Neutral Citation Number: [2020] EWHC 2319 (Ch)

Case No: E30NE041

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

The Moot Hall, Castle Garth,
Newcastle-Upon-Tyne NE1 1RQ

Date: 27/08/2020

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

(1) AKASH GHAI
(2) HARJIT KAUR GHAI
(3) DEEPINDER SINGH SOMAL — **Claimants**

- and –

(1) RANJIT SINGH CHAHAL
(2) BOLBEC HALL LIMITED — **Defendants**

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- -

Mr Robert Amey (instructed by **Square One Law LLP**) for the **Claimants**
The 1st Defendant in person
The 2nd Defendant was not represented and did not appear other than in relation to an application to amend on which the Court gave permission for Mr Chahal to represent the 2nd Defendant

Hearing dates: 14 (reading day) to 17 July 2020 (inclusive)

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Approved Judgment

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

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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email (and the Defendants direct) and release to Bailii. The date and time for hand-down will be deemed to be 2pm on 27 August 2020 . A copy of the judgment in final form as handed down can be made available after that time, on request by email to NewcastleBPC@justice.gov.uk

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His Honour Judge Davis-White QC :

Introduction

1. Bolbec Hall (the "Property") is a building in the centre of Newcastle upon Tyne. It comprises six stories of accommodation over a large basement. It was constructed as speculative offices in 1909. Estate agent's particulars in evidence before me describe the building as "*an exuberant work of Edwardian Baroque eclecticism and Grade II listed.*" The parties to these proceedings entered into a joint venture with a view to the development of the Property. That joint venture broke down. The Property has since, purportedly, been sold by the joint venture company, the second defendant (the "Company") acting by its director, the first defendant.

2. The main issue in these proceedings is whether the claimants are responsible for fraudulent misrepresentations, which induced the first defendant to enter into the relevant joint venture agreement and, if so, whether the first defendant was thereby entitled to rescind that agreement, as he has purported to do. These matters are raised as a defence to the claimants' claim seeking to enforce the relevant joint venture agreement.

3. The relevant joint venture agreement is a shareholders' agreement dated 14 March 2018 (the "Shareholders' Agreement"). In particular, but among other things, complaint is made that, in breach of the terms of that agreement, allotments of shares to the claimants have not been completed by relevant entries in the Company's register of members, appointments of directors have not been made, signatories to the Company bank account have not been altered to include Dr Ghai and Dr Somal and that information has been withheld. By this claim, the Claimant seeks to enforce the Shareholders' Agreement. The purported sale of the Property by the Company is one that is challenged, although not in these proceedings.

4. As I understand it, the challenge to the sale of the Property by the Company was brought in proceedings before the First Tier Tribunal (Property Chamber) ("FTT") by the claimants in the proceedings before me. The FTT's decision is dated 17 May 2019. That decision was adverse to the claimants in these proceedings. On 23 March 2020, permission, to the claimants before me in these proceedings, to appeal that decision was granted by Judge Martin Rodger QC, Deputy Chairman of the Upper Tribunal (Lands Chamber). The appeal is listed to be heard on 15 September 2020.

5. Mr Chahal's case before me is that he was induced by fraudulent misrepresentations made by the claimants to enter into the Shareholders' Agreement and that he is entitled to (and has) rescinded it. Such misrepresentations are said to revolve around what is said to be the stated intention of the claimants, or at least of Dr Ghai and Dr Somal, to invest further monies of their own in the Company to enable it to discharge specific debts. These alleged representations are said to have been false to the knowledge of the claimants, and thus fraudulent. As I shall explain, the content of the representations alleged to have been made has varied over time and, after the conclusion of evidence, Mr Chahal sought further to amend his case. I refused that application to amend for reasons to be given in this judgment and which I set out later in this judgment.

6. There is some confusion as to the extent that the simple adoption of the first defendant's detailed defence amounts to a claim (or defence) that the second defendant (of which the first defendant was at all material times sole director and shareholder) itself was induced by misrepresentation to enter the Shareholders' Agreement and also claims rescission. For reasons that will become clear, I do not need to consider that issue, nor whether an opportunity to amend in this respect should be given nor the question of what happens if one party only to a contract is entitled to and/or seeks rescission for misrepresentation and another innocent party does not. There is also some uncertainty as to which of the claimants are said to have made relevant misrepresentations and how it is said that the other claimants are liable in respect of them but again, for reasons that will become clear, I need not consider those issues further.

7. The debts to which the alleged representations relate are liabilities of the Company to Auction Finance Limited ("AFL") and to the Newcastle Literary and Philosophical Society (the "Society").

8. The Property was originally acquired by the Company from the Society. The purchase price was in part provided from finance provided by AFL. I understand such finance to have been, in effect, a term loan which matured, or fell due, in September 2018, with monthly interest payments falling due over the term. AFL had a charge registered against the Property, securing repayment of the loan. The principal lent was about £640,000 but at the time of the negotiations that I am dealing with the principal due to AFL was about £572,000. As regards the Society, I understand that under the sale arrangements for the Property, the Society retained certain rights over the Property. The Society had some protection by virtue of a notice registered against the title to the Property. The claimants say that the position has never been made clear to them and certainly there are very few if any relevant documents before me explaining the position in relation to the Society. Contemporaneous documents suggest that by Spring 2018, liabilities of the Company to the Society had crystallised into a monetary liability and that there was, at the least, a real risk that that liability would become secured by a charge.

9. By the time that the claimants became involved in discussions with Mr Chahal, in early 2018, that eventuated in the Shareholders' Agreement, the Company was in arrears with interest payments due on the loan from AFL. As I understand it, the principal had also therefore fallen due as a consequence, though the written terms of the loan were not in evidence before me.

10. Receivers under the Law of Property Act, Mr Tobin and Mr Joseph, (the "Receivers") had been appointed by AFL over the Property on or about 22 November 2017. The Receivers had taken steps to market the property for sale. In practice, most communications were with Mr Tobin who took the lead in the receivership.

11. In addition, by early 2018, the Company owed some £32,000 or so to the Society.

12. The negotiations between the parties in these proceedings were opened on the basis that the Company needed more finance. Whether the negotiations were on the basis solely that immediate financing to prevent a sale by the Receivers was to be provided, with a hope that further finance would be obtained, or that further financing to redeem

the mortgage with AFL (and/or any liability to the Society) and/or to enable redevelopment of the Property was also to be provided by the Claimants personally, within a fixed time period, lies at the root of the dispute.

13. For present purposes, the misrepresentations alleged at various times up to trial have been identified as being four in number. These representations were first asserted in a letter of claim dated 24 May 2018 and sent by Mr Chahal's then solicitors, Clarke Mairs LLP. They were repeated in the Particulars of Claim. The representations are said to have been made by or on behalf of the three claimants and are as follows:

    i) The claimants had both the ability and the intention to repay AFL in full (the "First Representation");

    ii) The amounts and time periods within which the claimants had both the ability and intended to make such repayment was as follows:

        a) payment of £50,000 immediately upon receipt of confirmation from the LPA Receiver that he would take no steps to sell the property for a period of 12 weeks following receipt of £50,000 [I interpose to say that, technically, this must be a reference to both Receivers];

        b) the balance owing to AFL of or about the amount of £572,000 within the 12 week period agreed with the Receiver and following the sale of the home owned by Dr Somal

    (the "Second Representation");

    iii) the claimants further had the ability and intended to fund the amounts owing to the Society of approximately £32,000, with payment to be made at the time of repayment of AFL (the "Third Representation");

    iv) the claimants further had the ability and intended to fund the cost of the development of the Property, which costs were anticipated to be in the approximate amount of £250,000. This funding was to be provided in the Autumn of 2018 (the "Fourth Representation").

14. The case regarding the Fourth Representation was abandoned by the Defence served by Mr Chahal. In oral evidence he was unable to explain how the allegation regarding the Fourth Representation came to be made. In oral evidence before me his case also moved from the pleaded one (that the only representation was that funds would be found to pay off AFL and the Society) to one that Dr Somal and Dr Ghai had represented that either they would personally finance the repayment of AFL or that they would personally fund the development costs (but not both). In any event, there is no explanation as to how Mr Chahal came to assert a case that development costs were anticipated to be in the region of £250,000. It is clear from the contemporaneous documents that the anticipated redevelopment costs were at least three times that amount,

15. The claimants deny making any of the alleged representations. They say that the total commitment that they made was limited to that promised under, and performed pursuant to, the Shareholders' Agreement: an injection of some £50,000 by way of

loan to enable the Company to pay sums (directly or indirectly) to AFL, and so prevent an immediate sale of the Property by the Receivers. Although they hoped to raise further funds to enable the Company to make a profit from the Property, the claimants' case is that they never suggested or represented that such funds would come from them, or any of them, personally nor within any time frame. They fully intended to take steps to raise funds for the Company. However, other than the sum of £50,000 to be paid under the Shareholders' Agreement, they made no representations about this and certainly no misrepresentations.

16. The claimants raise other defences to the alleged liability which I will come onto. Among other matters, they deny, in the alternative, any relevant reliance by Mr Chahal or that rescission is appropriate because, they say, restitution is not possible. They also say that the contract was affirmed.

Representation in the proceedings

17. Before me, the claimants were represented by Mr Amey, instructed by Square One Law LLP.

18. The first defendant represented himself, assisted by his son as a Mackenzie Friend, Mr Joven Chahal. As matters stand, the first defendant currently remains the sole shareholder and sole director of the second defendant.

19. The defendants were originally represented by Clarke Mairs LLP. That firm wrote the letter before action in this case. Its name also appears on the Defence of each defendant. A notice of change of legal representative dated 23 January 2020, indicating that the defendants were acting in person, was lodged by that firm with the court under cover of a letter dated 31 January 2020.

20. At the commencement of the trial, the second defendant made an application to strike out the claim against it, alternatively for summary judgment. On that application, the second defendant was represented by Mr Kidwell of Counsel, instructed under the direct access scheme. For the reasons given at the time I dismissed that application. Thereafter, the second defendant was not represented at the trial until the application was made, in the course of closing submissions, by the first defendant to amend his defence, which defence is in effect adopted by the second defendant. On that application, I gave permission for the first defendant, currently the sole director and shareholder of the second defendant, to represent the second defendant in joining in on that application. As I have said, I dismissed that application at the time for reasons to be given later, which are set out later in this judgment.

21. I am grateful to both Mr Amey and to Mr Chahal for their helpful submissions, both written and oral.

The parties

22. The first and second claimants are husband and wife.

23. The first ("Dr Ghai") and third ("Dr Somal") claimants are in practice together as dental surgeons. They also have various property interests outside their dental practice. The contemporaneous correspondence, for example, shows Dr Ghai to have

been a director of Grayson's Properties Limited and Dr Somal to have an email address associated with that company. This appears to be the building company through which Dr Ghai and Dr Somal carry out property developments as referred to in a contemporaneous email before the court. The same email (dated 20 April 2018 and sent to a finance broker, Mr Mansel as part of a process of seeking to raise finance for the Company) also refers to Dr Ghai and Dr Somal as developing and managing their own property portfolios, which they had been doing "over the last 10 years".

24. No point was taken by or on behalf of the claimants that if one claimant made a misrepresentation, that should not be attributed to the others or that if that gave rise to a right to rescind in the defendants (or one of them) such right was effective against all the claimants.

25. Mr Chahal, the first defendant, (also referred to informally as "Minto"), is married to Meena. He has been involved in various family businesses over many years. In his witness statement he said that he had been involved in investment properties "for a number of years" although Bolbec Hall was the first property that he became involved in with a view to property development. In his oral evidence he appeared to seek to suggest that he had little involvement with property as such prior to Bolbec Hall.

The evidence before me

26. The three witnesses in the case were Dr Somal, Dr Ghai and Mr Chahal. Each made a witness statement exhibiting various contemporaneous documents. Included among them were various text messages between the claimants, Mr Chahal and his wife. Most of these were conducted through a WhatsApp chat group. All three witnesses gave oral evidence before me. After the hearing I was provided, at my request, with papers in relation to the appeal of the claimants before me in the Upper Tribunal proceedings so that I could understand them and some of the evidence before me. Those papers have not been material in my reaching the conclusions that I do on the case before me.

27. I found Dr Somal and Dr Ghai to give clear, reliable and honest evidence. It was entirely consistent with the contemporaneous written evidence before me. Their position has been consistent throughout. Where they were unable to remember specific detail they said so. Where they lacked certainty in giving oral evidence, tentative recollection was borne out by the written contemporaneous evidence or it supported their case, the detail of which they had not remembered.

28. I found Mr Chahal to be doing his best to assist the court. His evidence was honest in the sense that he genuinely believed it. As I shall explain, in certain key respects it did not make out his case. To a large extent, his case is inconsistent with the contemporaneous written documents, contemporaneous events and the probabilities. He has also been inconsistent in the allegations that he has made. The withdrawal of the case regarding the Fourth Representation and his changed case regarding Representations One to Three, which in oral evidence were said to be in the alternative to paying development costs, which I have referred to above, is a clear example of this. He obviously feels that the Shareholders' Agreement was a "bad" deal for him which he regrets entering into. In my assessment, he has therefore cast

around to find reasons why he may be able to escape its consequences. Before me these included a lengthy complaint that the Shareholders' Agreement was unfair and/or that it was entered into by him in unfair circumstances because the Company paid the costs but, he said, neither he nor the Company benefitted from the legal advice which was being paid for. I have found his evidence to be unreliable. This is largely based upon his changing case, the vagueness of his evidence, and its inconsistency with the contemporaneous evidence and/or probabilities. Where there is a conflict between the evidence of either Dr Somal and Dr Ghai on the one hand and Mr Chahal on the other I have no hesitation in preferring the evidence of the first two.

Earlier loans by Dr Somal to Mr Chahal

29. Prior to 2018, Dr Somal had lent various sums over time to Mr Chahal.

30. By a loan agreement dated 13 April 2010 between Dr Somal and Mr Chahal (the "2010 Loan Agreement") it is recorded that Mr Chahal had, in 2003-4, borrowed £250,000 from Dr Somal. Leaving aside interest, some £100,000 remained outstanding. The sums so borrowed (and repaid to) Dr Somal are recorded as being as follows:

Date	Amount £
---.---.03	100,000
03.12.03	27,000
02.04.04	(100,000)*
11.10.04	100,000
28.02.05	23,000
---.---.07	(57,356)*+

*repayments

+£50,000 plus interest of £7,356

31. The 2010 Loan Agreement goes on to record that the sums lent bore interest at the same rate that Dr Somal was being charged from time to time on his home mortgage. As at 31 March 2010 the total outstanding sum (including interest) was £132,862 (£100,000 plus £32,862 interest). The 2010 Loan Agreement confirms and acknowledges this outstanding sum and that interest continued to accrue on the loan at whatever rate of interest Dr Somal was charged on his home loan (then 1.5%). Although Mr Chahal did not remember signing the agreement he freely admitted that he probably had done so and the signature to it purporting to be his undoubtedly appears to be his signature.

32. Mr Chahal was the subject of a bankruptcy order in about 2011. On discharge from such bankruptcy, he would have been discharged from the debt to Dr Somal which would have remained to be proved for in his estate.

33. When Mr Chahal approached Dr Somal with a view to him lending further money, which proposal then became one of investing sums in the Company, Dr Somal saw it as an opportunity not only to make a profit on a new investment but a means of recovering some of the money previously lent to Mr Chahal.

Purchase of Bolbec Hall by the Company and cash flow difficulties

34. On 17 September 2015 the second defendant was registered as proprietor of Bolbec Hall. It bought the Property from the Society. The price paid on 10 September 2015 was recorded as £850,000 plus VAT of £170,000. The property was acquired with the benefit of finance from, secured by a charge over the Property in favour of, AFL. The charge was also dated 10 September 2015. The sum advanced was some £640,000. The remaining sum was effectively found by Mr Chahal, as I understand it particularly assisted by members of his family. Title to the Property was also subject to a restriction in favour of the Society. The Shareholders' Agreement contains a warranty and representation by Mr Chahal that some £32,000 plus interest was owed to the Society as at 14 March 2018.

35. By late 2015, the second defendant was experiencing difficulties in meeting the monthly direct debit payments to AFL. The Company's bank statements show a number of missed direct debits, apparently due to absence of sufficient funds, from November 2015 onwards. Mr Chahal's case was that the cash flow difficulties in meeting payments due to AFL did not arise until much later but I am satisfied that this is not the case. This is another example of Mr Chahal's evidence being inconsistent with the contemporaneous documents.

36. Contemporaneous correspondence shows that Mr Tobin and Mr Joseph of Strettons were appointed Law of Property Act receivers on 22 November 2017. The property was marketed by them through BNP Paribas in Newcastle. Marketing commenced in early February 2018 at a price of £1.2 million. According to Mr Tobin there was a good level of interest and best bids were sought by Friday 16 March 2018. Some five offers were received. According to an email dated 13 July 2018, form the Receivers to the Claimants' solicitors, offers were received "at around the quoted price".

37. Marketing was suspended when Mr Chahal offered part payment of the sums outstanding to AFL as a result of the arrangements that he entered into with the claimants under the Shareholders' Agreement.

Mr Chahal's negotiations with the Claimants

38. Negotiations between Mr Chahal and the Claimants with regard to the lending of sums to assist with the Bolbec Hall project commenced in about February 2018. Mr Chahal was looking for finance for the Company. He was anxious to prevent a sale by the Receivers and to buy time so that, through the second defendant, he could develop the Property and realise a greater profit than a sale of the Property, in an

undeveloped state and by receivers, would achieve. Dr Somal explained how Mr Chahal approached him and that he, Dr Somal, decided to bring in Dr Ghai because of the manner in which they operated as "property partners". Dr Ghai's wife, also a dental surgeon, was brought in later particularly because Dr Ghai considered there to be personal tax advantages were she also to be involved in the venture as shareholder.

39. The first approach by Mr Chahal to Dr Somal was in February 2018. Mr Chahal was vague about what had been discussed between him and Drs Somal/Ghai in February 2018. He thought some figures had been mentioned but couldn't remember what they were. He couldn't remember what sum he suggested to Dr Somal that he/the Company needed. I am satisfied from his answers in oral evidence and from his witness statement (and of course the evidence of Dr Somal and Dr Ghai), that no representations in the terms of those identified as the First to Fourth representations were made in this month. Even if Mr Chahal went so far as to indicate that funds would be needed to repay AFL the principal owed and/or developments costs in relation to the Property, I am satisfied that talks were in general terms only and that the focus was on the need for immediate funds to enable the sale by the Receivers to be put off by paying arrears of interest.

40. I am satisfied that an in principle agreement was reached between the parties during March 2018 and prior to the formal entry into the Shareholders' Agreement to the effect that:

i) Dr Somal and Mr Chahal would immediately inject loan capital into the Company to enable outstanding interest to AFL to be paid so that the Receivers would hold their hands on the proposed sale (this being something AFL and the Receivers were prepared to agree to). They would find further sums to pay off accruing interest thereafter arising on the AFL loan to prevent the sale by the Receivers being "re-activated";

ii) They, with Mrs Ghai, would become shareholders in the Company, holding between them 50% of the shares in the Company with the other 50% being held by Mr Chahal so that they could share in profit on any redevelopment/sale of the property;

iii) Dr Somal and Dr Ghai would seek to obtain finance to enable redevelopment to go ahead and to enable the Company to refinance or pay off the loan from AFL, maturing in September 2018.

iv) On the Company realising a profit on the sale and making a return to the underlying individual participants, Dr Somal would receive back the money previously lent to Mr Chahal.

41. Mr Chahal accepted that he had found it more difficult to borrow money after his bankruptcy. Drs Somal and Ghai suggested that they had hopes of being able to raise finance (a) because of their record and available assets and (b) because they did not have the bankruptcy record of Mr Chahal. They also suggested that part of the problem they encountered in raising funds for the Company after entry into the Shareholders' Agreement was because of Mr Chahal's bankruptcy record and the fact that he was sole director of the Company. They fairly accepted that they could not point to a written record of this in the correspondence before me. As will be seen, it

did not appear to be a problem on the face of things in relation to the finance that Mr Mansel of Advanced Funding was seeking to raise (the problem was more one of information not being available). However, they indicated that at least one of the potential investors identified by Bespoq Commercial Solutions Limited gave this as a reason why funding would not be provided.

Discussion: possibility of third party funding

42. For what it is worth, I am satisfied that Mr Chahal's previous bankruptcy was at the least an issue making third party finance harder to find.

43. I am also satisfied that there was a realistic prospect of raising third party finance and that, at the least, Drs Somal and Ghai genuinely believed this to be the case. This is supported by the history of their seeking to obtain such finance after entry into the Shareholders' Agreement. One part of Mr Chahal's case is that it was obvious that the raising of third party financing was simply impossible and that therefore the Shareholders' Agreement must have been based on representations by Drs Somal and Ghai that they would personally, from their own resources, find the money to pay off AFL. I do not accept this. Efforts by third party brokers to raise the sums show that they believed it was possible to raise the finance and confirm the belief of Drs Somal and Ghai in the same.

44. The conduct of Mr Chahal in not raising any question over the fact that within a day or so of the Shareholders' Agreement, Dr Ghai and Dr Somal were seeking to raise third party finance to pay off/refinance the AFL debt and his actively participating in that process, also confirms my conclusion and the further conclusion that he also genuinely considered such raising of third party finance to be possible. Accordingly, I reject Mr Chahal's case that the Representations (or at least the First to Third Representations) were made because, without such finance being found by Drs Somal and Ghai personally, there was no prospect of finding third party finance and the Shareholders' Agreement would not have been entered into. I find that he too believed that Dr Somal and Dr Ghai had good prospects of raising further finance for the company and re-financing the existing loan from AFL, even though he, Dr Chahal, had experienced difficulty to date.

45. For the avoidance of doubt, I also reject any case that third party finance was clearly unavailable because the receivership of the Property continued: as Mr Tobin made clear in an email referred to below there were third party funders who would be prepared to lend money despite the presence of receivers. Indeed, the attempts to find such funding after entry into the Shareholders' Agreement progressed on the basis and against a background where the LPA receivership remained in being.

46. I also accept Dr Somal's evidence that there was never any question of him having represented that he would use the proceeds of sale of his family home to invest in the Company and permit the Company to pay off the AFL and/or Society debts. As he said, having already been out of pocket in a considerable sum lent to Mr Chahal why would he risk his family home in yet another venture? It is also confirmed by the fact that, as is clear from the contemporaneous texts, Mr Chahal was aware in due course that Dr Somal's sale had gone through and that he had moved and yet at no time until May 2018, and the letter before claim, did he raise any question about the proceeds of

sale being invested in the Company or why they had not been. In oral evidence, Mr Chahal was again extremely vague in his answers on this issue. He did not know how much the house was selling for and he was unable to identify what sum he thought would be used from the proceeds to inject into the Company.

March 2018

47. By an email of 1 March 2018, Mr Tobin wrote to Mr Chahal referring to "our call just now". He referred to his understanding that Mr Chahal had identified a potential investor who needed "some time" and Mr Chahal's proposal that, by the end of the following week, he would pay the then current arrears of interest of about £21,000 (including a payment due the following day, 2 March 2018) plus a further two months at £5,700 per month. In other words, a sum of approximately £32,400. Mr Tobin confirmed that he had spoken to Together (which I understand to be a reference to the trading name of AFL) which had confirmed that, provided such payment was made in cleared funds by the end of the following week, it was content for the Receivers to put further action on hold. The Receivers would remain in place, but the agents would be told to stop marketing.

48. Mr Chahal was vague in oral evidence as to whether the reference in Mr Tobin's email of 1 March was a reference to Drs Somal/Ghai or someone else. He finally seemed to accept that it was a reference to Dr Somal. I am satisfied that it was a reference to Drs Somal and Ghai and that it reflected the then position that there had been no understanding nor representation that those gentlemen would find sums to repay the entirety of the AFL debt but that the focus was on avoiding an imminent sale by the Receivers, to be achieved by the Company paying off arrears of interest on the loan from AFL.

49. On 8 March 2018, Dr Ghai had some initial discussions and exchanges of texts/emails with Mr Jamal Saleh, an associate within the corporate department of Withers LLP, solicitors. These were preliminary discussions. At this stage no engagement letter had been signed nor monies paid on account as requested by Mr Saleh.

50. The earliest text message in evidence was sent on the afternoon of 8 March 2018 by Mr Saleh, in which he referred to Dr Ghai's "wish to acquire 50% of the shareholding in the Company." He asked for confirmation that the consideration in return for the shares would be discharge of "the relevant debts" or "otherwise clarify whether any further amounts" would be payable.

51. An email response was sent later that afternoon by Dr Ghai who said, among other things,

> "Once the shares are transferred there will be no other discharge of debt. The shares only provide us with security to cover any future bank interest payments. In terms of the historic debt from my understanding is that [Mr Chahal] has loaned in the region of 240K pounds into the company. However, he has loaned 150K pounds of that figure from [Dr Somal] and this needs to be recorded somewhere."

52. By email also dated 8 March 2018 and sent that evening, Mr Jamal Saleh an associate solicitor working for Withers LLP, solicitors instructed by Dr Ghai, referred to a

telephone conversation that he had just had with Dr Ghai. By way of bullet points he set out his understanding of what was then proposed. These included:

> "- you and [Dr Somal] will be providing further loan monies to pay off the principal amount owed by Bolbec Hall to ensure that the company is no longer subject to receiver action.
>
> - you and [Dr Somal] would continue to pay off the interest owed by Bolbec Hall to the receiver on a monthly basis while [Mr Chahal] has no income.
>
> - [Mr Chahal] has previously lent the Company about £240,000, £150,000 which was actually lent by [Dr Somal] and should be reflected accordingly in the documents.
>
> - You agree that subscribing for shares in Bolbec Hall would be preferable to acquiring shares from [Mr Chahal] and would still enable you, [Dr Ghai and Dr Somal] to hold the same proportions of shares and would enable to have the same rights to entrepreneurs' relief at a later date as acquiring shares would do.
>
> - [Mr Chahal] will also be a client so please ensure that [he] sends his hardcopy certified copies to us as well."

53. As it happened, Dr Ghai, as he explained in oral evidence, decided not to proceed with instructing Withers LLP but instead instructed Square One Law LLP as solicitors for himself and Dr Somal. This was for reasons of convenience and cost.

54. At this stage, the communications between Dr Ghai and Mr Saleh evidence the early stage at which discussions had reached. Thus, to take one example, Mr Chahal's eventual position was that he had invested not £240,000 but nearer to £700,000.

55. Mr Chahal particularly relies on the first bullet point in the email from Mr Saleh of 8 March 2018 that I have referred to above. However, that bullet point is consistent with the money coming from a third party source rather than Drs Ghai and Somal personally. Further, the second bullet point makes clear that the money was not going to come in immediately nor was all the interest falling due until September envisaged as being paid off immediately at this stage. Finally, the preliminary arrangement referred to in the email in question was, in due course superseded by the Shareholders' Agreement.

56. By email dated 9 March 2018, Mr Tobin wrote to Mr Chahal. He referred to the fact that "best bids" were due in by the following Friday (16 March) and that that day an offer had been received from an owner occupier of £1.25 million.

57. According to Mr Chahal, matters solidified and the Representations (or representations One to Three) were made at a meeting on 11 March 2018. In brief, at that meeting, he says in his witness statement, Drs Somal and Ghai agreed "as an immediate step" to lend the Company roughly £600,000 in order that it could repay the AFL loan (and the Society debt) in exchange for 50% of the Company. According to his witness statement, Mr Chahal said that Dr Somal also said that the £600,000 would become available when he sold his family home, in the next few weeks and

that "in the meantime" he and Dr Ghai would lend the Company £50,000. However, in his oral evidence he was a lot vaguer. He accepted that it had never been said in terms that Dr Somal and Dr Ghai would lend their own money to enable the Company to repay the AFL and Society Debts and that he "presumed" that this was what they would do. That he had made various "presumptions" became a fairly common theme of his oral evidence. In the end he admitted that the claimants had not promised (or represented) that they would lend the Company their own money to enable it to discharge the AFL debt and/or the Society debt.

Discussion regarding the 11 March 2018 meeting

58. I have already explained why I reject the evidence of Mr Chahal regarding Dr Somal saying that roughly £600,000 would be found from the proceeds of sale of his family home and that that would be lent to the Company to enable it to pay off the AFL and Society debts.

59. I also reject his case that, at this stage, it was agreed that 50% of the shares in the Company would be given in exchange for a loan of £600,000 to the Company, which he was content with as it was roughly what he had paid in. That this was not agreed is demonstrated by the email communication from Dr Somal dated 13 March 2018 referred to below, the terms of the Shareholders' Agreement itself and the subsequent history. This alleged "agreement" seems to be the basis of the case regarding the making of Representations One to Three. Accordingly, I reject that case too on the facts.

60. I also reject the case that any of Representations One to Three were made prior to entry into the Shareholders' Agreement. I have given some reasons already regarding specific arguments said to support the case that the Representations were made. Apart from those points, I am satisfied that the Representations were not made. Had they been, it is hard to see why they would not have been incorporated into the Shareholders' Agreement or why Mr Chahal would not immediately have raised them and their non-performance. However, as will be seen, they were first raised in a letter before claim over two months later and despite problems in the relationship manifesting themselves much earlier. Further, the oral evidence of Mr Chahal was so vague and unclear, often referring to "presumptions" that things had been meant or implied, that there was no clear evidence from him in oral evidence that they had been made. On the other hand there was very clear evidence from Dr Somal and Dr Ghai that they had not been made. Thus, the contemporary documents, the likelihoods in the context of both the situation as it was in March 2018 and the subsequent history and the oral evidence all point in the same direction.

The email of 13 March 2018

61. By an email dated 13 March 2018 Dr Somal wrote to Mr Chahal, copying in Mr Ghai. This email is relied upon by Mr Chahal as setting out what he says was the agreement between the parties. The parties differ as to the construction of this email. I therefore quote from it extensively. In the email, among other things, Dr Somal said as follows:

> "I think we need to be clear about where we stand re-our position on directors loan into the company.

I understand your position of having spent 700K on Bolbec Hall, but if we are going to go ahead

The 400 K can be taken out by you as being directors loan but the 300 K is lost as far as I'm concerned. Unfortunately you have spent way too much in trying to hold onto this property and taking too long to develop this. Ultimately it was your choice and it cannot be down to us to try and salvage this.

Your choice is

1. Sell Bolbec Hall, where you may get 1.3 million. If you get this you will be left with 700K after paying your loans. You will then in effect get back money you have spent but not really make any profit after having the property for 2-3 years.

2. We go ahead in partnership with you having 400k in loan accounts to draw down at a future date but you will have to pay me 164k as money owed to me from this. In the meantime you can draw 50k in the next 4-6 weeks to allow you to proceed with your other business venture.

   Akash and myself will organise further borrowings to complete the project which be either offices or hotel and we are not asking for any funds from you. If we go down the office route our max cost should be 600k for the building work with 1 million (your 400k + the money owed on loan) and depending on end value of project there could be profit of up to 2 million but at least 1 million.

   We would get 1 million and you would get 1.4 million with your loan drawn down but then minus money you owe me, or worst case we make 500k and you will get 900k, you should still be better off.

   So if we go down the partnership route you could possibly get twice the profit. I know we will be making 1 million but I think it's still a good proposition for you.

   It is painful to lose any money especially 300k but it was down to the decisions you took.

   I think while you reflect on this you should also consider the cost to me of the money I have lent you…."

Discussion of the email of 13 March 2018

62. Significantly the email of 13 March refers to "organising further borrowings" not to Dr Ghai and/or Dr Somal themselves providing finance from their own pocket. It is also clear that organising these borrowings is not solely a reference to borrowings for the purposes of any works to or development of the Property but is also in respect of paying off the existing debts to AFL/the Society.

63. The email also makes clear that despite Mr Chahal saying that he was entitled to £700,000 by way of loan repayments from the Company, Drs Somal and Ghai were only prepared to proceed if the Company's liability in this respect was limited to £400,000 and that from this sum Mr Chahal would have to pay a sum equivalent to that which he earlier borrowed from (and not repaid) Dr Somal. In essence this was reflected in the Shareholders' Agreement save that, if a certain level of profit was made by the Company, then Mr Chahal was entitled to repayment of £500,000 rather than £400,000.

64. This email also sets out the commercial justification of the deal that was entered into by Mr Chahal. Before me, Mr Chahal kept asking if it was fair that he should invest £600,000 (or £700,000) and Drs Somal and Ghai only £100 for their shares yet they would get half of any profit as shareholders. This was a typical example of Mr Chahal trying to "spin" the facts. As shall be seen, under the Shareholders' Agreement the profit was only split 50:50 between the respective 50% shareholdings once relevant debts to shareholders had first been paid off. Another example of "spin" was Mr Chahal seeking to suggest in his cross-examination of Drs Somal and Ghai that there had been a promise or statement by Drs Somal and Ghai that they would invest monies (as capital) rather than by way of loan, and that they in fact only invested £100. However, this was not how Mr Chahal put it in his own witness statement where he referred to them agreeing to invest in the Company by way of loan.

65. Finally, as regards this email, I should note the reference to Mr Chahal being permitted to draw down £50,000 in the next 4 to 6 weeks. Mr Chahal fastened on this during the trial, asserted that this had not been honoured, that therefore this must also have amounted to a dishonest misrepresentation and, after closure of evidence, sought the permission to amend that I have referred to. This is not a point referred to in his written witness evidence or which had been raised before.

13 March 2018: preparation for entry into the Shareholders' Agreement

66. Late on 13 March 2018, shortly before 10 PM, Mr Ali of Square One Law LLP, emailed Mr Ghai, enclosing a "draft suite of documents" for consideration and comment, including a first draft of the Shareholders' Agreement and a power of attorney. Among other points, the email confirmed that those advising at the firm were not qualified to give advice about the insolvency aspects of the transaction, and highlighted the receivership position. Given the Company's current insolvency, Mr Ali advised that Dr Ghai and Dr Somal should not become directors. Early the next morning Dr Ghai confirmed that "generally everything looks fine" and that he would forward the documents to Mr Chahal to have a look and asked if it would be possible to come over at 4pm that afternoon to sign the documentation. Mr Ali proposed a time of 4:30 which Dr Ghai later confirmed to be "ok".

67. During the course of 13 March 2018, various texts were sent between Dr Ghai and Mr Chahal. The former confirmed at about 07:22 am that he had emailed Mr Chahal the relevant transactional documents proposed to be executed the following day. He also sought further information on various matters, such as the period of interest covered by the required interest payment of £32k for AFL.

68. By email dated 14 March 2018, sent at about 03:10pm, Mr Tobin wrote to Mr Chahal confirming that the "best" deal he could get from AFL was that if Mr Chahal paid all of the monthly payments up to 2 September 2018, when the loan ended, it would discharge the Receivers' appointment but it would immediately reappoint Receivers if the loan was not redeemed on termination. He pointed out that there were many lenders who would not be deterred from financing by the presence of a receiver although he accepted that there were some who would be. He suggested awaiting the outcome of the "best bids process" on the Friday. In fact, the option, at or about this time, of paying off all the interest which would be due up and until September 2018 was not taken up and the Receivers remained in office until June 2018.

The Shareholders' Agreement: 14 March 2018

69. The Shareholders' Agreement is dated 14 March 2018. It is made between all five parties to these proceedings. Among other things, the Shareholders' Agreement provides for (a) loans from Dr Ghai and Dr Somal to the Company; (b) the loan position as between the Company and Mr Chahal; (c) the subscription for shares in the Company by Dr Ghai, Mrs Ghai and Dr Somal; (d) provisions as to the application of sale proceeds in the event of a disposal by the company of all or substantially all of its undertaking and assets or a situation in which a controlling interest in the Company is acquired and (e) practical provisions for the running of the Company. The Shareholders' Agreement defines Dr Ghai, Mrs Ghai and Dr Somal collectively as the "Investors".

70. As regards loans from Dr Ghai and Dr Somal, the Shareholders' Agreement provides for the following.

    i) It records a sum of £164,000 as being owed by Mr Chahal to Dr Somal pursuant to loans advanced by the latter to the former prior to the date of the agreement. It defines this loan as the "DS Debt".

    ii) By Clause 4, it provides for Dr Ghai and Dr Somal to loan the second defendant an initial total principal amount of £50,000, for "general working capital purposes", defined as "the Loan". This Loan is provided to be repayable on demand and to carry interest at a rate of 3% per annum above Bank of England base rate. On the occurrence of certain defined events of default, Dr Ghai and Dr Somal are given the right to require immediate repayment of the Loan plus interest together with all other monies and liabilities owed by the Company to them from time to time whereupon all such sums become immediately repayable. Any further loans advanced by Dr Ghai and Dr Somal following the date of the agreement are to be advanced on the same basis and on the terms of clause 4. Among the events of default are included (this list is not exhaustive) the Company failing to comply with any material provision of the Agreement, provided such failure is not rectified within five days of the Company becoming aware of it, the appointment of a receiver or administrative receiver over the whole or substantial part of the Company's assets, and the Company becoming insolvent or being deemed to be insolvent.

71. As regards loans between the Company and Mr Chahal, the Shareholders' Agreement makes the following provisions, primarily by clause 8.

    i) It confirms that no sums are owing to Mr Chahal by the Company other than the sum of £550,000, defined as the "RC Directors Loan".

    ii) It provides that once the Company has repaid the Investor Debt (being the £50,000 loan to the Company plus any other sums owing by the company to Dr Ghai and Dr Somal), the Company is permitted to make repayments to Mr Chahal in respect of the RC Directors Loan, up to a maximum sum of £400,000 in such amounts as may be agreed in writing by the Investors (clause 8.2).

    iii) It also provides that the Company will also be permitted to make repayments to Dr Chahal up to a maximum aggregate of £75,000, "*in exceptional circumstances and where such a repayment has been approved in advance by the Investors*" (clause 8.3).

    iv) With the exception of payments received under clause 8.3, Mr Chahal undertakes that all initial repayments to him under clause 8.2 or payments from the proceeds of sale paid to him under clause 9.1.2, will in the first instance be paid by him, up to a sum of £164,000, to Dr Somal in full satisfaction of the DS Debt (clause 8.4).

    v) In addition to repayments of the RC Directors Loan under clause 8.2, further repayments may be made where on a refinance or valuation, the Company would make a specified profit (clause 8.5).

72. As regards the share position, the Shareholders' Agreement provides for Dr Ghai and Mrs Ghai to subscribe for 25 shares each in the capital of the Company and for Dr Somal to subscribe for 50 shares in the capital of the Company. The subscription price is £1 per share. Following such subscription, the claimants would, between them, hold 100 shares and Mr Chahal would hold 100 shares. The Shareholders' Agreement provides that on completion the subscription monies should be paid and a board meeting of the Company should take place at which the subscription shares should be issued and allotted, the names of the allottee entered into the register of members, share certificates should be executed and delivered and any other necessary resolutions passed (clauses 2 and 3).

73. In the event of a sale by the Company of all or substantially all of its undertaking and assets or the acquisition of a controlling interest in the Company, the Shareholders' Agreement provides for the consideration to be distributed according to the following waterfall:

    i) first, repayments of the Investor Debt;

    ii) secondly, the repayment of £400,000 to Mr Chahal in respect of part of the Director's loans (to the extent not then repaid). In the event that a £1million profit is realised, this payment shall be increased by £150,000;

iii) thirdly, in distributing the balance to the shareholders in proportion to their respective shareholdings (see clause 9).

74. As regards the practical provisions for the running of the Company, clause 11 of the Shareholders' Agreement provided certain information rights for the Investors, clause 12.3 contained agreement that Dr Ghai, Dr Somal and Mr Chahal would be the authorised signatories to the Company's bank accounts and certain actions of the Company set out in Schedule 2 required the unanimous consent of Dr Ghai and Dr Somal. In addition, clause 5 dealt with the board of the Company and provided, among other things, that so long as the Investors held shares in the Company they should each be entitled to nominate and appoint (and remove) one director of the company.

75. The Shareholders' Agreement also contained clauses negativing partnership (clause 20), an agreement to act in good faith (clause 21) and an entire agreement clause as follows (clause 18.1):

> "18.1 This Agreement… constitutes the entire and only agreement between the parties in relation to its subject matter and replaces and extinguishes all prior agreements, undertakings, arrangements, understandings or statements of any nature made by the parties or any of them whether oral or written (and, if written, whether or not in draft form) with respect to such subject matter. Each of the parties acknowledges that it is not relying on any statements, warranties or representations given or made by any of them in relation to the subject matter hereof, save those expressly set out in this Agreement, and that it shall have no rights or remedies with respect to such subject matter otherwise than under this Agreement…. save to the extent that they arise out of the fraud or fraudulent misrepresentation of any party"

76. Clause 17 of the Shareholders' Agreement provided that the Company would bear the costs associated with preparing and executing the agreement. Mr Chahal spent time in cross-examining the Claimants' witnesses to establish that as the Company had paid for the legal costs it must therefore have been a client of Square One Law LLP (as must he). This was not a relevant issue before me. It is quite usual for a company to pay the legal costs in this situation without it necessarily being the client of the solicitors in question and I make no finding in relation to the relationship between Square One Law LLP and the Defendants.

77. The Shareholders' Agreement was executed as a deed. The relevant signatures were witnessed by a trainee solicitor at Square One Law LLP. Mr Chahal signed on his own behalf and as director of the Company.

78. Each of the three claimants separately signed documents dated 14 March 2018 which in each case applied for the allotment of the relevant numbers of shares to the signatory as provided for by the Shareholders' Agreement, referring to the payment that day of the subscription price in line with the Shareholders' Agreement and authorising entry of their name in the register of members of the Company. It is admitted by the Defence of the 1st defendant (adopted by the 2nd defendant) that the shares to be allotted were paid for by way of electronic transfers totalling £100 made on 14 March 2018.

79. Apparently at the same time as execution of the Shareholders' Agreement, the following documents were executed by Mr Chahal as sole director (or, where appropriate, sole shareholder) of the Company:

    i) a written resolution of the shareholder authorising the allotment of shares pursuant to s551 of the Companies Act 2006 ("CA 2006") and disapplying pre-emption rights pursuant to s569 CA 2006;

    ii) a form "SHO1" showing a return of allotment of 200 shares on 14 March 2018 in accordance with the Shareholders' Agreement;

    iii) signed share certificates for the allotments of shares to each of the claimants;

    iv) a board resolution "held at the company's registered office" on 14 March 2018 at 5:30 PM, at which (among other things) the share subscription letters, the form SH01, share certificates in respect of the proposed allotments, resolutions by the shareholder authorising the allotment and sublime pre-emption rights and the Shareholders' agreement were considered and resolutions were passed approving the proposed allotments, approving execution of share certificates, approving the Shareholders' Agreement and authorising Mr Chahal to enter into and execute the same on behalf of the Company and appointing Dr Ghai and Dr Somal as signatories to the Company's bank accounts.

80. In cross-examination, and in his written closing submissions, Mr Chahal made much of the issues of the amount of time he had had to consider the documentation and whether or not Square One Law LLP were or were not acting on his behalf. These issues were irrelevant to the pleaded case of either party. However, I am satisfied that Mr Chahal had adequate opportunity to consider the documentation and that he freely entered into it knowing what it was and that such documentation was explained to him at the meeting at the offices of Square One Law LLP.

81. On 15 March 2018, the Company's business bank account shows that two sums of £25,000 were credited to the account from "Somal and Ghai" and that a transfer of £18,000 was made to Mr Chahal. The following day some £31,778.22 was paid to AFL by the Company. It is common ground, on the statements of case, that the £18,000 payment to Mr Chahal was made pursuant to clause 8.3 of the Shareholders' Agreement and was consented to by Dr Somal and Dr Ghai.

82. Also on 15 March 2018, by email sent at 8:20 am to Mr Chahal, Mr Ali referred to the fact that Mr Chahal had mentioned that he believed the statutory books of the company were held by his accountant. Mr Ali asked that the books be written up as soon as possible and that steps were taken as soon as possible with the Company's bankers to make Dr Ghai and Dr Somal signatories to the Company's bank account and to give them access to online banking facilities. These steps were, apparently, never taken. Mr Ali chased the matters again by email dated 21 March 2018.

83. Also by email dated 15 March 2018, sent at 10:20am, Mr Tobin advised Mr Chahal that he was emailing the estate agent to confirm that the property was now off the market, at least until May. He put forward the details of three lenders, said to be "active" in case Mr Chahal was looking to arrange new development finance.

84. Also by email dated 15 March 2018, sent at 10:41, Mr Ghai, apparently having been forwarded the email from Mr Tobin, wrote to Mr Chahal suggesting that it might be best to arrange a meeting for development finance with other providers to see what they might offer. As regards the outstanding debt of £540,000 to AFL, he recorded his belief that an approach should be made to Lloyds to raise this sum. "*The fact that BNP have marketed it for £1.25 have you have a offer already at that level we should be able to loan 50% LTV*". Significantly, there was no response evidencing even surprise and saying, in effect, that Mr Chahal had understood that the claimants were arranging to provide their own monies rather than sourcing finance from third parties and that he had entered the Shareholders' Agreement on this basis.

85. At some time a WhatsApp group was established comprising the claimants and Mr Chahal. Shortly after the execution of the Shareholders' Agreement Mr Chahal's wife, Meena, was added to the group. During March 2018, various texts were sent through the WhatsApp group. They demonstrate that the parties were looking at various options for development of the Property including offices, various types of hotel (budget/aparthotel hotel), student accommodation and a retail shop unit.

86. In addition, further finance for the Company was being pursued by Dr Ghai. Towards the end March 2018 Dr Ghai was in touch with a Ms Lucy Hope, a director of Bespoq Financial Solutions Limited with a view to her assisting in the search for finance for the Company. Mr Chahal was aware of this and provided a copy of a bridging finance agreement so that it could be provided to Ms Hope.

87. The issues of completion of the share register and the changes to the bank signatories were chased by Mr Ali by email to Mr Chahal dated 21 March 2018. On 23 March 2018 Mr Tim Fife of Reid Hackett accountants emailed Mr Ali to ask what changes to the Company's share register were required. Mr Ali replied, providing the details. At about the same time Dr Ghai confirmed to Mr Ali that he was chasing the bank signatory point.

88. On 26 March Dr Ghai texted Mr Chahal. Among other things he said:

> "The priority is to try and sort out the money owed to the lender. It may be a case where we may need to come up with the full debt owed until the development finance is available. Development finance won't be available until we have approved plans and a business plan which may take us beyond September this year."

89. On 29 March 2018, the Company's bank account was credited with £7,000 "from Somal & Ghai" and the same was paid out to Mr Chahal the same day. It is common ground that this was a further loan to the Company and payment out pursuant to clause 8.3 of the Shareholders' Agreement with the consent of the Investors.

90. During April 2018, the Whatsapp text messages reveal Dr Ghai and Dr Somal chasing Mr Chahal regarding the shareholding position and the bank mandate and the parties turning to look at the Shareholders' Agreement.

91. By email of 3 April 2018 Ms Hope told Dr Ghia that she would make initial enquiries regarding "the bridging loan" and set out information that she would need in that connection including (among other things) a personal asset and liability statement for

each director. As is clear from later emails, Mr Chahal later provided such a statement with regard to himself directly to Ms Hope.

92. By email of 5 April to Mr Chahal, Mr Ali told Mr Chahal that he had not received replies from Mr Chahal's accountant (Mr Fife) and chasing the matter of the updating of the share register.

93. In texts through the whatsapp group on 9 April, the issues of the making up of the Company's register of members and the changes to the signatories to the Company's bank account were chased again, Mr Ali having indicated that there had been no progress. By email 13 April 2018 Mr Ali wrote to Dr Ghai and indicated that Mr Fife was making up the register.

94. On 10 April 2018, Mr Chahal forwarded to Dr Ghai and Dr Somal an email from Mr John Mansel of Advanced Funding of the same date. In the latter email Mr Mansel set out details of a previous "in principle" offer of financing by way of a bridging loan of £700,000. He indicated that it would need to be "refreshed" once the new partners' information and latest build timings were to hand. This would then be followed up by further development funding and an exit through a commercial mortgage, "likely with a high street lender". It is fairly clear that the bridging finance was to pay off the AFL debt and discharge the AFL mortgage. This sits ill with Mr Chahal's position before me that re-financing through a third party funder, other than the claimants personally, was simply not possible and/or that it was not possible in conjunction with third party development funding. It is also of course inconsistent with Mr Chahal at this stage operating on the basis that he was relying on the claimants personally providing sums to pay off AFL and the Society.

95. On 19 April 2018, Dr Ghai sent a text to Mr Chahal in which he said (among other things):

> "Had a chat with [Dr Somal] this morning. We both feel that at this stage we are unable to release any further money. We would love to help. Currently we are struggling to get finance and we need to prioritise this and making sure we can kick start the development."

96. On 20 April 2018, the Company's bank account was credited with a further £7,000 from "Somal & Ghai" and the same day a matching sum was paid out to Mr Chahal. Again, it is common ground that the payment in was a further loan to the Company and that the payment out was made pursuant to clause 8.3 of the Shareholders' Agreement, with the consent of the Investors.

97. As shown by an email of that date from Mr Mansel, by 24 April 2018 Mr Mansel was close to completing a credit proposal and was anticipating a response from the proposed lender within 48 hours or so of submission of the relevant forms. Such forms included a form showing Mr Chahal and Dr Somal as Applicants for a loan for the Company being "£700k initial and £900k development funds".

98. On 25 April 2018, Mr Mansel emailed seeking various documents including both a schedule of works and cost of works. In a reply of the same date, copied to Mr Chahal, Dr Ghai explained that at that point they did not have a cost of works or schedule of works and that what they would like to do would be "*to secure funding*

for the building itself first and until that is done not to progress any further if that makes sense. For development costings we have an idea of costs but nothing formal." Again, this is inconsistent with any idea that the funding to repay AFL and the Society was to come from the claimants personally.

99. Mr Mansel's response, by email dated 26 April, was to point out the obvious advantage of not having to pay for an additional application, valuation and legal fees if the two loans were arranged separately. The additional cost would be likely to be, in his view, an additional £20-30k were the re-financing loan and the development loan to be arranged separately. Mr Chahal was copied into all the relevant emails at this time.

100. By the start of May 2018, the WhatsApp texts among the group show that both sides were feeling dissatisfied with the working relationship. Mr Chahal appears to have been "confused" by what he regarded as unnecessary and confusing demands for detail with regard to the proposed works and costings. Dr Ghai expressed the view that Mr Chahal was not the only one "confused":

> "In meetings you indicate that you are to sort something out and then we receive part information. This then leaves me confused."

101. By email of 2 May 2018, a surveyor (Mr Greg Davidson of Cushman & Wakefield) gave advice about the possible letting of the Property and possible rental income. He was firmly of the view that letting the Property ahead of undertaking works would be a very difficult task and something that his firm would not only advise against but would refuse any instruction to act on that basis.

102. It seems that there was a meeting between Mr Chahal and the claimants, or some of them, on 2 May. According to a text within the WhatsApp group from Dr Somal:

> "Hi guys
>
> Just update since wednesday 2
>
> May meeting
>
> [Mr and Mrs Chahal] would like to look
>
> Into a sale of bolbec Hall as we are
>
> Struggling to make progress
>
> [Mr Chahal] mentioned a 2 week period
>
> to consult with previous interested
>
> party re sale
>
> Mento can you confirm what
>
> You aim to achieve over those 2 weeks

> Ie will you be looking at exchanging
>
> Contracts or finalising end price etc
>
> By the 16 May we should have
>
> a clearer picture of things is my
>
> expectation
>
> At the same time does this mean
>
> We postpone any further discussion
>
> With possible lenders
>
> I don't want to waste our time or
>
> Other people's if we are looking to
>
> Sell
>
> …
>
> If there is a difference of
>
> Understanding please now is the
>
> Time to clarify things
>
> Cheers
>
> Deep.

103. By email of 11 May 2018, Mr Mansell sent to Dr Ghai, Dr Somal and Mr Chahal a template to assist in identifying and setting out a schedule of works that would be required to raise funding.

104. Also, at about this time, Dr Ghai was chasing Ms Hope to chase a potential provider of finance, Seneca Bridging, which had expressed an interest.

105. Things appear to have reached a crunch point on 18 May 2018. There were a number of text messages on that day through the WhatsApp group.

i) Mr Chahal was asked to send on an email from the solicitors regarding the Property and for contact details for the receiver. He clearly was not prepared to despite several repeated requests by text that date.

ii) Mr Chahal complained that despite asking "numerous times for funds" to clear debts and "discussing a proposal plan to pay" the Society £5k a month. "Nothing was done."

iii) Dr Somal countered by complaining that other than monthly sums owed to the receiver and Mr Chahal coming up at the last minute and saying "this has to be paid NOW!" Mr Chahal had never provided clear details on who was owed what and a relevant timeline when payments would arise in the future.

iv) Mr Chahal's response, which Mr Amey says is telling, was "everything is in the agreement. We don't need to keep going round in circles. Everything is in black and white"

v) Dr Somal's response was that "it is in the details that money is owed but no payment plan has been mentioned-until meeting last week when you said they need £5k the next day". He also referred to the fact that Ashraf [Ali of Square One Law LLP] had phoned seeking payment of the £4,800 bill in respect of the Shareholders' Agreement. He also raised a question as to why Mr Chahal had sought to have a private conversation with Mr Ali some days earlier, as reported to him by Mr Ali. Mr Ali had apparently declined to have such a conversation.

vi) Mr Chahal's response was that he had sought a meeting with Mr Ali "to discuss Bolbec and exit route as we clearly have irreconcilable differences. We didn't discuss this as I'm not his client". As regards the £4,800 (payment of which was provided for by the Shareholders' Agreement), Mr Chahal claimed that he had "no idea" about it.

vii) After a further response from Dr Somal, Mr Chahal wrote that "Many times I have made it clear that this [partnership] doesn't work After only 5 weeks it beams apparent that communications have broken down. Last night I came up with an amicable solution to move forward this still hasn't resolved anything. Clearly by the above texts there is no trust, no respect and a clash in working styles. I went to [Mr Ali] thinking he was our solicitor as a "partnership". I found he's your solicitor not mine."

viii) Dr Somal's response sought the details already requested, this now being the 5th time the request had been made. He said that if Mr Chahal could raise the relevant funds they could all move on and would have no issue with it. In the meantime the claimants had been trying to ensure there were no problems with another charge on the Property to "sort out" the Society, this being something Mr Chahal had been "stressed about" the night before. In his opinion there had been no breakdown in communication, Mr Chahal had wanted the works to start without a clear plan and the claimants had not wanted that.

ix) A further request for details of the receiver and solicitor was sent by Dr Somal, later the same day.

106. On 21 May 2018, Mr Chahal texted that "the issue is plain and simple" the partnership was "not working as anticipated at inception" and that he wanted to "reverse and get out of" the current arrangement by paying in the interim £64k in cash, with the outstanding balance being redeemed within 6 months.

107. Also on 21 May 2018, Dr Ghai informed Mr Chahal by text message through the WhatsApp group that he and Dr Somal wanted to be appointed directors of the

Company. The following documents were sent to Mr Chahal on that day by or on their behalf:

i) Letters from each of Dr Somal and Dr Ghia seeking appointment as director and consenting respectively to their appointment;

ii) A draft broad resolution providing for their appointment as directors;

iii) Companies House Forms AP1 in respect of each appointment.

108. Dr Somal sent various texts explaining that he and Dr Ghai wanted to be appointed as directors until matters were sorted out, that they still required the information requested, that they were trying to keep the company afloat so it avoided insolvency. On 24 May he sent various texts setting out the various suggestions Mr Chahal had made about selling the Company or Property but that he had "finally come clean" and admitted that "you want us out because you have found somebody to replace us in the partnership."

109. On 24 May 2018, Clarke Mairs LLP sent the letter of claim on behalf of Mr Chahal that I have earlier referred to. As well as setting out a case of fraudulent misrepresentation, the misrepresentations being the Four Representations that I have earlier identified, the letter also speaks to the insolvency of the Company on the basis that it is unable to repay sums due to the Investors, unable to pay the "£550,000" payable to Mr Chahal on demand, unable to pay the Society and unable to pay Stamp Duty and interest and penalties thereon since September 2015. On that basis, it was said that advice had been given to place the Company into creditors' voluntary liquidation. It is notable that this letter is the first time that the Representations are raised.

Purported sale of the Property

110. By email of 8 June 2018, Mr Tobin emailed Dr Somal to let him know that the AFL debt had been redeemed that afternoon and the receivership was terminated. Dr Somal replied to ask for clarification and, in particular, whether the reference to the debt being redeemed was the to the "debt which will be owed until September when the loan comes to an end" (presumably the interest) or "the loan as well".

111. It later emerged from a completion statement prepared by the solicitors acting on the sale for the Company, Brar & Co., that the Property had been sold on 8 June 2018 for £650,000 plus VAT of £130,000 out of which some £588,352.62 had been paid to redeem the AFL mortgage and some £33,155.11 to the Society apparently "in redemption of Second Mortgage". This sale price was considerably less than the price said by Mr Tobin to be offered to the Receivers some months earlier.

112. Thereafter from the net proceeds of sale:

i) On 12 June 2018, a payment of £60,000 was made to Mr Chahal;

ii) On 13 June two further payments, totalling £47,500, were made to Mr Chahal and a payment of £10,403.12 was made to Clarke Mairs LLP;

iii) On 22 June 2018, two further payments were made to Mr Chahal, totalling £7,000.

113. Following a letter from or on behalf of the claimants, Brar & Co. retained the balance of the proceeds pending resolution of the dispute between the parties. The sum was a little over £25,550. Before me, Mr Chahal sought to assert that the proceedings were unfair because the claimants had effectively threatened Brar & Co such that it had retained funds that would have been available to the Company to pay legal costs in these proceedings. This is not really an issue before me, however in my judgment the claimants were entitled to put Brar & Co on notice of their position that the sale was not properly authorised and that the proceeds should not be distributed to Mr Chahal, or that they would be at risk if they permitted the same. Further, had the Company or Mr Chahal wanted to make an application to the court about such proceeds they would have been able to do so.

The current proceedings

114. The proceedings were commenced by claim form issued on 19 June 2018. The Particulars of Claim are dated 16 July 2018. The Defences of each defendant are dated 10 August 2018. That of the 2nd defendant effectively adopts the defence of the 1st defendant.

115. Paragraph 9 of the 1st defendant's defence is as follows:

"9. The First Defendant had received estimates of £800,000 to £900,000 as to the cost of developing the Property for office use. From enquiries made with mortgage brokers, the First Defendant was aware that it would be feasible to either:

a. Refinance the [sums owing to AFL and the Society] and develop the Property with funds supplied by shareholders; or

b. Repay [the sums owing to AFL and the Society] with funds supplied by shareholders and develop the Property with development financing."

116. This paragraph is of course inconsistent with the Fourth Representation having been made, given that it is said that the development costs of the property, which it is said the claimants represented they would find personally, was said to have been "in the approximate amount of £250,000".

117. In addition, paragraph 10 of the 1st defendant's Defence refers to enquiries that Mr Chahal is said to have made of Gotham Hotels Limited involving developing the Property as a hotel, acquiring a neighbouring property for that purpose, all at a projected development cost of in the region of £7 million. That cost, it is said, could be financed through a development lease with Gotham Hotels Limited if the sums owing to AFL and the Society were first repaid.

118. As regards the Four Representations, the first three are admitted and averred by the Defence. However, in paragraph 32 of the Defence of the 1st defendant, it is said that:

> "The First Defendant accepts that he has no specific recollection of the Claimant making prior to the execution of the Shareholders Agreement the [Fourth Representation] and to that extent only the letter of 24 May 2018 was erroneous."

119. The proceedings before the FTT (or as they are now formulated, before the UT) raise a dispute primarily about whether or not the receivership was determined before or after the sale and, if it was before, whether the Company through its director nevertheless had authority to enter into a contract of sale and give good title to the Property. The purchaser says that even if the receivership was determined after the same (contrary to its primary case), the Company by its director Mr Chahal was able to sell the Property and pass good title to it to the purchaser.

The defence: discussion

120. I have already held that none of the first three of the Representations were made. The same applies to the Fourth Representation which Mr Chahal accepts was not made.

121. If I was wrong in my conclusion as to the making of the Representations, I would in any event have held that (1) they were not relied upon in entering into the Shareholders' Agreement and/or (2) that the Shareholders' Agreement was subsequently affirmed such that rescission was no longer open to Mr Chahal. Both these conclusions would have followed from what happened immediately after entry into the Shareholders' Agreement. In short, Mr Chahal immediately accepted that third party financing both for development costs and refinancing/paying off the AFL and Society debts was the right route to take and, implicitly, that there was no need for the claimants to find any relevant finances from their own resources. The absence of any complaint or pushing by him for the claimants to provide finance personally, also confirms that he did not rely upon it and/or that he had effectively waived any requirement to obtain the same, in the latter case, coupled with his seeking and obtaining further loans to the Company and repayment of sums to him by the Company. He thereby affirmed the Shareholders' Agreement.

122. I do not consider that the entire agreement clause assists the claimants with regard to any representations had they been made and had they been fraudulent (as alleged).

123. I would also have held that restitution is now impossible and for that reason rescission is not an available remedy. The Company is, on Mr Chahal's own case, insolvent and unable to restore the sums lent by the claimants. He is also in the same position.

124. It follows that there should be judgment for the claimants. The precise form of relief will need to be considered further if not agreed. My preliminary view is that whilst the claimants are entitled to orders that the share register is rectified (possibly with retrospective effect: see e.g. *Re Sussex Brick Company Limited* [1904] 1 Ch 598 and *Greenwich Millennium Exhibition Limited v New Millennium Experience Limited* [2003] EWHC 1823 (Ch), [2004] 1 All ER 687 and to procure their appointment as directors, much of the other relief sought (such as the provision of information or the changing of bank signatories) would be secured by the making of such orders as I have identified.

The application to amend the Defence

125. The proposed form of amendment is to the effect that on 13 March 2018 Mr Chahal was personally promised that he could draw £50,000 from the Company in the next 4-6 weeks. In the event he received £32,000 in that period. On 19 April 2018 the claimants confirmed that they would be releasing no further sums. Therefore he has been "left short" some £18,000. Although pleaded as a contract it is clear (not least from his written "Closing Arguments") that Mr Chahal was seeking to assert that there was a fraudulent misrepresentation, the representation being made in the terms of the promise and not being intended to be performed, in other words a fraudulent misrepresentation regarding current intention.

126. The applicable principles when considering late applications to amend a statement of case are conveniently set out in the judgment of Carr J (as she then was) in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs [36] to [38]

> [36] An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> [37] Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
>
> [38] Drawing these authorities together, the relevant principles can be stated simply as follows :
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

127. In this case the trial had reached the stage where evidence was complete. If an amendment was permitted there would have had to be an adjournment to allow both Mr Chahal and the claimants to prepare and file further witness evidence. Such an adjournment would not be fair to the Claimant or other court users. There is also evidence that neither defendant could meet the costs of such an adjournment.

128. There is no satisfactory explanation for the lateness of the application.

129. There is evidence that the defendants could not meet the costs of an adjournment, if one were granted.

130. These factors by themselves weight overwhelmingly against an adjournment. In addition, the case sought to be raised is very weak even if, which I doubt (but assume in Mr Chahal's favour), it passes the "real prospects of success" test. The agreement in principle that sums could be drawn down was dealt with in the Shareholders' Agreement by making the drawing down of more sums by Mr Chahal in partial discharge of the sums owed to him by the Company, as one to be agreed upon by the claimants. It was not an absolute right. Further, the agreement also increased the maximum overall sum that could be drawn down by him, which might be seen as part of the quid pro quo for the right to draw down not being absolute. Further, if the Company did not have the money to repay Mr Chahal (as was the position) then the position regarding payment in by way of loan by the claimants was one where there was no obligation upon them to do so. The facts show that whatever the claimants might have been minded to do at the start, the reason that they refused to lend more sums to the Company to enable it to pay sums to Mr Chahal was because of events that took place after the Shareholders' Agreement. There is no evidence that they dishonestly made a representation as to their intention in March 2018 on the basis that at the time they did not intend to honour any promise. There are also problems with the remedy sought of rescission, for example, in terms of an inability to restore the

parties to their previous position given the solvency position of both the Company and Mr Chahal.

131. In all these circumstances, I refused permission to amend.

The Order to be made

132. I will adjourn the form of order to be made, and all consequential matters, to a further hearing, if an order cannot be agreed by 4pm on Friday 28 August 2020. In that event the claimants should apply to the Court to fix a further hearing with an initial time estimate of half a day, to be dealt with remotely by way of Skype for Business or CVP as arranged by the Court. I will also extend the time for lodging a notice of appeal to 21 days after the making of an order giving effect to this judgment, either in an agreed form or after the adjourned hearing.