May 2017 at 15.02), Anthony King said that "*we just got it wrong* […] *this was the right and just outcome for Barry and Robin*". Moreover, Anthony King was going to have to continue working with Primekings, as an executive in KSG; and it was in the Kings' interests for what was now a joint enterprise to succeed, preserving Anthony King's job and the value of the Kings' shareholding in the company.

559. In all the circumstances, it was sensible advice to make a public apology, and certainly advice that a reasonable well-informed and competent practitioner could have given.

(3) Merits of Costs Advice

560. The Kings alleged that the advice to agree to pay Primekings' costs on the indemnity basis was deliberately false or at the very least negligent. Their submission was the simplistic one that since a lawyer should act in the best interests of their client (subject to their duties to the court), and given that it will always be in the client's best interests to pay less costs, the legal team should have at least tried to avoid an indemnity costs order.

561. Further, the Kings argued that the legal team knew that Primekings were in the habit of over-stating their costs, so it was all the more wrong for them to have advised the Kings to agree to the indemnity basis. For example, in March 2016 there was a CMC where the estimated costs budget of Primekings was discussed. Primekings provided a figure of £2.7m which, according to Anthony King, Mr Blakey stated "*was laughable and an impossible figure and was not true and was being used to*

intimidate us and frighten us." Similarly, a note of a meeting between Mr Hall Taylor, Ms Connor and a costs lawyer from DWF dated 23 September 2016 recorded that the Primekings' costs budget anticipated "*10h days. 5 days on every occasion. Its just ridiculous – it doesn't require it. I don't believe they have actually done the work*." Ms Connor said at § 24 of her witness statement:

> "Primekings' solicitors were Teacher Stern LLP ("Teacher Stern"). I have some recollections of the meeting referred to in the Particulars, which took place on 23 September 2016, regarding Teacher Stern's costs which followed the provision of a revised costs budget. Lionel Marcus, an in-house costs lawyer at DWF, was also in attendance at that meeting with Jason, AHT (I think by telephone) and myself. I remember that Teacher Stern's costs were in the millions. I have looked at an attendance note of the meeting which I made, including the comment "*I don't believe they have actually done the work*" I haven't attributed this comment to any individual but it might have been me or Jason who made this comment. I'm not sure that this comment was made on a serious note and I would have said that it was more likely to be a speculative comment given the size of Teacher Stern's costs budget; their costs were very high. It was not necessarily an out-and-out serious accusation, but it was not necessarily a flippant comment either."

Thus, the Kings say, it simply could not have been in the Kings' best interest to agree to indemnity costs without at least putting up a challenge.

562. I do not accept that submission. An order to pay costs on the indemnity basis was an inevitable consequence of the fraud claim which the Kings had pursued against the Primekings defendants until it collapsed at trial. Attempting to avoid it would have been hopeless and further aggravated relations with Primekings. Moreover, an order on the indemnity basis still left it open to the Kings to show that claimed costs had not actually been incurred or were unreasonable.

(4) Conclusion on negligence case

563. For the reasons given in sections (1) to (3) above, I reject the Kings' case in negligence.

(L) REMEDIES

564. In view of my findings on liability, it is unnecessary to consider these matters in any detail, and I shall not prolong an already long judgment by doing so. I therefore make only the following very brief observations:

i) Even if the Kings had succeeded on their primary or secondary case, and even if they were entitled to equitable compensation for breach of duty, it would not be assessed in the way the Kings suggest, viz on the basis of advice given to them that their claim against Primekings had a 100% chance of success. I have already found that such advice was not given. In any event, any compensation could only properly be for what had in fact been lost (see, e.g.,

Snell's Equity (34th ed.) § 7-059, and, by analogy, *Target Holdings v Redferns* [1996] A.C. 421 on breach of trust).

ii) The assessment in the present case would need to take account of all the evidence that had been given to date in the Misrepresentation Trial. There is no pleaded case that the claim had any particular settlement value as at the date of discontinuance. In my view, the case had no more than a negligible chance of success (cf *Edwards v Hugh James Ford Simey* [2019] 1 W.L.R. 6549 § 23) – realistically, probably a zero chance – and no settlement value. This is not a case where the court would have any difficulty in assessing the value of any claim the Kings might be said to have lost, or has been deprived of any relevant evidence (cf the cases *Mount v Barker Austin* [1998] PNLR 493 and *Libertarian v Hall* [2013] HKCFA 93 cited by the Kings). No compensation would therefore have been due.

iii) No credible evidence has been adduced to show that the Kings would have been able to fund the payment that would have been required in order to achieve rescission (had rescission been ordered), including money both to compensate Primekings for at least the £3 million it had put in, and to replace the KIF loan (which stood at £4 million by the time of the Misrepresentation Trial).

(M) PROCEDURAL MATTERS

565. I summarise here certain aspects of the recent procedural history leading up to the trial before me, and certain events at trial, since the Kings have in their written closing alleged unfairness to Mr Newman, who represented them until the pre-penultimate day of trial.

566. The parties appeared before me at a pre-trial hearing on 27 April 2023. The main contested issue was a disagreement about the form the trial bundles should take, and in particular whether the Opus platform should be used (at the Defendants' cost) or a set of pdf bundles that Anthony King had prepared. After hearing submissions, I reached what I considered to be fair compromise, involving the use of Opus but preserving the bundle and tab numbering system Anthony King had used. During the hearing there were one or two exchanges between Mr Newman and Mr Croxford, centred on the propriety of some of Mr Newman's allegations against the Defendants. At the end of the hearing I indicated that, though a case such as this was bound to provoke strong feelings, the advocates should do their best to keep the temperature down as the case proceeded to trial.

567. Following that hearing, Mr Newman sent me a letter dated 9 May 2023, copied to Mr Croxford and Mr Pooles, which was expressed to be sent on his own behalf as a citizen and not on behalf of the Kings. The central complaint was this:

> "You will recall that I mentioned at the end of the hearing on Friday 28 April 2023 that attempts to associate me with the King case were illegal (Principle 18, Legal Service Board v Forster at [85]) and needed to stop. That came after Mr Glassey filed a Witness Statement naming me in express terms. Because Mr Glassey filed a Witness Statement naming me and then the

> next day must have instructed his Leading Counsel to attack me personally in court, notably after court business had finished and the Order had been made, that is a course of conduct (at least 2 occasions) engaging the Protection From Harassment Act 1997. In the 1998 Report of the Special Rapporteur on the independence of judges and lawyers, the Rapporteur explained the rationale for this principle, stating at §181 that: Identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned. - It is also a contempt. Intimidating and harassing lawyers (by deliberately seeking to associate them with the cause of their clients) is the hallmark of some of the most despotic regimes in history, and an attack on lawyer is always and only an attack on the rule of law. …" (footnotes omitted)

568. The offending passage from Mr Glassey's witness statement appears to have been this:

> "I have become accustomed to the numerous and baseless allegations of dishonesty and impropriety which have been variously made against me and my Associates during my conduct of these proceedings by the Kings, their solicitors, and their counsel Mr Newman, but I should address the allegations at paragraphs 6.2, 6.3 and 57 of Mr Newman's skeleton argument that we and Clydes have chosen deliberately to breach a Court Order so as to bring about a situation whereby we wrest control of the preparation of the trial bundles from the Claimants. This is unfounded and untrue."

Mr Newman had indeed filed a 22-page skeleton argument for the hearing, making a number of allegations to the effect complained of by Mr Glassey. Mr Newman's complaint that he ought not, in this respect, to have been associated with his clients overlooks, in my view, the conduct reasonably to be expected of him personally with regard to allegations of deliberate impropriety.

569. Mr Newman's letter of 9 May also took exception to correspondence addressed to him by the Defendants' legal teams on the subject of trial bundles, a chronology and the trial timetable, which he considered to be part of a plan *"to associate me with the King case for strategic purposes, which can only be part of a strategy of intimidation"*. The letter also included allegations against a number of other judges and members of Mr Newman's then chambers.

570. I heard a pre-trial review on 12 May 2023, at which the Kings were represented by Anthony King, without counsel. Anthony King told me that he expected Mr Newman to be representing the Kings at trial.

571. As I mentioned near the beginning of this judgment, on the morning after he had made oral closing submissions on behalf of the Kings, Mr Newman circulated a letter dated 19 July 2023 stating that he was unable to represent the Kings for the final two

days of the trial. The letter indicated that it had been triggered by § 14 of the Barristers' written closing submissions, which said this:

> "14. This case demonstrates why those obligations [the professional obligations on counsel] are so important. As Lord Hobhouse explained in *Medcalf* at [53] – [54], the advocate is in a privileged position, with a right of audience and immunity from suit for defamation. That carries with it certain duties, including the duty to exercise appropriate restraint when making allegations of serious misconduct. Ds 2 and 3 (as well as Ms Connor, Mr Blakey, and Mr Wilson) are professional persons who have spent the last four years under the shadow of allegations of the utmost seriousness made in public – allegations which if made out would destroy their reputations and end their careers. However misconceived they may be, the stress of living with those allegations, and the risk that third parties may if only in passing think that there is something in them, are both heightened by the fact that they carry the imprimatur of Counsel. That is, in part, precisely the state of affairs that Counsel's duties exist to prevent by the exercise of his informed professional opinion conscientiously formed and having identified whether or not there is admissible evidence that can objectively be said to support the making of such serious allegations. Disregard of those obligations has in this case been deeply unfair on Ds2 and 3."

572. Mr Newman's letter of 19 July complained that that paragraph was unlawful harassment, contrary to principle and an offence under the Protection from Harassment Act 1997. He suggested that it formed part of a pattern that had continued throughout the trial, citing three occasions when Mr Croxford had referred to Anthony King and Mr Newman in the same breath.

573. There were, during the course of a 23 day trial (of which Mr Newman was present for 21 days), a small number of occasions on which Mr Croxford made an intervention or statement to which Mr Newman took exception. Again, these tended to concern the propriety of the allegations made by the Kings against the Defendants. However, there was nothing that in my view came close to intimidation or an improper attempt to place Mr Newman under pressure. Still less did anything occur that in my view meant the Kings did not have a fair trial.

574. On the contrary, having filed a 50-page written opening on behalf of the Kings, Mr Newman made oral opening submissions for the greater part of a day. Following Anthony King's evidence for the Kings, Mr Newman was then allowed to cross-examine the DWF witnesses and the Barristers from Days 8 to 19, and part of Day 20, of the trial before me: a total of about 12 days. During the course of his cross-examination he was afforded considerable latitude, even for junior counsel acting on a *pro bono* basis. He provided a 95-page written closing, and made oral closings submissions for a day on Day 21. As recorded earlier, I offered the Kings time to consider their position, and almost had to insist that they took the opportunity to consider making further written submissions rather than closing the case before

Anthony King had fully read the Defendants' written closings. In the event, the Kings produced the voluminous further submissions that I mention in § 8. above.

575. The Kings' written reply submissions dated 9 August 2023 also suggested that there was *"no discernible intervention ... from the bench to protect the Pro Bono Counsel against this harassment during the trial and allowed Mr Croxford to continue making implied allegations of professional misconduct against Mr Newman throughout"*. That is not, to my mind, a fair representation of the course of the trial. In the context of Mr Newman's two days of oral submissions and twelve days of cross-examination, interventions were relatively infrequent. Such interventions as were made were in my view justifiable, particularly bearing in mind the nature of the allegations being advanced and the slender or absent evidential or logical basis for them.

576. The same document also took exception to my having pressed Mr Newman, during his oral closing submissions, about the allegation which I consider in §§ 330.-335. above and my having advised Mr Newman to reflect on it (a request which, it is said, *"must have played a significant part in his decision to withdraw as Pro Bono Counsel"*). The gist of the relevant exchange, which is at Day 21 pages 241-253, was an attempt to discover what precisely it was alleged Mr Wilson must have been told in order to induce him to decide to commit perjury, and what reason he could have had, on the Kings' case, to do so. It became apparent that, quite apart from being unpleaded and not squarely put to Mr Wilson, the allegation had no coherent logical basis. It was an allegation that quite plainly should not have been pursued – indeed, it should have been withdrawn – and it was one which Mr Newman ought of his own volition to have reflected very carefully about.

577. The Kings' 9 August 2023 written reply submission also makes the suggestion that my questions during oral closing submissions by Mr Newman and Anthony King, querying the basis for the allegations that Mr Wilson had lied in his oral evidence, showed a predisposition to believe the Defendants' evidence: *"... the approach of the Court to the claim, is that because the defendants are lawyers, the claim must be implausible"*. That is not, however, the basis of my questions, or of my conclusions in this judgment. The inherent improbability of a whole group of established professional persons deciding and agreeing, for no plausibly suggested reason, to commit a wholesale breach of their professional duties is no more than one part of the picture. The stark reality is that there is no evidence in this case from which any such thing could even plausibly be inferred; and, to the contrary, ample evidence to show that the actions the Defendants took in and about the Misrepresentation Trial were those which one would expect from competent professionals.

578. On a separate procedural topic, the Kings complained that there was little mobile phone evidence available from the Defendants and invite the court to infer deliberate destruction. The Kings suggest that the circumstances of the "texted you" email referred to in § 348. above "suggest a second channel of communication was being used with the specific goal of that not being recorded and stored for seven years by the DWF Document Management System": a characteristically extravagant (yet serious) allegation by the Kings devoid of any real basis. Reference is also made to an email from Mr Blakey to Mr Hall Taylor on 13 June 2017 saying "re your text" (which Mr Blakey said he thought probably reflected Mr Hall Taylor having sent a request by text for an update on the complaints that it seemed the Kings had made to Primekings about DWF's conduct).

579. The Kings complain that an absence of relevant documentary evidence may make a fair trial impossible, citing inter alia *Landauer v Comins & Co (*1991) WL 838018, 14 May 1991, where the Court of Appeal upheld a judge's decision to strike out a claim where there was a serious risk that essential documents had been destroyed (whether or not deliberately) with the result that a fair trial was no longer possible. They also make the point (correctly) that both deliberate destruction of evidence and, in particular circumstances, failure to keep records can lead to the drawing of adverse inferences, citing also *inter alia* statements in *General Tyre & Rubber Co v Firestone Tyre & Rubber Co* [1974] FSR 122, 163, *Tullett Prebon v BGC Brokers* [2010] EWHC 484 (QB) and *Vardy v Rooney* [2022] EWHC 2017 (QB) §§ 70-71.

580. The Kings go further and suggest deliberate destruction, in a passage from their written closing which it is appropriate to quote in full:

> "74. Now the Court is being asked to believe that through mere oversight:
>
> 74.1. Mr Hall Taylor, a professional litigator, allowed his mobile device to be 'rendered inaccessible' after he had written in an email in response to a text message: "what is this talk of new lawyers", and after a discontinuance which was a first for Mr Hall Taylor, 'a big deal….a huge deal'.
>
> 74.2. Mr Morcos, who was a professional litigator at the time, allowed his mobile device to be destroyed after the end of the only trial he has ever been involved in which was discontinued.
>
> 74.3. Mr Blakey, a professional litigator, gave no warning about preservation when handing in his phone to be wiped and destroyed, even though that post-dated his involvement in a litigation privileged note, and having sent a crucial text "texted you" on 11 May 2017. A discontinuance was something which was a first Mr Blakey: "I've never had to do it before".
>
> 74.4. Ms Connor gave no warning when handing in her phone to be wiped and destroyed, even after emailing to Mr Wilson and Mr Blakey the advice to discontinue on 1 August 2017 and to Mr Wilson an extract from Day 9 on 2 August 2017 She was then allowed to search her own personal phone, contrary to the rule that "The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance —or even potential relevance—for himself ….".
>
> 74.5. Ms Amy Franks, a key custodian, was allowed to search her own phone: "We have asked her direct whether or not she had a DWF phone at the time and/or used her personal mobile phone and, if so, to search for any relevant messages."

> 74.6. It appears that Mr Armitage, a key custodian, was not even asked about his personal phone: Mr Armitage's DWF mobile phone would have been handed in and taken away for destruction when he left the practice. DWF obviously does not have control over his personal phone.
>
> 74.7. DWF told the Kings all the devices had been destroyed: – "As you will also note from our client's Disclosure Certificate, no mobile telephones used in May 2017 time by any of our client's custodians survive, including those of Mr Blakey and Mr Wilson", when it later emerged in early 2023 that in fact some phones used in May 2017 survived.
>
> 74.8. DWF did not take steps to request that mobile phones be retained even when insurers were notified on 1 September 2017, and even though: "Anthony King's email of 26 July 2017 and his subsequent email of 27 July 2017 raised serious allegations against DWF, in particular that they had allowed the Kings to pursue hopeless litigation at enormous costs and financial risk to the Kings and that Mr Wilson had given false evidence at the trial."

581. The evidence, however, was that departing DWF employees, including Mr Blakey and Ms Connor, were asked to hand back their work phones to the firm. In Mr Wilson's case, his work phone was replaced. At the times when Ms Connor and Mr Blakey left DWF, the Kings had made no suggestion that the firm had been involved in a fraudulent conspiracy. There is a large volume of documentary evidence in this case, and none of it suggests the existence of any suspicious but missing text messages. DWF explained the position of each custodian as part of the correspondence between the parties about disclosure, and I am satisfied that all proper steps were taken. DWF also made requests for a number of custodians to search their personal mobile phones for messages and emails which might exist from May 2017 onwards, despite the fact that those phones were not within DWF's control. Both of the Barristers gave evidence about Mr Hall Taylor's disinclination to use text messages at the time, and each had disposed of the phone he had at the time of the Misrepresentation Trial in the ordinary course before any claim was intimated against him. I do not consider there to be any basis for drawing adverse inferences against any of the Defendants in this regard, still less any question as to the fairness of the trial.

(N) CONCLUSIONS

582. For all of these reasons, the Kings' claims fail and must be dismissed.